BUILDING APPROVALS for PROJECTS

It is suggested in recent publications that the development approval process may be tuned to the station WIIFM which is causing it not to function as it should.
This presentation looks at some of the statutory pitfalls and external elements which can affect Building approvals for multi unit developments, whether residential or commercial

BUILDINGS AND TEMPORARY STRUCTURES

S.2- Interpretation clauses

"building" means a domestic building, a public building, a building of the warehouse class and any other physical structure, whether a temporary structure or not, any part of the structure, and any architectural or engineering product or work erected or constructed on, over or under land or the sea or other body of water;

The definition of a building under the Act includes a temporary structure.
So a worksite shed of wood or a trailer should not be erected on the development site until and unless a Permit is first granted. There is a practice to not include the temporary construction structures in the Building Plan but the Act requires that their size, type and site location must now be shown

UNIT SIZE

Recently there was an advertisement for a residential development featuring Studios of 1,400 sq ft. That's illegal and any approval for such may technically be invalid.
In October 2015 a Ministerial (Planning Guideline Policy) Order signed by Minister Pickersgill was issued applicable exclusively to multi family residential developments prescribing that;

a) A studio unit should not exceed 400 sq ft or 37.16 sq. m including the kitchen and bathroom and if it did then it was to be treated as multiple habitable rooms by the formula of one habitable room per 100 sq feet or 9.29 sq.mover the 400 maximum for purposes of calculating adequacy of sewage systems, open space, parking et.

b) A habitable room was any liveable space which was not a kitchen or bathroom or storeroom not exceeding 6.5 sq. m

The developer who believes a super size 800 sq ft studio unit is a sure sell may find that the Building Approval is invalid and consequently so will be the Strata Plan and ultimately the strata titles could be at risk of a Registrars Caveat
The financial institution and realtor who encounters that size unit should be careful.

PLANNING REPORTS

The Municipal authority for the capital city in October 2019 issued a requirement for Mandatory Planning Reports for commercial, institutional and resort developments on land areas exceeding 500 sq. m or 5,400 sq. ft. and subdivision developments exceeding ten lots.

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Municipal Corporation

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MUNICIPAL NOTIFICATION #2476

MANDATORY PLANNING REPORT FOR CONSIDERATION OF DEVELOPMENT WITH HIGH IMPACT

All developers, contractors and the general public are advised that effective **October 1, 2019**, the Kingston and St. Andrew Municipal Corporation (KSAMC) will request a **Planning Report** for all commercial, institutional and resort developments over 500m² and subdivisions of 10 lots and over.

These **Planning Reports** are required to:

1. Improve efficiency of the development applications review process;
2. Manage change to ensure that the cumulative impacts of developments do not negatively affect the environment;
3. Improve the quality of developments;
4. Balance public and private interests by ensuring that new developments fit the character of the area and sit comfortably within the "public domain."

All Planning Reports MUST be prepared by a trained Urban/ Regional Planner.

The format of the Planning Report below is presented for public information as the KSAMC advances the Development Application Process in the interest of sustainable development and nation building.

FORMAT FOR PLANNING REPORT

REGIONAL ASSESSMENT (EXISTING CONDITIONS)

Regional Character
Social services
Physical Infrastructure
Environmental conditions
Drainage

SITE ASSESSMENT (EXISTING CONDITIONS)

Location
Land use
Property characteristics
Land cover
Elevation
Slope
Geology/Soils
Access
Terrain

DESIGN CONSIDERATIONS (PROPOSED CONDITIONS)

Project description
Land use allocation
Infrastructure conceptual design
- *Sewage,*
- *Water,*
- *Storm drain,*
- *Road network,*
- *Lot sizes*

Subdivision
- *Building configuration*

DESIGN DESCRIPTION (PROPOSED CONDITIONS)
Buildings
Land use analysis
Open spaces
Lot information
- *Sizes*
- *Densities*
- *Coverage*

The requirement seems to have been observed in the breach but failure to have a Planning Report prepared and submitted with the Building Application may render the final Building Approval voidable. Financial institutions should take heed and request to see the Planning Report when considering financing for such projects.

ENFORCEMENT NOTICES

These come under Section 45 of the Building Act

Enforcement Notice

45.—(1) If it appears to a Local Authority that—

(a) building work has been carried out, is being carried out, or is proposed to be carried out without the issue of a building permit; or

(b) any condition subject to which a building permit was issued has not been complied with,

then, subject to subsection (3), the Local Authority shall serve an enforcement notice in the prescribed form and manner on each of the persons specified in subsection (2).

(4) Without limiting the generality of subsection (3), an enforcement notice—

(a) may specify the steps required to be taken under subsection (3) for—

(i) the demolition or alteration of any land or building work;

(ii) the discontinuance of any use of the land or building work; or

(iii) the carrying out of building work or other operations; and

NEPA on July 17, 2019 served notices on the developer of the project at 29 Dillsbury Avenue, for failing to post a sign, tree flagging, and hoarding the site. The Court issued a stay of permits on October 22, 2019.

Subsequently in February 2022 in the case of ***Wint, Coe & Others v The KSAMC, the NRCA & Others (2022) JMSC Civ 21*** for the same premises there was literally a judicial hammering of the Kingston and St Andrew Municipal Corporation (KSAMC) and the Natural Resources Conservation Authority (NRCA) when the Courts chastised the state regulators for breaking the law in approving that housing development and revoked permits issued by the KSAMC and the NRCA for the developer to build that complex.

The Court found that not only was the approval irregular but the fact that no proper checks were done by the authorities to ensure that the actual development matched what was approved in the plans put the final construction in doubt of compliance with the Building Approval

It is important to note that the case of was aimed not at the developers but at the regulatory authorities and the property owners.

COURT ORDERS FOR DESTRUCTION OF BUILDINGS

Section 47 of the Building Act- brings the Court and its power of Injunctions into the Building Approvals process. The injunctions can both be restraining to stop certain building activity or mandatory to ensure that certain building activity occurs.

the court may make an order under subsection (5).

(4) The court may for the purposes of this section make an order against a person whose identity is unknown.

(5) An order made under this section may require the builder, the owner or occupier of the land where the building work has been carried out or is being carried out, a person who carries out or takes steps to carry out the building work on the land and any other person concerned in the management of the building work on the land, as the case may be, to—

(a) comply with the steps, or remedy the breach, within the time specified in the order;

(b) demolish or alter building work, in such manner as the Chief Engineering Officer shall direct;

(c) discontinue any use of the land for building work;

(d) carry out on the land building work, in such manner as the Chief Engineering Officer shall direct;

(e) pay the costs and expenses associated with the application; or

(f) perform such other act as the court considers appropriate in the circumstances.

This is not new as the power always existed under the old statute and was exercised in the case of ***Auburn Court Ltd v The K.S.A.C.*** circa 1996. That was an action for breach of the Kingston & St. Andrew Building Act by construction of a "bowling alley on South Avenue, Kingston 10 without approval went all the way to the Privy Council which in 2004 upheld the K.S.A.C. s enforcement notice that the building be demolished. The building was eventually taken down by the authorities

Subsequently ***Auburn Court Ltd v Town & Country Planning Authority*** circa 2004 involved an Order made under S.23 of the TCPA for sections of a building in New Kingston to be demolished for being in breach of planning guidelines.

PERIMETER WALLS

The Perimeter wall of a development also requires building approval especially along a road boundary, because it must be able to contain vehicular impact and not fall into the road in the event of an earthquake or subsidence due to erosion.
Section A.1(a)-(c) Third Schedule Part 2 of the Town Planning and Country Planning (Kingston and Saint Andrew and the Pedro Cays) Provisional Development Orders, 2017 prohibits development without approval for;

a) Newly constructed gates and fences/walls adjacent to vehicular roadways exceeding 3.6 feet or 1 metre in height.
b) Any other non road facing newly constructed gates, fences/walls exceeding 7.2 feet or 2 metres in height

c) Any Improvement or alteration of existing gates, fences/walls to exceeding 7.2 feet or 2 metres in height

Gates, fences/walls are by regulations of the National Building code controlled for their components of construction.

PARTY WALLS AND DIVIDING WALL / FENCE STRUCTURES

Sections 58-69 of the Building Act has provisions which deal with party walls and structures and the rights of adjoining owners.
No longer will construction be allowed on a common party wall or zero lot line without the involvement of the adjoining owner.

PART VIII—*Party Structures*

59. In this Part, "party structure" includes—

(a) party walls and dividing walls, partitions and fences, between premises either owned or occupied by different persons; and

(b) partitions, arches, floors and other structures, separating buildings, stories or rooms, which belong to different owners, or which are approached by distinct staircases or separate entrances from outside the building.

Normally a boundary wall or fence between two properties is governed by the Dividing Fences Act. Section 4 provides that every occupier of land shall, as between himself and the occupier of the adjoining land, be liable to bear one half of the expense of erecting and maintaining **a sufficient dividing fence** to separate their respective holdings.

Essentially what the statute requires is that one should invite the neighbour to agree to the type of dividing fence to be constructed on the boundary line and the parties agree to share the expense based on reasonable cost of a simple fence. The Building Act uses consultation under Section 22-23 to attach the law for Dividing Fences .

A sufficient fence by Section 5 can be as simple as post and wire or if there are dogs or other animals to be contained, a chain link fence

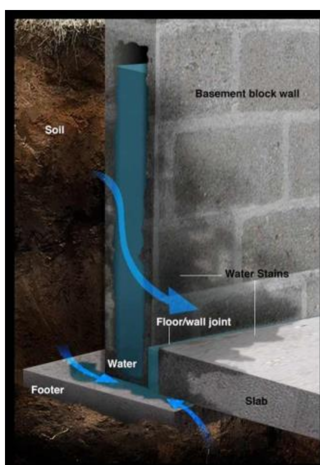
Section 6 of the statute speaks to anything more elaborate than a sufficient fence that would consequently be the expense of the party wanting to have a more complex structure. What matters is that should not exceed 4.5 feet or 3 meters in height.
Walls above 4.5 feet or 1.5 meters in height requires Building Approval

So the six or eight foot tall wall around the development requires both the consent of the neighbour and a separate Building Approval.

It therefore means sharing the details of the walls dimensions, design and surface finish with the neighbour and if not then the Court can Order that it be taken down or award the neighbour damages under Section 6

SUB GROUND LEVEL WALLS

Digging below the level of the foundations of the neighbouring property to erect a boundary wall would constitute party structure construction.
This is a common feature of construction of buildings with basement parking. Neighbours must be notified and their permission obtained for the construction of what will be a retaining wall between the new development and the subterranean area of the adjoining premises.
The co-operation is important because the neighbour may have a pit in their back yard which leaches in the direction of the basement to be constructed in the development and that can lead to black water seeping through the basement wall due to inadequate waterproofing. That issue was examined by the Court in ***Wint, Coe & Others v The KSAMC, the NRCA & Others (2022)*** at paragraph 72



Failure to consult with the neighbour can .as happened in ***Green v Cunningham (2019) JMCA Civ 33*** end up with the developer in Court under an injunction to restrain the construction of the party wall
The

STOREYS AND FLOORS

There now seems to be a question of whether a building erected on a slope which has one side open at ground level and the other sides below ground level has a storey in the ground area or simply a floor. That point came up in the ***Wint, Coe & Others v The KSAMC, the NRCA & Others (2022)*** case on the matter of setback of the building and whether certain features of the construction were floors, stories or levels. Under the relevant statutes the relative setback distance for a storey is different from that of a floor. The matter was interrogated at paragraphs 74 to 79 of the Courts Judgment.

That issue was examined by the Court in *Bristol City Council v Digs (Bristol) Ltd [2014] EWHC 869*
In summary the Appeal Court looked at the factors that would define a storey of a building and concluded that if the space was essentially for access and not occupiable then it should not be counted as a storey of a building but simply a floor

PLOT TO PLAN RATIOS

In the case of ***Belgravia Development Co. Ltd Re 10 Roseberry Drive (2021) JMSC Civ 187*** *Restrictive Covenants (Discharge and Modification)* application the Court found that the Building Approval was irregular because the property size was 1705.281 square meters or 0.421 of an acre in size, which rendered it pr unsuitable for multi-family residential development. Consequently although, NEPA granted the requisite environmental permits and licences on September 17, 2019 and submitted recommendations to the KSAMC, which in turn granted building approval on October 3, 2019, both approvals were technically invalid for non compliance with the statutory guidelines.

Section 12 (1A) of the **Town and Country Planning Act** provides that:

> *"Where an application to a local planning authority seeks permission for a development which is not in conformity with the development order, that application shall be deemed to be one required to be referred by the local planning authority to the Authority under this section.".*

So if the developer wishes to use a lot less than a half an acre in size or for more habitable rooms than the Plot Plan ratio allows it means the KSAMC does not have the authority to give building approval without first referring the application to NEPA .

NEIGHBOORHOOD CONSULTATION

The Court has authority by the Judicial Review process to declare that a Building Approval is invalid. That standard was demonstrated in **Young & Others v *The KSAMC & NEPA (2020) JMSC Civ 251*** *(the Birdsucker case)* where the Court found that the governing statutes had been breached by lack of the prescribed consultation with neighbours as required under S. 22-23 of the Building Act.

More important in that case was that the Environmental Permit was issued in May 2018 after the Building Approval had been granted in December of 2017. The Building Approval was therefore unlawfully granted without an environmental permit contrary to section 11(1A) of the TCPA. Similar to Roseberry Drive was the fact that the 17 Birdsucker Drive lot was below the minimum half acre size required for multi family residential development

APPROVAL LIFE

Previously a Building Approval was valid for two years.

Since the New Building Act it is only effective for 6 months until construction begins. If construction does not begin in 6 months the Approval has to be returned to the Municipal Corporation to be revalidated.
Revalidation requires that certain documents such as proof of payment of taxes up to date and a Certified copy of the title be re-submitted. A fee is payable which is ten (10%) per cent of the original application fee.
The revalidation can only be done three times up to a maximum of 2 years from the date of the original grant of the Building Approval. After the 2 year period if construction has not begun the Building Approval expires.
Thereafter a new Building Application has to be made and the Plans and all supporting documents must be updated to reflect any regulatory changes changes that may affect the development. For example ownership of the land may have changed, roadways could have been widened or converted to one way traffic and public sewage facilities could have been upgraded.

The Jamaican Proverb "What gone bad a morning cant come good a evening" applies to Building approvals.

The Jamaica Developers Association has several law firm as associate members who have the knowledge and experience to guide the Developer before committing to a project that has a Building approval which may be inherently flawed.

Every Building Approval has to be carefully checked to ensure that it is properly granted and its terms must be adhered to avoid the complications that could prevent sale of the units or worse a Court order that the building be demolished any of which could destroy the developers reputation built up over decades.

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October 2021