National Conservation Council
Cayman Islands

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20 January 2025

Hon. Dwayne Seymour, CCI, JP, MP
Minister for Sustainability & Climate Resiliency, and Wellness

Dear Minister Seymour,

Re: National Conservation (Amendment) Bill, 2024

The National Conservation Council is charged by law with "promoting wider understanding and awareness of the significance of the ecological systems of the Islands, the benefits of conserving natural resources and of the provisions of [the National Conservation Act]"[i], among other functions. We are also committed to the government's priorities of improving the quality of life for Caymanians by future-proofing to increase resiliency and protecting and promoting Caymanian culture, heritage and identity[ii].

As the National Conservation Council was not consulted on the National Conservation (Amendment) Bill. 2024, now out for public consultation, we write to offer the Council's high-level views on the proposed amendment Bill.

Overall, the Council's position on the Amendment Bill is that there have been no cogent and compelling reasons advanced which substantiate the need for the Act to be amended. For example, it is very clear that development has not been slowed as a result of the Act, and the Act stipulates that Council may not direct Cabinet, yet these continue to be two of the main criticisms levelled by detractors of the current Act.

The various provisions of the NCA are necessary to support and provide for a robust environmental governance framework for the ultimate benefit of the people of our country. All of the provisions of the NCA embody best international practice such as the Act's use of the *precautionary principal* which acknowledges the likely significant risk of adverse effects – or the potential for irreversible damage – as reasons to fully consider the environmental implications of all our decisions and plans and to err on the side of caution when all the relevant information is not immediately available.

Regarding the specifics of the proposed amendments we offer the following comments in relation to the five most concerning proposals:

(i) Cabinet no longer an entity under the Amendment Bill.

We are concerned that this proposed change suggests that the Government is no longer committed, under the Act, to "ensure that its decisions, actions and undertakings are consistent with and do not

jeopardize the protection and conservation of a protected area or any protected species or its critical habitat"[iii], nor to comply with the provisions of the law. This is despite the Constitutional requirement in Section 18 of the Bill of Rights that the Government shall, in all its decisions, have due regard for the environment and to adopt legislative measures to protect the heritage and wildlife and the land and sea biodiversity of the Cayman Islands and "secure ecologically sustainable development and use of natural resources".

As you are aware, the Government is also required to meet its commitments under several international multilateral environmental agreements, including, but not limited to, the Convention on Biological Diversity and the Ramsar Convention on Wetlands, and the NCA satisfies these obligations. Additionally, the NCA enables the Cayman Islands Government to fulfil its responsibilities under the Cayman Islands Environment Charter which was signed by the UK Minister for the Overseas Territories and by the Honourable McKeeva Bush, JP, MP on 26 September 2001. The Environment Charter includes guiding principles and a set of mutual commitments by the UK Government and the Government of the Cayman Islands in respect of integrating environmental conservation into all sectors of policy planning and implementation. Precedent from the Bermuda Courts clarifies that the Environment Charter is in fact a legally binding agreement[iv].

It is also no longer clear how the Cabinet will fulfil its role as decision-maker on coastal works applications if it is no longer legally obligated to consult in order to obtain the non-binding advice of the Council. We are concerned that any attempt by Cabinet to make decisions without taking into account the advice of its own environmental experts will result in increasing numbers of Judicial Reviews by applicants or objectors to Coastal Works applications.

(ii) Section 41 Changes

The proposed amendments to the various parts of Section 41 of the Act have the effect of making the expert advice of the Council on matters falling under the ambit of the NCA subservient to the opinions of other entities with completely different expertise and mandates. This is at odds with the way in which other Cayman Islands legislation provides for different types of expert advice to be incorporated into other approval processes. For example, under the Water Authority Act, when the Water Authority issues advice to the CPA in relation to proposed activities that may affect water lenses, the CPA is not at liberty to disagree with the experts at the Water Authority and are obligated to incorporate the advice issued.

The proposed amendment to Section 41(4) is particularly egregious in that it removes the ability of the Council to direct an entity to refuse a proposal or to direct specific conditions of approval where a government action, such as approving planning permission, "would or would be likely to have an adverse effect, whether directly or indirectly, on a protected area or on the critical habitat of a protected species"[v]. It proposes instead that Council can make recommendations which shall be complied with unless the entity proposing to take the action "considers that there are good reasons not to do so"[vi]. This is very problematic as it replaces the decisions of Council as the government entity charged with management of these protected areas and species on behalf of the people of the Cayman Islands, with recommendations that another government entity can choose to ignore. Further, what would constitute "good reasons" has not been defined and discerning what they are becomes a subjective exercise. The proposed amendments then make "decisions" of the Council under this section of the Act (which would now be only recommendations) appealable to the proposed Conservation Appeals Tribunal.

(iii) Conservation Appeals Tribunal

The Amendment Bill introduces a Conservation Appeals Tribunal (CAT) made up of lay persons from each District as a way to avoid the "spectacle" of Judicial Review procedures being taken between two government entities. Any person aggrieved by a "decision" of the Council or the decision of another entity "not to comply with the Council's recommendation"[vii] may appeal to the CAT. The functioning of the proposed CAT appears to have not been properly thought through and we fear that this will lead to regular appeals of government decisions, especially as there are no guidelines for grounds of appeal, or grounds for decisions on appeals of decisions made by Government entities under their own laws. Using the Planning Appeals Tribunal as a guide, these appeals will (i) involve lawyers for the various parties (as the Attorney General's Chambers will often if not always be conflicted and unable to represent the myriad of involved government parties, including advising the Tribunal), (ii) be held in public, and (iii) reported on by the press. Further, we expect these will often be tricky decisions turning on fine points of administrative and other laws (as we have seen with Judicial Reviews) and involve questions of competing interests and conservation effectiveness.

It is difficult to see the advantages of the proposed CAT over the established JR process, as at least for JR the grounds for review are relatively constrained and the legal process well established. There are no such guardrails for the CAT and whereas a Judicial Review is on a point of law to a judge experienced in matters of law there is no guarantee that the Tribunal made up of lay persons will have either the legal knowledge or technical experience to adjudicate the matters before them in a way that will not also result in their decisions being regularly appealed.

This proposed amendment significantly limits the effectiveness of the Council as any person may appeal a decision of Council to the CAT (at no cost), appeal the decision of the CAT to Cabinet (at no cost), and until the final appeal is settled, the original Council decision is entirely on hold. This could take years to settle, and in the meantime, the environmental damage which the Council may have been attempting to avoid or mitigate may already be done.

(iv) Loss of Scientific & Technical Expertise

That there is no requirement for technically competent persons to make up the CAT is a significant problem repeated in the proposed amendments to the Council. The removal of the need for at least four of the eight members appointed by Cabinet to have relevant scientific or technical expertise could leave the Council challenged to decide on the balance of conservation benefits and costs involved in issues brought before them. This will be compounded by the proposal to remove the Directors of Planning and Agriculture from the Council to be replaced with their Chief Officers. Where Directors of Departments have historically been well versed in the technical aspects within their remit, Chief Officers, whose Ministry can change with the Government, are normally less so. We would strongly encourage you to retain the Directors and the technical and scientific expertise requirement for appointed Council members. This is especially important as one of the decisions taken by Council likely to be appealed to the Tribunal is the need for Environmental Impact Assessments, which is a technical decision at its core.

(v) Environmental Impact Assessments (EIA)

Under the current construct of the Act, decisions to require an EIA occur when, during the course of consultation under Section 41, Council finds that there is not enough critical information available to give fully informed advice on the matters brought to them. This determination is a technical one by the

Council based purely on the additional information needed, and the degree of possible adverse impact which could result from a misinformed decision. That this can now be appealed will inevitably lead to the problematic scenario of the Tribunal trying to second-guess whether the Council actually has enough information in order to render its advice, and it should be noted that under the proposed Amendments, these appeals can cascade through the process from the Tribunal to the Cabinet to the Courts. We suggest that the ability to appeal the Council's decision to require an EIA to support fully informed decision-making is both problematic as described, and unnecessary given how few EIAs have been required over the years and particularly given previous Governments' commitments to conduct EIAs for major infrastructure developments as a matter of best practice (see below extract from Environment Charter of commitments for EIAs). Members of the public have often expressed a desire for more EIAs not less, driven in part by the public consultation provisions of the EIA process, as the public clearly appreciate more not less involvement in decisions affecting them such as approving major infrastructure projects.

As we have said repeatedly, EIAs do not make the decision on the project, but they allow for fully informed decisions to be made. The EIA provisions in the current Act preserve the right of Cabinet and other entities to make their project-specific decisions once provided with the advice of the Council, supplemented and enhanced by the results of an EIA.

The decision to remove the Council's ability to appoint advisory committees[viii] will make managing EIAs harder. Currently EIAs are managed by an Environmental Advisory Board (EAB) appointed as a sub-committee of the NCC. Each EIA gets its own EAB made up of technical experts from within the Government (with the Council representatives for Environment and Planning as permanent members) who ensure that the EIA is carried out in a competent and professional manner by the consultants selected and a coordinated approach to the regulatory requirements of each entity represented. Without the ability for the Council to empanel Advisory Committees, particularly for EIAs, the result is likely to be an increase in bureaucracy, time and cost on the Government side. (This increase in bureaucracy and cost is likely to happen in several areas due to the Amendments but the loss of Advisory Committees will make this especially likely.)

In recognition of the length of our submission, we have opted not to discuss the other amendment clauses which all have issues worthy of discussion. However, given the frequency with which we have heard the point regarding the need to remove the Civil Service members of the Council as voting members, we would point out that this is more easily achieved by way of a Cabinet Order to amend Schedule 2 of the Act.

In closing, the NCC strongly believes that the NCA is extremely important in our collective efforts to preserve our Caymanian identity and our quality of life. There is a growing body of evidence which shows that a healthy environment, which is underpinned by strong legislative protections, is a prerequisite for healthy people as well as a healthy economy. The NCC is therefore resolute in its belief that the various provisions of the NCA are absolutely essential for the sustainability and viability of our country now and in the future. Any amendments to the Act which dilute the Council's ability to act efficiently, or that result in poorer conservation outcomes and a sub-standard environmental governance framework for the people and natural environment of the Cayman Islands, are ill advised and are therefore strongly discouraged.

As there are not yet well-articulated and factually correct reasons put forward to the public for many of the proposed amendments, we again express our availability to discuss the Government's goals with the

amendments, and remain committed to the government's priorities of improving the quality of life for Caymanians by future-proofing to increase resiliency and protecting and promoting Caymanian culture, heritage and identity.

Yours sincerely,

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Chairman

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cc: Her Excellency the Governor Jane Owen
Premier the Honourable Juliana O'Connor Connolly, JP, MP
Chief Officer, DCOs, SPO Ministry of Sustainability & Climate Resiliency, and Wellness
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[i] NCA 3(9)(g)
[ii] https://www.gov.ky/cigpriorities/
[iii] NCA 41(1)
[iv] Supreme Court of Bermuda case 135 of 2014
[v] Bill 41(4)
[vi] Bill 41(6)(a)
[vii] Bill 41(7) & 41(6)(a)
[viii] Bill 4

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v Bill 41(4)
vi Bill 41(6)(a)
vii Bill 41(7) & 41(6)(a)
viii Bill 4

2 Ensure the protection and restoration of key habitats, species and landscape features through legislation and appropriate management structures and mechanisms, including a protected areas policy, and attempt the control and eradication of invasive species.

3 Ensure that environmental considerations are integrated within social and economic planning processes; promote sustainable patterns of production and consumption within the territory.

4 Ensure that environmental impact assessments are undertaken before approving major projects and while developing our growth management strategy.

5 Commit to open and consultative decision-making on developments and plans which may affect the environment; ensure that environmental impact assessments include consultation with stakeholders.