

Drafting to Combat Corruption: the Anguilla's Physical Planning Bill 2005 as a Case-Study

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A. Introduction

I. Hypothesis

The hypothesis of this paper is that Anguilla's Physical Planning Bill 2005 is drafted in a manner that fails to combat corrupt behaviour of those in whom power is vested under the Act.

II. Methodology

The paper will first look at the term 'corruption' and what it means. This will be followed by an assessment of the hypothesis. To assess whether the Bill is drafted to eradicate corruption, the guidelines provided by Seidman¹ will be applied to the Bill. The paper will also explore responses to the Bill and in particular focus on any concerns that the drafting of the Bill allows room for potential corruption. Although the Bill incorporates the guidelines provided by Seidman, it is proposed that there may be room for further tightening of the draft to eliminate corruption. Recommendations for further improvements are provided in the paper.

B. Definition of Corruption

Johnston observes that in studying corruption one should be aware that our definitions of corruption may vary according to the questions we wish to ask and the settings within which we ask them². In fact he finds that a universally satisfying 'one line' definition of corruption has never been devised by anyone.³

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¹ A. Seidman, R. B. Seidman & N. Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (2001).

² M. Johnston, *The Search for Definitions: The Vitality of Politics and the Issue of Corruption*, 149 *International Social Science Journal* 321, at 333 (1996).

³ Johnston, *supra* note 2, at 321.

Behaviour-focused definitions generally hold that corruption is the abuse of public office, powers, or resources for private benefit.⁴ Aristotle⁵ used the term 'corruption' to refer less to the actions of individuals than to the moral health of whole societies.⁶

Corrupt practices silently and secretly savage development and good governance,⁷ always involving officials' exercise of public power for private-viewing purposes. Corruption manifests itself in many forms, however, five seem most common.⁸

Like all officials who engage in arbitrary decision-making, officials behave in corrupt ways in response to causal factors⁹ that reflect particular country circumstances. Before effective detailed legislation to reduce corrupt behaviour's incidence can be drafted, the drafter must first identify the factors that explain such behaviours.¹⁰ Different patterns of corruption in different places and times have their own explanations.

⁴ Johnston, *supra* note 2, at 322.

⁵ *Id.*

⁶ This was judged in terms of a number of factors including the distribution of wealth and power, relationships between leaders and followers and the sources of power and the moral right of rulers to rule.

⁷ Rose-Ackerman describes corruption as having first order and second order effects. First order effects are the inefficiency and unfairness introduced by the payment of bribes themselves. Inefficiencies include both the effects of bribes on the allocation of public benefits and costs and the transactions costs of giving and receiving illegal payments. Second order effects concern the disposition of bribery revenues. The illegality of the payments may limit the way the funds are used and encourage their investment outside the country and in illegal business ventures. See S. Rose-Ackerman, *Democracy and 'Grand' Corruption*, 149 *International Social Science Journal* 365 (1996).

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1. *Bribery*. An official receives value in exchange for exercising discretion – whether within or outside of the official's legally authorized scope of power – in the payer's favour.
2. *Embezzlement*. An official takes monies from entrusted funds.
3. *Speculation*. An official uses official power to buy goods or services cheaply and to sell them dear, pocketing the profits.
4. *Patronage and nepotism*. An official uses official power to provide employment, not to benefit the employing organization, but family members and friends.
5. *Conflict of interest*. Consciously or unconsciously, using legitimate discretion, an official makes a decision motivated, not by public good, but by personal, material interests.

⁹ Meny observes that causes of corruption are sought in wholly different directions, depending on the ideological stance and preference of the seeker. The neo-liberal school considers corruption to be one of the effects of the black market caused by excessive state interventionism. The more the state intervenes, the more it legislates and the more it develops interfering bureaucracies, the greater the risks of parallel procedures and markets spewing unlawful conduct. Others stress the erosion of public ethics, the loss of the status as the incarnation of the general interest, and the dilution of communal values through the pursuit of profit and the defense of the selfish private interests as the force behind corruption. Y. Meny, *Fin de siecle "Corruption: Change, Crisis and Shifting Values"*, 149 *International Social Science Journal* 309 (1996).

¹⁰ Also see A. J. Heidenheimer, *The Topography of Corruption: Explorations in a Comparative Perspective*, 149 *International Social Science Journal* 337 (1996). Heidenheimer suggests that attempts to assess national evaluation of national reputations for public service corruption can serve as a useful starting point for developing topography of corruption incidents on the global level.

Drafters may need to take subjective causal factors into account when designing measures to overcome institutional causes that foster corruption. E.g. for a staff position particularly vulnerable to corrupt influences, a drafter can erect a partial defense by prescribing appropriate hiring criteria to aid in choosing honest agents.¹¹ Klitzgaard suggests that in selecting agents one should look for ‘honesty’ and ‘capability’ in the quest to combat corruption.¹²

The Physical Planning Bill of Anguilla (hereinafter referred to as the Bill)¹³ creates positions to be filled on different levels; The Minister¹⁴ who is responsible for the overall administration of the Bill;¹⁵ The Director (of Physical Planning) who is responsible to the Minister for the administration and operation of the system of planning for which this Bill provides;¹⁶ The Physical Planning Board (the Board)¹⁷ which is to carry out such functions as are conferred upon it by the Bill.¹⁸ The Board members, two of which are persons not holding any public office and are appointed by the Governor on the advice of the Executive Council,¹⁹ arguably should be subject to hiring criteria to ensure their suitability for the post. In addition to the already existing criteria²⁰ persons who are responsible as Board members, for the implementation of the policies framed by the Minister should be subject to certain checks and inquiries about reputations for honesty.²¹

C. Limiting the Scope of Officials’ Discretion

Unaccountable, secret and unnecessarily broad discretion ineluctably creates the basis for arbitrary decision-making. To ensure that officials with discretionary power only use that power for the public purpose for which the legislature granted

¹¹ R. Klitzgaard, *Controlling Corruption* 95 (1988).

¹² This will involve 1) screening out the dishonest by looking at past records, tests, predictors for dishonesty and 2) exploiting outside ‘guarantees’ of honesty (that is, networks for finding dependable agents and ensuring that they stay that way), Klitzgaard, *supra* note 11, at 95.

¹³ The Physical Planning Bill has been confronted with much resistance and opposition from the public and as such has not passed its second reading. See *The Anguillian Newspaper*, <http://www.anguillian.com/article/articleview/2896/1/135/>.

¹⁴ Physical Planning Bill, Part 1, Section 1, Interpretation describes “Minister” as being the Minister for the time being in charge of the subject of land, physical planning and development.

¹⁵ Physical Planning Bill, Part 2, Section 3, Responsibilities of the Minister.

¹⁶ Physical Planning Bill, Part 2, Section 5, Powers and duties of the Director.

¹⁷ The Minister and Director assume their position under this Act by virtue of an already existing post that they possess. Creating criteria to fill these positions under this Act are thus not suitable for these posts.

¹⁸ Physical Planning Bill, Part 2, Section 4, Physical Planning Board.

¹⁹ The remaining five members of the Board are *ex officio* members in the service of the Government of Anguilla, see Physical Planning Bill, Schedule, Section 4(2), Membership of the Board, 1(1)(a).

²⁰ Physical Planning Bill, Schedule, Section 4(2), Membership of the Board, 1(1)(b).

²¹ This may come in the form of requesting character references from employees or checking records for probity.

it, the drafters must limit the scope of the discretion granted.²² The input-output process model of decision-making helps to determine the points at which drafters may limit officials' discretion.

Some devices that drafters might include relating to input, feedback and conversion-processes to limit agency official's discretion are as follows.

I. Input and Feedback Processes

1. Limiting the Issues Concerning Which Agency Officials May Decide²³

The kind and scope of issues a law permits decision-makers to consider significantly shape the input into their decision law process. If the law allows officials to decide only specified issues, no matter how much they may wish to do so, the *ultra vires* rule forbids them from deciding other issues.²⁴

a. The Board

The scope of issues to be determined by the Board is not strategically listed in an allocated Section of the Bill. Instead, the Bill states –

There is hereby established a Physical Planning Board to carry out such functions as are conferred upon it by this Act.²⁵

Section 4(3) of the Bill goes on to state that the Board shall have responsibility for matters assigned to it under this Bill. Although it is clear that the powers of the Board are confined to matters arising under this Bill, the drafter has failed to put in list form the actual issues to be determined. Instead, issues to be considered by the Board are found in different parts of the Bill. Although this may not be the most convenient for the reader, the kind and scope of issues to be considered by the Board can be ascertained by reading each section of the Bill. In light of this, it appears that there is little scope for the Board to consider matters outside those conferred to it under the Bill without offending the *ultra vires* rule.

Section 4(5) has been highlighted as a potential loophole for corruption. Harrigan²⁶ disputes the legitimacy of power vested in the Board as Section 4(5) allows the Board to delegate any of its duties to the Director of Physical

²² Faced by a problem within their jurisdiction, officials should only make decisions that the law empowers them to make, taking into account only factors that the law permits, by procedures that the law authorizes.

²³ Klitzgaard suggest that (i) legislation should define objectives, rules and procedures more tightly, (ii) have agents work in teams and subject them to hierarchal review, (iii) divide large decisions into separable tasks to remove the corruption-inducing combination of monopoly power plus discretion plus little accountability. See Klitzgaard, *supra* note 11, at 95.

²⁴ Seidman, Seidman & Abeyesekere, *supra* note 1, at 352.

²⁵ Physical Planning Bill, Part 2, Section 4(1).

²⁶ Paulette E. Harrigan is a solicitor in Anguilla. See her, *A Detailed Outline of the Opposition to the Physical Planning Bill*, at [http://www.anguillalaw.com/index\(feb2006_page3b\).htm](http://www.anguillalaw.com/index(feb2006_page3b).htm).

Planning. The drafter's use of the word 'any' suggests that the Board can delegate its decision making power to the Director and thus the power vested in the Board is merely superficial.²⁷

b. *The Director*

The issues to be determined by the Director are encompassed in Section 5 of the Bill, which lists the 'Powers and duties of the Director'.²⁸ Although an exhaustive list of areas to be determined by the Director is preferred, the range of issues that arise under this Bill may not be foreseeable and as such a complete list may not be appropriate. A general discretion given to the Director to do things necessary to carry out the provisions of this Bill may be a necessary evil. What is clear is that his/her powers are confined to issues arising under this Bill and as such will not be able to determine matters outside the Bill. The Director is responsible to the Minister and thus any scope for misuse of powers that may arise under Section 5 may be curtailed by this check inserted by the drafter to ensure accountability of the Director for his/her decisions.²⁹

These powers given to the Director, however, have been questioned by some. Harrigan³⁰ contests what she regards as 'The wide power of the Director'. In her view the Bill is drafted with the effect of vesting significant power in the hands of one man, the Director whose *powers are omnipotent*.³¹

c. *The Minister*

The powers conferred on the Minister³² under this Bill are very general and thus according to Seidman's evaluation of such broad discretionary powers, could

²⁷ The checks in place to ensure accountability of all decision makers is usurped, as a matter which should be decided on by a Board comprising of seven, voting on a majority basis, can be made by one man. A decision made by one man is more vulnerable to corrupt influences than one made by seven members. The only recourse to a decision influenced by corruption lies with the Appeal Tribunals which is available to those with standing.

²⁸ The scope of the Director's powers comprise of a combination of 1) specific duties to be carried out by the Director, and 2) a more general duty to administer and operate the system of planning and do such other things that may be necessary for carrying out the purposes and provisions of this Bill, Physical Planning Bill, Part 2, Section 5(2)(d).

²⁹ Klitzgaard suggests that policy makers could change the rewards (i.e. those given power under legislation). This could include 1) raising salaries to reduce the need for corrupt income, or 2) rewarding specific actions and agents that control corruption, 3) use non monetary rewards such as travel, publicity, praise, *see* Klitzgaard, *supra* note 11, at 95. Rewards could be offered to both Ministers and Directors as an incentive not to engage in or tolerate corrupt behaviour.

³⁰ *See* Harrigan, *supra* note 26.

³¹ Harrigan states "he may determine the very size and colour of our homes which is alien to our culture. He can prohibit the use of land or buildings and order their very destruction." *See* Harrigan, *supra* note 26.

³² (1) The Minister shall be responsible for the overall administration of this Act and, in the exercise of the powers conferred upon him, may do all things necessary or convenient for the purpose of carrying out his responsibilities.

possibly provide opportunity for abuse of power. An illustration of the scope of the Ministers power can be seen in Section 11.³³

The Minister has the ability to restrict a draft plan from reaching the Board for consideration. By requiring that further work or consultations on the draft plan be carried out, the Minister could deliberately cause substantial delays in the process if an interested party, opposed to the development plan, were to influence him. The drafter needs to incorporate in the Bill more checks to balance out such potential for corrupt behaviour which can arise under such broad provisions. One suggestion is for the drafter to include a time limit within which the Minister must approve the draft plan and submit for consideration by the Board. The Board is less susceptible to corruption as an interested body wishing to influence the decision of the Board would have to influence a majority on the Board.

2. Limiting Who May Supply Input and Feedbacks

a. Introduction

Officials bent on an arbitrary decision typically limit input to those from parties likely to support their predetermined position. Drafters must adopt different measures to limit official's opportunities to behave arbitrarily or corruptly.³⁴

The drafter of the Bill has included the requirement for input from a number of parties who are or may be affected by an application to develop land.

Firstly, it requires that the land owner be notified of the intention of the applicant to make an application for permission to develop the land.³⁵ What is unclear, however, is the position of the landowner who has not been notified, and thus does not object to the application within the two weeks stipulated.

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- (2) In addition to the several duties imposed on him by this Act, the Minister is responsible for the framing and implementation of a comprehensive policy with respect to the use and development of all lands in Anguilla in accordance with a development plan prepared under the provisions of Part 3.

Physical Planning Bill 2005, Part 3, Section 3.

³³ Approval of development plan –

- (1) The Minister, after considering a draft development plan which has been submitted to him under section 10(5), and all comments, representations and recommendations thereon, may –
- (a) adopt the draft plan with or without modifications and submit it for the approval of the Executive Council;
 - (b) require further work on, or revision of, the draft plan; or
 - (c) require further consultations on the draft plan in whole or in part.

³⁴ Drafters might draft a law to require that, before decision, an agency's official must hold a public hearing on the issue; solicit input of facts and ideas from specified vulnerable groups that the law would be likely to affect; refrain from contacting a party without the other's presence; and after decision, require notice and comment.

³⁵ Physical Planning Bill, Part 4, Section 19: Notification to landowner. Section 19(1) Further safeguards are in place to protect the landowner who within 2 weeks of the date of application can object to the application which would lead to its cancellation. See Section 19(2).

For some applications,³⁶ the Director may require that details of application are given to specified persons and that details of the application be published.³⁷ In determining such an application, the Board shall take into account any report, representation or comment submitted or made to it under Section 20.³⁸ Like other provisions relating to input from the public, application of this provision is to the discretion of the Director; ‘*the Director may require*’. The discretionary nature of this provision³⁹ means that failure to consult the above will not automatically give rise to cause of action by persons adversely affected by the approval of an application for which they were not consulted. The Minister may not be seen to have acted *ultra vires* in his failure to consult affected persons.

The drafter in Section 22⁴⁰ has provided that comments are given by public officers, public authorities or statutory bodies in relation to an application for development permission. Similarly, an environmental impact assessment⁴¹ in respect to an application for a development permit is carried out by a board comprising of persons with skills, qualifications, knowledge and experience to carry out such assessments.⁴² One criticism in the drafting of the Bill is that both consultations and environmental impact assessment only occur on the *request of the Director*. It is not mandatory that either take place before an application is considered.⁴³ It may well be the case therefore, that an application is successfully sent through to the Minister for consideration without such assessments/ consultations taking place. Arguably, however, if the relevant bodies were not consulted or an environmental impact assessment not carried out, when these were later regarded as imperative, this should be highlighted at the board level (which comprise of experts in this area) and necessary steps taken to remedy this oversight.

b. Recommendation

The drafter could insert a provision in the Bill requiring that officials (Director, Minister or the Board) respond in writing to a stakeholder who submits feedback concerning a decision. If the officials fail to respond, a court, on a proper complaint, would be able upset the decision.⁴⁴

³⁶ E.g. Where an application amounts to “development likely to derogate from amenities of the public or of adjacent or nearby properties.”

³⁷ Physical Planning Bill, Part 4, Section 20(1)(a)(b).

³⁸ Publicity for applications, Physical Planning Bill, Part 4, Section 20(3).

³⁹ Created by the drafter’s use of the word ‘may’ as oppose to the imperative ‘shall’.

⁴⁰ Consultation on applications, Physical Planning Bill.

⁴¹ Physical Planning Bill, Part 4, Section 21.

⁴² The drafter is aware of the need to include such consultation requirements in an effort to avoid decisions being made that would affect individuals who should rightfully be consulted. This is another tactic for combating corruption.

⁴³ The Bill does not require that a report should be issued. The Bill does not properly articulate its intent.

⁴⁴ Seidman, Seidman & Abeyesekere, *supra* note 1 , at 352, 353.

3. Limiting Substantive Input to Decision

Seidman suggests that a law may specify criteria that either directly or indirectly limit the range of admissible input into the decision making process.⁴⁵

This Bill does not provide for any limits on what *cannot* be considered by the Board when considering an application. Instead it provides the Board with a wide discretion to consider what it regards as necessary and as a result nothing they consider, no matter how irrelevant, can be held to be *ultra vires*.⁴⁶

II. Limits on the Conversion Process

Drafters may also limit discretion by structuring the conversion process. Procedural and substantive limits on the conversion process are considered below.

1. Procedures Justifying a Decision

Any decision by an individual official must be justified else no one can assess whether public-viewing or private-viewing interest influenced it. To reduce the danger of corruption, a law might require specified procedures for the conversion process.⁴⁷

The Bill is drafted so that the Board must give reasons if it a) refuses permission or b) grants a development permit subject to conditions as it thinks fit.⁴⁸ The requirement for reasons for decisions does not apply to the unconditional grant of a development permit. Arguably, just as a refusal or conditional permit could potentially be driven by corruption, so too can an unconditional permit. Reasons for approval should also be given in relation to approvals. Permission to develop land may have been given when such approval may be inappropriate/unreasonable for a number of reasons.⁴⁹

Where permission is refused or grant is conditional Part 4, Section 24(2)(b)⁵⁰ provides that the applicant be informed as to the opportunities available for appeal against the decision. This provision ensures that the applicant is informed of his/her rights of appeal if he/she is dissatisfied with the decision. The relaying of this information is the responsibility of the Director.

⁴⁵ Seidman, Seidman & Abeyesekere, *supra* note 1, at 353. *E.g.* a statute protecting endangered species may state that in proceedings determining whether the Agency should identify a particular species as endangered a hearing officer may not admit evidence of the economic importance of harvesting the species (direct limits on input) *or* the Agency may not consider the economic importance of harvesting the species (indirect limits on input) In both cases, the *ultra vires* rule forbids a hearing officer from admitting or considering the forbidden evidence.

⁴⁶ *See infra* Section C.II.2.

⁴⁷ It might prescribe that officials must give written reasons for decisions. It would be more difficult to impose an arbitrary rule if the official must justify it in writing.

⁴⁸ Physical Planning Bill, Part 4 Section 24(2)(a).

⁴⁹ *E.g.* granting permission for development in a saturated market in return for a 'favour'.

⁵⁰ Physical Planning Bill.

2. Limits on the Considerations Agency Officials May Take into Account

Drafters may limit discretion by specifying the factors that a decision-making agency official may or may not consider. The factors that may be taken into consideration as specified by a particular law contribute to structuring the agency official's decisions. Thus any decision taken, having considered factors outside those permitted under the law, is unlikely to be upheld by the court.⁵¹

In a variety of ways a drafter may stipulate the factors an official *must* or *may* take into account. At one end there is the 'bright-line' rule which leaves minimum discretion to the officials responsible for formulating regulations.⁵² At the other extreme, the law might give the agency discretion to act "when the agency deems it desirable". The further from the 'bright-line' rule, the more discretion and the greater the possibility for corruption. Alternatively, the agency may be required to take into account a list of considerations⁵³ to be taken into account, leaving the agency to weigh these factors when making their decision. This is the form taken by the drafter in the Bill.

The drafter in Section 23 provides the Board with a list of material considerations to take on board when determining an application. Section 23(1) is imperative and thus failure of the Board to give "principal consideration" to an approved development plan for Anguilla/plan applicable to land to which the application relates, would give rise to grounds for appeal on a decision of the Board which came about in absence of such consideration. Section 23 (2), however, only mandates consideration of those matters which *appear to the Board or the Director to be relevant*. Consideration of a particular issue is to the discretion of the Board and thus failure to consider one of the listed factors will not automatically provide grounds for appeal on a decision of the Board. Furthermore, the Board has discretion to consider –

such other matters as the Director considers to be relevant to the determination of the particular application.⁵⁴

Although, as Seidman highlights, such broad discretion breeds potential corruption, this should not arise in this case. Broad discretion is problematic when it lies in the hands of one person. The Bill provides for a Board of seven members to provide checks and balances on each other. The way in which decisions are made i.e. one vote per member (save the Chairman who gets two votes)⁵⁵ aids in ensuring fair and uncorrupted decisions are made, taking into consideration all necessary and relevant factors.

⁵¹ Seidman, Seidman & Abeysekere, *supra* note 1, at 354.

⁵² E.g. a law regulating retirement for aircraft pilots might require retirement at age 60.

⁵³ E.g. eyesight, reaction time, hearing acuity, etc.

⁵⁴ Physical Planning Bill, Part 4, Section 23(2)(o).

⁵⁵ Physical Planning Bill, Schedule 1(2).

3. Conflict of Interest

Key to combating corruption is the requirement to disclose any interests which may affect decision makers' ability to make impartial decisions. The drafter requires this in Schedule 1, Section 4(2).⁵⁶ The usefulness of this provision, however, is questioned as Harrigan⁵⁷ highlights that neither the Minister, Board nor Director can be held liable for acts carried out in good faith even when it is discovered that there has been a conflict of interest and such conflict of interest will not invalidate any acquisition. The purpose of having this requirement to disclose any conflicting interests, according to Harrigan's interpretation of this provision, is unfulfilled.

4. Accountability and Transparency

The rule of law requires that decision-makers account for their actions, and that those decisions meet standards of transparency. 'Accountability' means that, on demand by an authorized person or official, institutional imperatives require an official to give a satisfactory explanation of a decision. 'Transparency' requires that the institutions of civil society regularly learn of official proceedings and decisions.⁵⁸

III. Institutions of Accountability

To hinder corruption requires both financial accountability and accountability for decisions.

⁵⁶ Conflict of interest

4. (1) A member of the Board who is in any way, whether directly or indirectly, interested in any matter whatsoever with which the Board is concerned shall declare that interest at the first meeting of the Board at which he is present, after the relevant facts have come to his knowledge.
- (2) A member shall not take part in any deliberation or decision of the Board with respect to any matter with which the Board is concerned in which he has, whether directly or indirectly, any interest.
- (3) A disclosure made under subsection (1) shall be recorded in the minutes of the Board.
- (4) Where, owing to the number of members who have declared an interest in an item of business at a meeting, the Board lacks a quorum to transact that item of business, that fact shall be recorded in the minutes and reported to the Minister.
- (5) The Minister acting in his discretion may grant a dispensation, subject to such terms and conditions as he shall think fit to impose, to all or any of the members who have declared an interest in an item of business to which subsection (4) applies so as to allow that item to be disposed of at the next meeting of the Board following the meeting referred to in subsection (4).

⁵⁷ See Harrigan, *supra* note 26.

⁵⁸ Because without knowledge of a decision or its proceedings, nobody can demand an accounting, transparency counts as a necessary but not sufficient condition for accountability.

1. *Financial Accountability*⁵⁹

This guideline is not applicable to the Physical Planning Bill as the Board does not receive any funds.⁶⁰

2. *Accountability for Decisions*⁶¹

Accountability for decisions may come in one of four forms. Institutions that provide for 1. ongoing accountability; 2. accountability only at the instance of an aggrieved party; 3. upwards accountability,⁶² and 4. downwards accountability.⁶³

The Bill has been drafted so that there is '*upwards accountability*'. This is evident in the Powers and duties of the director as where the Director is responsible to the Minister.⁶⁴ Similarly, there is a Right of Appeal where the decision of the Board must be justified before the Appeals Tribunal if the decision is contested⁶⁵ and lastly, the High Court can review decisions of the Appeals tribunal on a point of law.⁶⁶ The drafter has also included '*accountability at the instance of an aggrieved party*'. Where the Board grants a conditional permit or refuses

⁵⁹ In the Anglophone tradition, an Audit and Exchequer Law usually provides the basic framework for fiscal accountability. Where such a law exists the drafter can usually rely on this law's requirements to ensure basic financial accountability. Where that kind of law does not exist, the drafters, in every bill they write, should include provisions to ensure financial regularity. The provisions might e.g. require annual audits by an independent auditor, impose on an identified senior civil servant an obligation to certify before payment that an expenditure meets the requirements of the laws; or require the agency to keep up-to-date account books available for inspection, Seidman, Seidman & Abeyesekere, *supra* note 1, at 356.

⁶⁰ Klitzgaard also suggests that information should be gathered and analysed to raise the chances that corruption will be detected. He suggests that a) auditing and management information systems be improved; b) that 'information agents' should be strengthened (create a climate where agents will report improper activities e.g. whistleblowers); and c) that information provided by third parties, clients and the public be used. See Klitzgaard, *supra* note 11, at 94-95.

⁶¹ Seidman, Seidman & Abeyesekere, *supra* note 1, at 356-357.

⁶² That is, institutions that provide for accountability to an office higher in the hierarchy of authority (a judge , an administrative superior).

⁶³ That is, accountability to people not hierarchically superior to the decision-maker e.g. to a legislative committee, a shareholders' general meeting, or a town meeting.

⁶⁴ Part 2, Section 5-Powers and duties of the director provides

(1) The Director shall be responsible to the Minister for the administration and operation of the system of planning for which this Act provides\

⁶⁵ Part 9, Section 66 – Right of Appeal.

⁶⁶ (1) Any applicant, or person other than an applicant, whose interest in land may be affected by a decision of the Board set out in subsection (2), if dissatisfied with such a decision of the Board, may appeal to the Appeals Tribunal against that decision in the manner prescribed in subsection 2.

⁶⁶ Part 9, Section 70 – Appeal to the Court

(3) An appeal shall lie to the High Court from a decision of the Appeals tribunal on a point of law but not on any matter of fact and not in any manner upon the merits of the policies applied by the Board or the Appeal Tribunal in reaching the relevant decision. See also, Physical Planning Bill Part 9, Section 70 (1), (2).

permission to develop the applicant must be given reasons for the decision of the Board and is informed about his rights of appeal.⁶⁷ Lastly, there is ‘*downwards accountability*’ in the Bill. Where applications, which are inconsistent with development plans, are nevertheless approved, the Board is to account for its decision by, among other things, publishing a notice in the Gazette notifying the public of its decision, informing them about the date and place of a public inquiry to be held concerning the application and inviting comments and representations to be submitted orally at the public inquiry or in writing.⁶⁸

One recommendation is that the drafter should have included penalties for engagement in corruption which would apply to the Minister, the Director and Board members alike.⁶⁹

IV. Institutions of Transparency and Further Recommendations

A drafter may include a number of provisions in a Bill to ensure transparency.⁷⁰ The Bill includes provisions to improve transparency e.g. requiring the agency to advertise its meetings in advance and notify the public of their right to attend;⁷¹ to publish its proposed decisions for notice and comment;⁷² to respond to adverse criticism;⁷³ and on demand to make available to interested persons relevant information from its files.

Other provisions to increase transparency might include widening the rules of standing to permit interested persons to appear and be heard in proceedings that may affect them or broadening the concept of ‘interest’ to permit intervention in a proceeding not only by those with a material but also an ideological interest in a matter (e.g. NGOs). Under the Bill only applicants, or person other than an applicant, whose interest in land may be affected by a decision of the Board possess the right of appeal. Lastly, it could be required that the decisions are published together with their supporting reasons.⁷⁴

⁶⁷ Physical Planning Bill, Part 4, Section 4 (1),(2).

⁶⁸ Physical Planning Bill, Part 4, Section 25, Applications inconsistent with development plans.

⁶⁹ Penalties that could be employed include raising the level of formal penalties or increasing the principal’s authority to punish e.g. the Ministers authority to punish the Director. This will enable to be detected at an early stage in the process. Under the bill, there is no right to appeal a decision of the Board on grounds of corruption. This could possibly be added to Part 9 Section 66: Right of Appeal so as to allow interested parties contest decisions of the Board if there is evidence that the decision was driven by corruption non formal penalties could also be employed to combat corruption e.g. publicity of corrupt behaviour, loss of professional standing, etc.

⁷⁰ In contrast to some governments’ official secrecy laws, the drafter could opt for the Swedish approach where the law makers wrote into the constitution a public information section that practically forbids government secrecy. Alternatively, the drafter might impose affirmative responsibilities on an agency, to induce greater transparency.

⁷¹ Part 4, Section 25(1)(a)(iii)(b).

⁷² Part 4, Section 25(1)(a).

⁷³ Part 4, Section 25(1)(b).

⁷⁴ Seidman, Seidman & Abeyesekere, *supra* note 1, at 357-358.

D. Conclusion

It appears that the two measures that are imperative in combating corruption are: 1. ensuring that each provision is drafted so as to limit the scope of discretion given to decision makers; and 2. ensuring at each level, those who are authorized to make decisions are accountable to a higher authority. The Bill does demonstrate a consciousness of the drafter to limit the scope of power held by one person. Similarly, we see that in the hierarchy⁷⁵ at each level there is accountability.

The attempts of the drafter to reduce opportunities for corruption appears to be displaced by the wide and unregulated power given to the Executive Council to overrule decisions of the Board, found in Subsections 17(2) and (3)⁷⁶ which deals with “Applications for development permits.” Mitchell⁷⁷ asserts that these “offending subsections introduce an appeal mechanism that invites corruption.”⁷⁸ The Executive Council which consists of politicians is arguably more vulnerable to corruption than any other body/post created under the Bill. Politicians are often in receipt of bribe payments in the guise of contributions to campaigns, this type of payment being difficult to prove. We are yet to see whether or not the drafter has succeeded in drafting in a manner to reduce opportunity for corruption.

As mentioned above, the Bill has not yet been enacted due to much controversy over its content. It is worth noting that opposition is to the changes which this Bill seeks to bring about.⁷⁹ The drafter’s attempt to combat corruption is not full-proof and as highlighted above there are opportunities for corrupt behaviour. One must wait until the Bill’s enactment to see whether the loopholes will manifest themselves. In Harrigan’s view the legislation is dangerous because it promotes corruption to the detriment of the landowners of Anguilla. It can be concluded, however, that opportunity for corruption, does not equate to inevitable corrupt behaviour.

⁷⁵ Director, Minister, Board of Directors, Appeals Tribunal, High Court (on points of law).

⁷⁶ Subsection (2) provides that permits for hotel and tourist related developments that are refused by the Board can be ruled by Executive Council to be “of importance to the economic development” of Anguilla. Subsection (3) provides that once the Executive Council has so ruled the Board “shall consider the application as approved by Executive Council as an application requiring speedy disposal in the interests of the economic development of Anguilla.”

⁷⁷ Don Mitchell CBE Q.C., in a private communication; he is a retired High Court Judge of the Eastern Caribbean Supreme Court, residing in Anguilla.

⁷⁸ Subsections (2) and (3) that have been concealed in the midst of this section. They provide for easily influenced politicians to overrule without any proper justification the determination of the professionals on the Board. This is an invitation to foreign investors to bribe or otherwise illegally influence members of the Executive Council to approve tourism-related developments that otherwise contravene the planning standards and regulations of the island.

Quoting Don Mitchell CBE Q.C.

⁷⁹ See Dame Bernice V. Lake Q.C., *Why the Physical Planning Act 2005 Is to Be Condemned*, 6 November 2005, at <http://www.anguillanews.com/Constitution1982/physplanning/THETHECASEFORCONDEMNATIONOFTHEPHYSICALPLANNINGACT2005.doc>