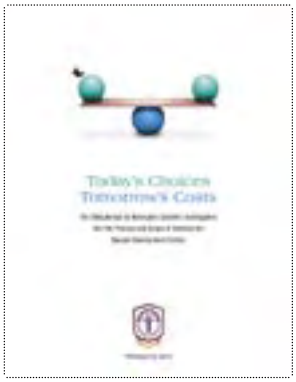
OMBUDSMAN FOR BERMUDA

SPECIAL REPORT

Pursuant to s. 16(3) Ombudsman Act 2004

Re: response of the Cabinet Office and Ministry of the Environment, Planning and Infrastructure Strategy to the Ombudsman's Own Motion Systemic Investigation into the Process and Scope of Analysis for Special Development Orders



June 2012

June 1, 2012

The Speaker, The House of Assembly
The Hon. Stanley Lowe, OBE, JP, MP
Sessions House
21 Parliament Street
Hamilton HM 12

Dear Honourable Speaker,

I have the honour to present a Special Report regarding the response of the Cabinet Office and Ministry of the Environment, Planning and Infrastructure Strategy to the Ombudsman's Own Motion Systemic Investigation into the Process and Scope of Analysis for Special Development Orders.

This Report is submitted in accordance with Section 16(3) of the Ombudsman Act 2004 which provides:

Authority to notify Ombudsman of steps taken

16(3) If within the time period specified in this section, the authority –
(a) fails to notify the Ombudsman of the action that has been taken or is proposed; or
(b)(i) has taken no action; or
(b)(ii) has taken action that in the Ombudsman's opinion is inadequate or inappropriate

The Ombudsman, after considering any reasons given by the authority, may submit a special report under Section 24(2).

Yours sincerely,

Arlene Brock
Ombudsman for Bermuda

OMBUDSMAN FOR BERMUDA
Suite 102 • 14 Dundonald Street West • Hamilton HM 09 • Bermuda
TEL 441-296-6541 • FAX 441-296-7734 • www.ombudsman.bm • complaint@ombudsman.bm

SPECIAL REPORT re Government response to Today's Choices – Tomorrow's Costs

S. 16 Ombudsman Act 2004 ("Act")

In accordance with s.16 of the Ombudsman Act 2004 this Special Report comments on the Government's response dated 30 April 2012 to Today's Choices – Tomorrow's Costs ("SDO Report"). I also note the 2 May 2012 Press Statement of the Minister of Environment, Planning and Infrastructure Strategy ("Press Statement") and thank him for correcting one of the claims made (with respect to my "own motion" jurisdiction) in an earlier public statement.

The Press Statement asserted: *"we do not disagree with the essence of her recommendations"*. This is good news. The essence of my recommendations is that – for the purpose of determining a Special Development Order ("SDO") – there is no proper existing procedure to gather and analyze data to inform decision-making. As chapters 3 - 8 and 13 of the SDO Report made clear, all evidence points to Environmental Impact Assessment ("EIA") as the proper procedure.

General Observations

In summary, the Government's responses of 30 April and 2 May claim that: the 2001 UK Environment Charter ("Charter") is not legally binding; the EIA procedure is not needed; and there is no need for action on most of the Recommendations. I find the continued challenge to my jurisdiction inappropriate and many of the responses to the Recommendations inadequate or even unresponsive. The attached grid shows the specific responses to each Recommendation. I find 4 of the 32 to be appropriate and adequate. Rather than refute each of the remaining responses I have simply noted the kinds of questions that, had they been addressed, would have rendered the responses adequate and truly responsive.

The seemingly default denial of the gaps evidenced in the SDO Report do not acknowledge clear procedural problems. For example: (a) the deficiencies in the conditions attached to the Tucker's Point SDO (pages 60 - 62 SDO Report) illustrate serious fault lines in the time frame and opportunity available for civil servants to aim for "joined up civil service"; (b) the much-touted General Notice 106 (page 22 SDO Report) is dated July 2010 but does not apply to SDOs or other development applications beyond the remit of the DAB and, further, does not have a formal public consultation component; and (c) relevant civil servants were not aware of the CARICOM training in Strategic Environmental Assessment that was offered in Spring 2011.

This Special Report sets out principles of international law relevant to the development of the Charter. Without divulging confidential or whistle-blowing sources, I have received impeccable evidence that, when signed, the intention was that the Charter constitutes a summary of legally binding responsibilities. Certainly there was never any expectation that – eleven years down the road – any signatory would try to claim that the commitments are only "aspirational".

Finally, the Government continues to question my jurisdiction despite the clear language of sections 2 and 3 of the Act. This was addressed in Appendix I of the SDO Report. However I do add in this Special Report clear corroboration by the Privy Council of the principle underlying my jurisdiction to conduct this investigation. The Privy Council's formulation, read with the plain words and requirements of the Act, puts into question the Government's claim that its response is "voluntary" – just because it disagrees with my findings.

Relevant Principles of International Law

Domestic law is enforceable ultimately due to the power of the state, through the Court, to impose prison terms and fines. International agreements may be multilateral (amongst several governments) or bilateral (between two governments). These agreements are legally binding even if they do not stipulate enforcement mechanisms for non-compliance. In such cases, the primary sanction for non-compliance is the risk to the reputations of signatory governments.

Agreements between agencies or departments within countries are not legally binding. However, bilateral agreements between governments do have the force of binding international law if:

(a) signed in writing, with specific commitments
(b) entered into without coercion or duress; and
(c) there is no express written provision that the signatories do not intend to be bound.

The 14 Overseas Territories ("OT") of the UK are largely self-governing and entrusted with responsibility for local environmental matters. However, Article 4 (re Jurisdictional Scope) of the 1972 UN Convention on Biological Diversity ("CBD") imposes accountability on each country with overseas territories – for those processes and activities *"carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction"*. That is, UK commitments under the CBD (as well as certain other international instruments regarding human rights and financial regulation) must cover the OTs.

The UK cannot unilaterally extend its multilateral environmental responsibilities to the OTs. The 1999 White Paper on Partnership for Progress and Prosperity ("White Paper") requires that the UK consult and then the OTs request if they wish to be included in such multilateral agreements. The British Virgin Islands, Cayman Islands and St. Helena requested to be included in the UK's ratification of the CBD. It is a straightforward process for other OTs to join. Whether or not they do so, the UK must account for all of its OTs under Article 4 of the CBD.

The White Paper signaled that – as priority actions – the UK must (and the OTs were encouraged to) undertake certain responsibilities. The White Paper stated *"these responsibilities already exist but the UK and its Overseas Territories have not always addressed these issues sufficiently consistently or systematically."* The UK Charters were intended to clarify respective roles and responsibilities in furtherance of consistent and systematic action.

A 2006 -7 review of the role of the Foreign and Commonwealth Office ("FCO") by the Environmental Audit Committee of the UK House of Commons noted that in order to ensure adequate funding and support of the OTs, it is *"necessary to assess whether both the* [UK] *Government and the governments of the UKOTs have met their respective obligations under the Environment Charters and Multilateral Environment Agreements."* Moreover, *"if the Government fails to address these issues it will run the risk of continued environmental decline and species extinctions in the UKOTs, ultimately causing the UK to fail in meeting its domestic and international environmental commitments. Failure to meet such commitments undermines the UK's ability to influence the international community to take the strong action required for reversing environmental degradation in their own countries, and globally"*.

Development of the UK Environment Charters with the OTs

In June 2001, the Bermuda Government announced that the UK Foreign and Commonwealth Office sent a two person team (one was a legal expert) to: give tips on how Bermuda can keep in line with the CBD; talk with local officials to identify changes needed in programmes and legislation for Bermuda to comply with the fine print of the CBD; and, discuss with the then Environment Minister a joint charter on the environment.

Each OT freely negotiated and signed its own Charter. While the Guiding Principles and UK commitments are pretty much identical for all the OTs, each OT could vary its commitments depending on its particular circumstances. Note that Gibraltar did not sign a Charter at the time precisely because it would have legal effect (there were concerns about obligating Gibraltar to the UK on matters of local jurisdiction such as the environment).

Again, without divulging confidential or whistle-blowing sources, the evidence before me is overwhelming that the Charter that Bermuda signed on 26 September 2001 was intended to set out legally binding commitments derived from the CBD. Accordingly, the language in the Charters drew extensively from multilateral environmental agreements binding on the UK.

In announcing the Charter, Baroness Valerie Amos, then Overseas Territories Minister, stated that the Charter (a) sets out guiding principles and (b) contains *"some real long-term commitments"*. [Contrary to what is implied in the Press Statement the word "aspirational" was not asserted by the UK Government.]

Certainly, it was understood that not everything could be achieved immediately. The UK committed to early funding mechanisms precisely to enable the OTs to achieve the objectives of the Charters. The OT Environmental Program was established in 2003 as a joint initiative of the FCO and the Department for International Development ("DFID"). This was to compensate for the fact that the OTs, unlike independent developing countries, are not eligible for funding from the Global Environment Facility and other international funds.

The language of the Charter was deliberately chosen. Commitments that could be implemented in short order were set out in mandatory language. The requirement of EIAs before approval of proposals that are either major or likely to have significant adverse impact on the environment is one such commitment. It is the developers, not governments, who pay for EIAs. Subsequent review of EIAs by governments is one component of the EIA process. Accordingly, in order to ensure implementation of the Charter commitment to require EIAs, the UK has provided funding and expertise for certain other OTs to conduct their reviews.

Commitments that require additional legislation and strategies in order to be implemented were articulated in more general, non-mandatory language in order to take prevailing local conditions into account. Interestingly, despite strong assertions that the Charter imposed no obligations, the Government's response of 30 April 2012 states *"It is of significant note that the Department of Conservation Services was set up as a direct result of the 2001 Charter – a clear indication that the Government of Bermuda has taken its commitments very seriously"*. This begs the question of why the commitment of requiring EIAs was not equally taken seriously – as this commitment does not need the creation, policies, funding and staffing of a whole new department.

For their 2006 -7 review, the FCO's evidence to the Environmental Audit Committee was that *"responsibility for the Overseas Territories is a cross-government responsibility so the FCO has a role in this as well as DEFRA and DIFD, and the Environmental Charters provide the basis on which government departments here, individually and collectively, can work in co-operation with the governments of the OTs on implementation."*

Indeed, DEFRA (Department for Environment, Food and Rural Affairs) defines the Charter as *"a formal, individual agreement, listing commitments to develop and implement sound environmental management practices in the OTs and clarifying the roles and responsibilities of the UK Government, Overseas Territory Governments, the private sector, NGOs and local communities"*. Note also that DFID requires full EIAs for major projects that it funds.

The 2003 Third Conservation Conference for UK OTs was hosted by Bermuda. The then Permanent Secretary for the Environment declared *"We all* (the OTs) *signed on to the Environmental Charter and that means we've signed on to a variety of commitments"*. Notably, Bermuda's presentation (jointly by the Government and local NGOs) at this conference included the Charter in a list of international legal instruments: *"some of the more important international agreements that are relevant to Bermuda"*. Other such agreements listed included the 1971 Ramsar Convention, 1982 Convention on the Law of the Sea, 1992 UN Framework Convention on Climate Change and the 1997 Kyoto Protocol on Greenhouse Gases – which the Government evidently accepts are binding international legal instruments.

With respect to EIAs:

- Paragraph 4 of the commitments page of the Charter states that Bermuda **will** ensure that EIAs are undertaken **before** approving major projects.
- Paragraph 11 pledges to abide by the Rio Declaration on Environment and Development. Note that Principle 17 of the Rio Declaration sets out, again in mandatory language, that EIAs **shall** be undertaken for proposed activities that are likely to have a significant adverse impact on the environment (emphasis added).

Paragraph 11 is identical for both the UK and Bermuda (page 8 SDO Report). Incorporation of the Rio Declaration was deliberately intended to indicate that the Charters were organically linked to the growing body of global commitments on the environment and development.

The essential goals of EIAs are to identify risks and possible mitigation. The main components of EIA toward achieving these goals are (a) independent scientific studies (b) government review of such studies and (c) public disclosure and consultation. The Charter was designed to confirm this latter role for civil society. Accordingly, the Charter was intended to inform public expectations in both the UK and the OTs that the commitments set out would be adhered to. It was anticipated that governments could legitimately expect to be criticized for failure to comply.

The SDO Report acknowledged (page 7) that the Government has taken steps to implement other commitments of the Charter. However these steps are no defence to the fact that the commitment to require EIAs was not complied with. (Appendix II of the SDO Report notes that EIAs were submitted for 13 of the 57 SDOs granted since 1978 but they are not required as a matter of SDO procedure.)

EIA is the Diamond Standard

The SDO Report sets out (chapters 4 - 6 and Appendix V) ample evidence of EIA jurisprudence, international standards and best practices. In the case of *Belize Alliance of Conservation NGOs* v. *The Department of the Environment* [2004] UK PC 6, the Privy Council noted that whatever the different sources of law that require EIAs, all jurisdictions have a similar goal:

> *The Belize legislation has much in common with legislation in a number of other countries (e.g. EEC Directive) which require some sort of environmental study before significant projects may proceed... What each system attempts in its own way to secure is that the decision to authorize a project likely to have significant environmental effects is preceded by public disclosure of as much relevant information about such effects as can reasonably be obtained and the opportunity for public discussion of the issues.*

The Privy Council went further in the Bahamas case with respect to the public consultation component of EIAs. *Save Guana Cay Reef Association* v. *R* [2009] UK PC 44 (p. 14 SDO Report) held that – based on the legal doctrine of 'legitimate expectation' – the Bahamian Government was obliged to engage the public even in the absence of a domestic statute requiring EIAs to be conducted (EIAs were done in the Bahamas for years as a matter of practice):

> *The public had a legitimate expectation of consultation arising out of official statements recognizing the need to take account of the residents' concerns and wishes...But taking their concerns and wishes into account does not of course means that the plans for the development must necessarily be changed, if only because the residents' views were by no means single-minded.*

EIA, including adequate public consultation, is globally accepted and the proven procedure to gather and analyze the information necessary to inform decision-making (pages 13 - 20 SDO Report). In Bermuda, independent EIAs would be especially necessary for those SDO applications that – by definition – will have significant adverse impact on the environment by virtue of the fact that they propose to lift decades-old conservation zoning. Note that:

- Bermuda agreed in the 2001 Charter that EIA is the appropriate procedure
- Indeed, quite apart from the legal status of the Charter, our signature created a legitimate expectation that EIAs would be conducted prior to approval of certain developments
- Independent, transparent EIAs (and evolving iterations such as Strategic Environment Assessment and Limits to Acceptable Change analysis) are required throughout the world (including by DFID) as best practice prior to approval of proposals to develop fragile ecosystems and where public interests are at stake
- Supreme Courts throughout the world have endorsed the EIA procedure
- the International Court of Justice recognizes that EIAs may be considered a requirement "under general international law" where a proposal risks significant adverse impact
- over 167 lending institutions, including HSBC, have signed on to the Equator Principles that require EIAs, stringent monitoring and public disclosure for certain developments
- leading environmental experts and advocates, including the UKOT Conservation Forum, are unable to suggest an alternative procedure better than EIAs.

I look forward to seeing if the protocol to be established by the Government includes the essential components and requirement of EIAs for sensitive development proposals.

Jurisdictional Issues

What may be investigated

The challenges to Ombudsman jurisdiction to investigate the SDO procedure were addressed in Appendix I of the SDO Report. Essentially, the argument appears to be that this matter is barred from investigation by the Schedule to the Ombudsman Act 2004 because either (a) the process to gather and analyze data is tantamount to the decision to grant the TP SDO or, (b) the actions of civil servants are the actions of Ministers (concept of Ministerial Responsibility).

a. In the case of *Belize Alliance of Conservation NGOs* v. *The Department of the Environment* [2004] UK PC 6, the Privy Council held that a distinction must be made *"between the procedure to be followed in arriving at a decision and the merits of the decision itself."* The decision to grant SDOs is the purview of the Legislature. The procedure leading to the decision is the work of the civil service – fully subject to review.

   Bermuda's 2011 Amendment to the Development and Planning Act 1974 changed the decision-maker – from sole discretion of the Minister to affirmative resolution of the Legislature. This amendment changes ***who*** makes the decision but does not change or otherwise affect the existence or lack of procedure that leads to and informs the decision.

b. The concept of Ministerial Responsibility for actions of civil servants arises from *obiter dicta* (a side statement) in a lower Court decision in the UK (*Carltona Ltd.* v. *Commissioner of Works* [1943] 2 All ER 560). This concept articulates a Minister's responsibility to answer in Parliament for activities of the Ministry – quite logical as each civil servant cannot be hauled before Parliament to account for his/her actions.

   Equally logical, this does not apply to the investigation authority and powers set out in a later Ombudsman statute. Sections 2 and 3 of the Act unequivocally provide that actions of civil servants (such as data gathering and analysis) are within Ombudsman jurisdiction.

Government response to findings

The Cabinet Office asserted that – as it does not agree with (a) Ombudsman jurisdiction or (b) findings – it does not have to respond to the Recommendations in accordance with section 16 of the Act.

c. While there is no requirement that the government accept the findings, there are no provisions in the Act or any Commonwealth jurisprudence to support the stance that the government need not respond just because it rejects the findings.

d. Note: the UK Court of Appeal has held: *"the* [minister] *acting rationally, is entitled to reject a finding of maladministration and prefer his own view. But...it is not enough that the* [minister] *has reached his own view on rational grounds; it is necessary that his decision to reject the Ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies* [the Ombudsman's] *legislation."* (*R [Bradley]* v. *Secr. of State for Work and Pensions* [2008] WL 45666).

Ombudsman jurisdiction to investigate this matter is unimpeachable and the recommendations stand.

TODAY'S CHOICES – TOMORROW'S COSTS

RESPONSE TO RECOMMENDATIONS BY AUTHORITIES

Note: The QUESTIONS ARISING column illustrates the kind of information that would have rendered Authorities' responses adequate

RECOMMENDATIONS	ACTION TAKEN / PROPOSED	REASONS FOR NO ACTION	*QUESTIONS ARISING*
1. Review of Law **a** Review of relevant international obligations that bind Bermuda		Reviews of relevant international obligations that bind Bermuda are reviewed on an ongoing basis. Currently annual reports are submitted to the Convention of Migratory Species. There exist 7 RAMSAR sites that are maintained by the Department of Conservation Services with 3 potential sites being considered (Walsingham, Castle, Nonsuch and Cooper's Islands and Mangrove/Trott's Pond).	***Which obligations are reviewed; by whom; and frequency?*** ***Do annual reports for the Convention on Migratory Species monitor impact on the hills of Tucker's Point from development and fragmentation since 1995?*** ***Which international obligations did the TP SDO take into account?***
b Follow-up with the Government of the UK regarding its obligations under the UK Environment Charter, specifically **(i)** Facilitate extension of UK's ratification of Multilateral Environmental Agreements of benefit to Bermuda	**Action Taken:** The Charter is not a binding instrument and does not trigger obligations. Nevertheless, the Department of Conservation Services was created in response to the Government embracing the principles of the Environment Charter.	The Government works closely with the UK Department of Environment, Food and Rural Affairs (UK DEFRA) regarding our commitments to environmental agreements. A legislation gap analysis review was undertaken in 2003. With the passing of the Waste and Litter Act, the National Parks amendment Act and Protected Species Act Bermuda is now eligible to apply to have the Convention on Biodiversity extended to us. The Department of Conservation Services (DCS) is investigating the advantages of such an extension.	***What is the timeframe for considering the inclusion of Bermuda in the UK's ratification of the CBD?***
(ii) Invite Bermuda to participate in the UK's delegation to international environmental negotiations and conferences		This relationship already exists. Various departments participate in international and regional conferences including the Department of Environmental Protection in the International Convention for the Conservation of Atlantic Tuna (ICCAT) and Convention on Bio-Diversity (CBD) – as needed and as of benefit to Bermuda.	***Is Bermuda automatically notified of upcoming conferences?*** ***Will Bermuda participate in Rio+20?***

RECOMMENDATIONS	ACTION TAKEN / PROPOSED	REASONS FOR NO ACTION	*QUESTIONS ARISING*
1. Review of Law *(continued)* **(iii)** Use UK, regional and local expertise to give advice and improve knowledge of technical and scientific issues		The Bermuda Government works closely with the UK Department of Environment, Food and Rural Affairs and has taken advantage of opportunities to obtain technical and scientific expertise. DCS partners with the Joint Nature Conservation Council (JNCC) as the main advisory body to UK-DEFRA. The Department works collaboratively with the Royal Botanic Gardens at Kew, RSPB, Durrell Wildlife Sanctuary, London Zoo, and Chester Zoo on matters relating to biodiversity, protected species and conservation related matters. Also full members of US Association of Zoos and Aquariums as well as Henry Doorly Zoo in Omaha Nebraska. DCS explores all opportunities to work with international organizations – examples include Vienna Zoological Gardens, US Turtle Conservancy, Florida State University, Australia Royal Society for the Protection of Birds.	***Appropriate and adequate*** ***Should UK expertise also be sought to evaluate SDO applications?*** ***Note: the UK has provided funding and expertise for reviews of developers' EIAs by other OT governments.***
(iv) Use the existing Environmental Fund for the Overseas Territories, and promote projects of lasting benefit to Bermuda		Bermuda regularly makes application for funding through the Overseas Territories Environmental Programme. We are also aware of and where appropriate would apply for funding through the UK Government's Darwin Initiative, Challenge Fund, Flagship Species Fund, and the Biodiversity and Ecosystem Services in Territories (BEST) scheme.	***The 2005 Report on the State of the Environment and 2010 Report on the Economic Value of the Coral Reefs were cited in the SDO Report.*** ***What specific projects were funded? Are there projects proposed in the foreseeable future?***
c Update the Ramsar Convention list to include Mangrove Lake and Trott's Pond at TP and other wetlands	**Action Taken:** DCS is currently reviewing the potential for the development of 3 new areas: 1. Mangrove Lake and Trott's Pond. 2. Coopers, Nonsuch and Castle Islands. 3. Walsingham. 7 other wetlands are already on the Ramsar Convention List.		***This response is appropriate, adequate and commendable.***

RECOMMENDATIONS	ACTION TAKEN / PROPOSED	REASONS FOR NO ACTION	*QUESTIONS ARISING*
1. Review of Law *(continued)* **d** Conduct a scientific study of the value of Paynter's Hill and Catchment Hill for migratory birds; determine and facilitate any regional agreements that Bermuda should enter into under the Convention on Migratory Species	**Action Taken:** DCS has conducted a preliminary review of the ecological significance of Paynter's and Catchment Hill.	DCS ensures that Bermuda is in full compliance with the Convention on Migratory Species, providing annual reports and assisting in the entering into of appropriate MOUs as needed. E.g. currently working on one with Department of Environmental Protection (DEP) regarding the protection of shark species.	***Is preliminary review equivalent to a scientific study?*** ***When was it done? What were results and next steps?***
e List the graveyard as an Historic Building under s. 30 of the Development and Planning Act (DPA). (Although already referenced under s. 31 as an Historic Protection Area, a s. 30 listing would add status and an extra layer of protection)	**Action Taken:** In considering any application within a Historic Protection Area, the Board shall have regard to the provisions of section 31 of the Act and, in accordance with section 31(3), the Board shall have the power to refuse planning permission if it is considered that the development would cause detriment to: (a) the established historic, architectural or cultural character of the area; (b) the aspect, appearance or view of the area; or (c) a prospect or view, being an environmentally important prospect or view, from one or more parts of the area. **Action Proposed:** The Minister of the Environment, Planning and Infrastructure Strategy will consult with the property owner as required by the Act, the Historic Building Advisory Committee, the Department of Planning and other relevant interests. On completion of the review the Minister would have the information to assist in making a decision on the recommendation to add Tucker's Town Cemetery to the list.		***Appropriate and adequate.*** ***S.31 zoning as an Historic Protection Area can be changed by the development plan zoning process.*** ***Listing as an Historic Building under s.30 of the DPA adds another layer of protection to the site which does not entail a planning application.*** ***What is the timeframe for due diligence before decision?***

RECOMMENDATIONS	REASONS FOR NO ACTION	*QUESTIONS ARISING*
2. EIA is done for all developments that are major or likely to have significant adverse impact on the environment **a** Scoping and analysis **(i)** Review and redraft GN106 in accordance with legal obligation; Biodiversity Convention guidelines	The Charter does not carry a legal obligation on the Bermuda Government. Further, Bermuda is not a signatory to the Convention on Biodiversity and as such the Convention does not carry a legal obligation on Bermuda. GN 106 refers to the relevant extracts of the Rio Declaration on Environment and Development (1992), Principle 17 and the UK Environment Charter. It sets out the 8 main steps in the Environmental Impact Assessment/Environmental Impact Study (EIA/EIS) process including the 'screening' step to determine whether an EIA/EIS is required and the "scoping" step to agree the content and scope of the EIA/EIS, and provides a comprehensive checklist of the type of information to be included in an EIS including consultations with the public. The EIA/EIS guidance note is based on the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, Parts I and II of Schedule 4. This UK legislation on environmental impact assessment was introduced to implement European Directive 85/337/EEC, as amended by Directive 97/11/EC. The information to be included in an EIA includes a section on the 'Regulatory Framework', it is not considered necessary to list each convention, agreement, act or subsidiary legislation.	***Why was fund created to facilitate implementation if the commitments of the Charter were not intended to be implemented?*** ***How is GN 106 relevant to SDOs and other developments which are beyond the jurisdiction of the Development Applications Board and for which there is no existing procedure?***
(ii) Determine deadlines and set out clear guidelines for developers	The existing guidelines are considered sufficiently comprehensive. Deadlines can be determined on the merits of the case and are the subject of discussion. For example, empirical data collection may be required over different seasons and under specified conditions. Such are matters for discussion and agreement at the appropriate time.	***Is there a process for developers and agents to raise concerns about existing guidelines without fear of retaliation?*** ***Note: evidence was submitted to me by developers and agents – particularly hoteliers – that there are serious concerns about both guidelines and process.***
(iii) Determine which up to date analytical and digital tools will be deployed (including up to date maps to show cumulative impact of proposal on existing development)	The analytical and digital tools for monitoring impacts on the environment are a specific product of the EIA and are included in the EIS. In cases where there is a need for environmental monitoring, the relevant tools would be case specific and cannot be predetermined. These particulars would be the subject of environmental mitigation and management plans to be agreed as a condition of approval and would be assessed and determined at the due time.	***How is GN 106 relevant to SDOs and other developments which are beyond the jurisdiction of the Development Applications Board and for which there is no existing procedure?***
	ACTION TAKEN / PROPOSED	
	Action Taken: GN 106 provides guidance on the objectives of monitoring programmes and contingency plans.	

RECOMMENDATIONS	ACTION TAKEN / PROPOSED	REASONS FOR NO ACTION	*QUESTIONS ARISING*
2. EIA is done for all developments that are major or likely to have significant adverse impact on the environment *(continued)* **c** Compatibility review (see *Today's Choices – Tomorrow's Costs* Preliminary Checklist Template, pg. 72) (Note, for example: in the UK, before the Second Reading of any Bill, the Minister Responsible must make a statement to the effect that provisions of the Bill are compatible with the European Convention on Human Rights)	**Action Taken:** The information to be included in an EIA includes a section on the "Regulatory Framework".	This information is identified in the pre-consultation discussions and scoping documents and scrutinised by all relevant Government agencies in the review of the EIS. Each agency provides due diligence in its respective areas and the Department of Planning manages the process.	***How is GN 106 relevant to SDOs and other developments which are beyond the jurisdiction of the Development Applications Board and for which there is no existing procedure?***
d Financial feasibility studies and disclosure of projections (taking into account any revisions in scope of project)	**Action Proposed:** There is merit to assessing the financial feasibility of a project. Such assessment should consider other proposed similar projects. However, this perhaps need not be a part of an Environmental Impact Assessment.		***If not part of an EIA, what international best practice procedure is there to achieve this?***
e Due diligence regarding developer's track record, prior compliance and third party compliance	**Action Proposed:** There is merit to assessing the developer's track record, prior compliance and third party compliance. However, this perhaps need not be a part of an Environmental Impact Assessment.		***If not part of an EIA, what international best practice procedure is there to achieve this?***
3. EIS is submitted for public consultation by: **a** Developer, setting out **(i)** Third party compliance e.g. Equator Principles		These "principles" are a fundamental part of the EIS process and mechanism and included in GN106.	***How is GN 106 relevant to SDOs and other developments which are beyond the jurisdiction of the Development Applications Board and for which there is no existing procedure?***
(ii) Why alternatives / mitigation is or is not feasible		A fundamental component of any EIS and included in GN106	***How is GN 106 relevant to SDOs and other developments which are beyond the jurisdiction of the Development Applications Board and for which there is no existing procedure?***

RECOMMENDATIONS	ACTION TAKEN / PROPOSED	REASONS FOR NO ACTION	*QUESTIONS ARISING*
3. EIS is submitted for public consultation by: *(continued)* **b** Government, stating **(i)** Response to technical advice	**Action Taken:** Technical comments from all agencies consulted form part of the public record.	It would not be appropriate to mandate that Cabinet declare its deliberations over technical officer recommendations.	***How does this reconcile with globally accepted standards for government EIS (see p. 13 of the SDO Report) and principles of disclosure set out by the Supreme Court of Bermuda in BEST v. Min. of Environment (2008) No. 321.***
(ii) Declaration of interest		This is covered by Government's Good Governance legislation.	***The Good Governance Act 2011 and amendments to the Public Treasury (Administration and Payments) Act 1969 are commendable. However, only contracts are covered.*** ***How will non-contractual conflicts of interest be addressed?***
4. "Joined up" Civil Service involves all relevant departments; notes role of the Sustainable Department **a** Analyze what works and what is scalable or transferable from the experience of the new hospital development central coordinating committee	**Action Taken:** This has already been agreed.		***Appropriate and adequate.***
b Determine early triggers for informing relevant departments of applications / presentations to the Cabinet Committee on Special Hotel Development – Form central coordinating committee, developer liaison and central file		This is already in place through the Cabinet Committee on Special Hotel Development – Technical Officers and the Department of Planning's Pre-application consultation process.	***During the investigation, no one could explain why this did not work adequately at the civil service level for the TP SDO, hence the deficiencies set out in Chap. 13 of the SDO Report.***
c Review of proposals proceed from broad principles to details (so that developers are not bogged down with extraneous details and reports before broad guidance and agreement is secured)		This is the process that is followed.	***Is there a process for developers and agents to raise concerns about existing guidelines without fear of retaliation?*** ***Note: evidence was submitted to me by developers and agents – particularly hoteliers – that there are serious concerns about both guidelines and process.***

RECOMMENDATIONS	ACTION TAKEN / PROPOSED	REASONS FOR NO ACTION	*QUESTIONS ARISING*
4. "Joined up" Civil Service involves all relevant departments; notes role of the Sustainable Department *(continued)* **d** Coordinate responsibility for monitoring and enforcement of SDO conditions		The Department of Planning has functional responsibility for the monitoring and enforcement of conditions. There is collaboration with the relevant Government agencies as necessary.	***What are the monitoring and enforcement guidelines and timelines for the TP SDO and where is this documented?***
5. Access to Best Practices, Research and training on an ongoing basis **a** Determine affiliate or observer status and potential obligations, benefits and training opportunities in, for example **(i)** CARICOM (Bermuda is an Associate Member)		Government takes advantages of opportunities made available through CARICOM.	***Why were relevant civil servants not aware of EIA training by CARICOM in Spring 2011? Is there a designated Point of Contact for CARICOM in Bermuda?***
(ii) United Nations World Tourism Organization	**Action Taken:** On-going. The Department of Tourism uses the UNWTO standards and guidelines for developing and disseminating tourism statistics. The greatest project in this regard was the development of Tourism Satellite Accounts (Tourism accounts that mirror the National Accounts) in 2008. The WTO Methodological Framework was used. The UNWTO World Tourism Barometer publication on tourism trends and marketing strategies is also used as a tool during policy making exercises.		***Will the Government apply UNWTO sustainable tourism standards and guidance to future SDO applications?***
(iii) Alliance of Small Island States ("ASOIS"): Non independent islands are eligible to apply for observer status. The Secretary to the Cabinet would need to confirm whether Bermuda must apply through the UK Foreign and Commonwealth Office (Bermuda may apply through the CARICOM caucus at the United Nations).	**Action Proposed**: Membership in the Alliance of Small Island States can be considered.		***Will membership be considered; within what timeline?*** ***(Note: Ombudsman has direct personal contact information if desired.)***

RECOMMENDATIONS	ACTION TAKEN / PROPOSED	REASONS FOR NO ACTION	*QUESTIONS ARISING*
5. Access to Best Practices, Research and training on an ongoing basis *(continued)* **b** Survey, keep up to date and determine relevance to Bermuda of "green" initiatives such as **(i)** Leadership in Energy and Environmental Design (LEED) certification (note: the ACE building in Hamilton, Bermuda is LEED certified at the Gold level)		LEED certification is but one example. Green Globe is another. Such programmes are already encouraged.	***Has a survey per recommendation been conducted; if so, is it available to the public*** ***Why were Green Globe and LEED not incorporated as conditions of the TP SDO?***
(ii) Research relevance and feasibility of long-term land banks (e.g. Martha's Vineyard and the Land for Maine's Future)		The Government sets aside funding for the purchase of open space and has for example, contributed to Buy Back Bermuda. In addition, the National Parks System continues to expand.	***Has research into long term land banks been conducted?*** ***Has the government researched methods by which park lands can be permanently protected from development?***

RECOMMENDATIONS	ACTION TAKEN	ACTION PROPOSED	*QUESTIONS ARISING*
6. Next Development Plan Consultative process should consider **a** Zoning, policies and standards should take into account changes in tourism development models	Chapter 27 – Tourism – of the Bermuda Plan 2008 Planning Statement provides the Development Applications Board ("the Board") with considerable flexibility when considering tourism developments proposed within lands zoned as Tourism. The Bermuda Plan 2008 states that it supports the enhancement of the Island's existing tourism products as well as the development of new tourism products. In addition to the traditional forms of tourism development, the Tourism policies of the Bermuda Plan 2008 Planning Statement permit consideration of fractional ownership, leases, licenses, timeshare and other forms of real estate ownership. Residential forms of development may also be permitted within Tourism zones at the discretion of the Board. The Bermuda Plan 2008 Planning Statement requires that the Board take into consideration the characteristics of the form of development but the development standards are not prescriptive. The Bermuda Plan 2008 Tourism zonings and policies were prepared in consultation with and supported by the Department of Tourism. The Tourism policies give discretion to the Board to provide flexibility in order to accommodate different tourism models in Tourism zoned lands. In addition, tourism developments may be permitted at the discretion of the Board in other development zone lands (Residential 1 and 2, Rural, Institutional, Commercial, Mixed Use and Airport) with the exception of Industrial zoned lands.	In the preparation of the next Bermuda development plan, the Department of Planning will review all the zonings and policies of the Bermuda Plan 2008 as they relate to tourism in consultation with government departments, stakeholders and the public to determine how effective the zonings and policies have been in meeting their intended objectives. Recommendations will be prepared for consideration of all parties before being submitted to the Minister, the Cabinet and the Legislature for consideration and approval. In considering a new development plan for the Island, all issues and recommendations submitted for consideration will be reviewed and considered by the Department of Planning, the Development Plan Objections Tribunal and Minister. The Office of the Ombudsman may wish to submit a more specific recommendation for conservation areas during that consultative process.	***Will a sustainable tourism review and standards be included in the consultative process? (as encouraged by CARICOM)***

RECOMMENDATIONS	ACTION TAKEN	ACTION PROPOSED	*QUESTIONS ARISING*
6. Next Development Plan Consultative process should consider *(continued)* **b** Conditions / level of stringency of zoning for lands where conservation protection is removed	Successive development plans for Bermuda have provided protection for conservation lands as provided for by the Development and Planning Act 1974. The general aim, as specified in policy STY.1 of the Bermuda Plan 2008, is to effectively manage Bermuda's natural and built environment, resources and development in a sustainable manner which provides for the environmental, economic and social needs of the community. The objective is to strike a balance between economic growth and the Island's scarce and finite natural resources. To further state the "conditions or level of stringency" of zoning for lands where conservation protection is removed has the potential to diminish the effectiveness of the conservation policies and provide opportunities for requests to develop within conservation lands. Conditions of development and policies that govern the development and mitigation actions should be included in the Development Order. This should include consideration of planning gain/community benefits which may involve consideration of a Section 34 Planning Agreement(s). The Bermuda Plan 2008 provides for limited forms of development within Conservation Zones, Conservations Areas and Protection Areas as detailed in sections 4, 5 and 6 of the Bermuda Plan 2008 Planning Statement. There are a few, exceptional circumstances under which the Board has the ability to consider encroachment into or development of a dwelling within a Conservation Area, for example policy ZON. 11.	To further state the "conditions or level of stringency" of zoning for lands where conservation protection is removed has the potential to diminish the effectiveness of the conservation policies and provide opportunities for requests to develop within conservation lands. Conditions of development and policies that govern the development and mitigation actions may be included in the development order. This could include consideration of planning gain/community benefits that may involve consideration of a Section 34 Planning Agreement(s). The Minister of Environment, Planning and Infrastructure Strategy will invite the Cabinet's consideration of the adoption of a protocol to govern the Special Development Order process. Following Cabinet's approval an appropriate Development Order Guidance Note and Protocol would be published formally.	***Currently, when conservation protection is lifted, the land reverts essentially to Residential II zoning.*** ***Will consideration be given to a more stringent zoning level for land that was once considered to be of such environmental importance that there should be no development, but will henceforth be allowed to be developed?*** ***Apart from an EIA is another appropriate and transparent procedure for determining conditions of development on lands where conservation zoning are proposed to be lifted?*** ***Is there a procedure that is globally accepted as better practice than EIA?***

RECOMMENDATIONS	ACTION TAKEN / PROPOSED	REASONS FOR NO ACTION	*QUESTIONS ARISING*
6. Next Development Plan Consultative process should consider *(continued)* **c** Undertakings to ensure that lands donated for conservation purposes cannot be rezoned for development		Any land donated to the Government for conservation or amenity is added to the National Parks System and protected under the National Parks Act 1986 and National Parks Act 1988. The Bermuda Plan and therefore zoning must comply to this Act. In order to develop an area it must be removed from the Parks Act through Affirmative Resolution and rezoned.	***How will parks and other opens spaces that are purchased and donated be protected from rezoning for development?*** ***What considerations would be acceptable for rezoning?***

OMBUDSMAN FOR BERMUDA
Suite 102 • 14 Dundonald Street West • Hamilton HM 09 • Bermuda
TEL 441-296-6541 • FAX 441-296-7734 • www.ombudsman.bm • complaint@ombudsman.bm