

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

**No 1367 of 2008**

**IN THE MATTER of the  
Administrative Justice Act, Cap 109  
of the Laws of Barbados**

**AND IN THE MATTER of the  
Judicial Review (Application) Rules  
1983**

**AND IN THE MATTER of an  
application for Judicial Review**

**BETWEEN**

**ADINA GERANIUM ARCHER  
CEDRIC HORACE ARCHER  
GEORGE WELLINGTON BREWSTER  
SHEILA ELISE BREWSTER  
NORMA MONICA FORDE  
MONICA ELAINE GREENE  
ERWIN BERNARD GREEN  
RHONDA ANITA HUTSON  
CALVER LEO HUTSON  
HILDA LORETTA YEARWOOD  
WESLEY MCDONALD YEARWOOD**

**APPLICANTS**

**-AND-**

**THE CHIEF TOWN PLANNER  
THE ATTORNEY GENERAL**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

**Before the Honourable Madam Justice Jacqueline A.R. Cornelius,  
Judge of the High Court**

**2010: March 29;**

**2014: November 18**

**Mr. Clement Lashley Q.C., for the Applicants**

**Ms. Stephna Greenidge for the Respondents**

## **DECISION**

### **Introduction**

- [1] Planning permission is required for the carrying out of any development of land in Barbados (*Town & Country Planning Development Order 1972*). The Chief Town Planner is one of two public functionaries, pursuant to the provisions of the *Town and Country Planning Act Cap 240*, charged with the responsibility of determining whether or not planning permission should be granted.
- [2] By application received on 22<sup>nd</sup> June 2007, permission was sought for the change of use of a property, located at Lot 9 Valley View in the parish of Saint George, from residential use to that of a day care nursery. The application was assessed and planning permission was granted on 2<sup>nd</sup> November 2007.
- [3] Prior to the grant of planning permission, the Town & Country Planning Department (TCPD) sent notices to adjoining land owners informing them of the application made and giving them 14 days from the date of receipt of the notice to inspect the application at the TCPD and thereafter to make any representations. The Applicants in this matter objected to the grant of planning permission and sent a letter to the TCPD signed by a number of them showing this objection. The letter was received by the TCPD on 1<sup>st</sup> October 2007.
- [4] The TCPD, prior to making its decision, sought an assessment from the Child Care Board (CCB) of the site in question. The CCB conducted a site visit and thereafter informed the TCPD that the site

had met with their approval. Thereafter planning permission was granted and this gave rise to the instant application

### **The Application before the Court**

- [5] The essence of the application before the Court is that the Applicants claim, and seek declarations accordingly, that the decision of the TCPD to grant planning permission was (1) unlawful; (2) arrived at unfairly; and (3) irrational. They seek further a declaration that they had a legitimate expectation to be consulted before the First Respondent made his decision to grant a change of use and by not so doing that the decision making process was unfair. Accordingly, they seek an order of certiorari to have the decision of the First Respondent quashed.

### **THE APPLICANTS' CASE**

- [6] The Applicants referred to sections 13 and 16 of the *Town Planning Act* in support of their submissions. Section 13 refers to the meaning of Development as “the making of any material change in the use of any buildings or other land or the subdivision of land.” Section 16 sets out the provisions for the determination of applications for Town Planning. The Applicants seek relief pursuant to the provisions of section 3 of the *Administrative Justice Act Cap 109B* which provides for relief from administrative acts or omissions made by way of applications for Judicial Review.

### **Natural Justice & The Duty to Act Fairly**

- [7] The Applicants submit that on the facts of the case the First Respondent’s decision was flawed. Notice was not sent to the land owners of the area but to the owner of the adjoining lot 10, Mr. Cedric Archer (one of the applicant’s in this matter). The residents of the area are all affected parties and consequently, they should have been heard.
- [8] The Applicants submit further that public bodies are under duties to act impartially and to act fairly. Legitimate expectation was no longer confined to the right to be heard but rather public bodies were under a substantive duty to act fairly. (*Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 347). There was a right to be heard before property rights were affected (*Cooper v Wandsworth Board of Works*

(1863) 14 C B (N.S) 180; *Urban Housing Co Ltd v Oxford Corp* (1940) Ch 70) and affected parties were entitled to have their matters decided in a judicial spirit in accordance with the principles of substantive justice (*Local Government Board v Arlidge* (1915) AC 120). The duty of the Court was to determine, *inter alia*, whether a decision making authority had exceeded its power, erred in law, breached principles of natural justice or reached a decision which no reasonable tribunal or authority could have reached (*Leacock v Attorney General of Barbados* (2005) 68 WIR 781).

- [9] In the circumstances the Applicants submit that the First Respondent's decision was flawed; that he did not act fairly; and that they had a legitimate expectation of being accorded a fair hearing.

#### **THE RESPONDENTS' CASE**

- [10] The Respondents submit that the decision of the Chief Town Planner was in full compliance with the Physical Development Plan Amended 2003 and in no way threatened the preservation of the residential amenity of adjacent residential properties at Valley View in the parish of Saint George.
- [11] The decision of the First Respondent complied fully with the provisions of section 16 of the *Town and Country Planning Act* and due regard was paid to all relevant considerations including the input of the Child Care Board and objections of the residents. The decision was clearly underpinned by fairness in that the Chief Town Planner sought to balance the interests of the residents and wider community with the need to improve community amenity, reduce care trips and encourage pedestrian travel.
- [12] The decision of the First Respondent was based on the guidance of the Physical Development Plan and a reasonable assessment of the factors relevant to a day-care nursery in Valley View in the parish of Saint George. His decision had to be focused on Valley View as a community and the role and impact of a day-care nursery thereon. The community therefore had to incorporate and embrace the establishing of various levels of services which met the needs and requirements of residents.

## **CLAIMANTS' AFFIDAVIT EVIDENCE**

### **Affidavit Evidence of Stephen Wiltshire**

- [13] Mr. Wiltshire is the Managing Director of Felicity Limited, a company incorporated in this Island as Valuers and Property Consultants. He was asked on behalf the Applicants to give an opinion on the proposed development of a day-care Nursery. Mr. Wiltshire deposed that the proposed development would create a traffic nuisance and make the neighbourhood less desirable. He noted concern about parking facilities and indicated that he could see problems arising when parents were dropping off and picking u their children. In his view, there would be traffic congestion and this would create an annoyance to the residents.
- [14] Mr. Wiltshire stated further that the building did not lend itself to an easy conversion from residential use to a day nursery and suggested that the proposed development would adversely impact the attractiveness and desirability of the neighbourhood thereby causing a stagnation of reduction in property values.

### **Affidavit of Norma Forde**

- [15] Ms. Forde was authorised by all of the Applicants in this matter to file an affidavit on their behalf. She deposed that the Day Nursery was of no benefit to the residents of the area given that the area was a quiet residential area where mostly adults resided. It was never in their contemplation that the development would be anything other than residential and she submitted that the Applicants had adhered to the covenants in their conveyances over the years.
- [16] Ms. Forde deposed further that she reviewed the Physical Development Plan Amended 2003 on behalf of the Applicants and stated that the day care nursery was incompatible with sections of the plan. The space on Lot 9 was inadequate and there were no adequate parking facilities for vehicular traffic. She stated further that the proposed change of use could not foster the economic, environmental, physical and social well being of the residents of Valley View in accordance with the provisions of the development Plan.

## **RESPONDENTS' AFFIDAVIT EVIDENCE**

### **Affidavit of the First Respondent**

- [17] The First Respondent, Mark Cummins, is the Chief Town Planner and has so been from 1998. He stated that neither the Act nor the Development Order made provisions for consultations with adjoining land owners but the TCPD has adopted a practice of notifying adjoining land owners when there was such an application. Adjoining land owners then had 14 days from the receipt of the notice to visit the TCPD, inspect the application and then submit written representations where necessary. In keeping with that practice, notice was sent to Mr. Archer as the owner of Lot 10. He stated that the proposed day nursery would serve the needs of the wider community and that the Physical development plan contemplated such facilities.
- [18] Their assessment determined that the parking area met the planning standard requirement of three parking spaces and they did not expect any impact on the privacy of neighbouring residents or on the residential amenity.

### **Affidavit of Wayne Forde**

- [19] Mr. Forde is the Commissioner of Land Tax and has so been from 2005. He is a member of the International Association of Assessing Officer and a member of the Barbados Association of Valuers. His duties as Commissioner of Land Tax entail the valuing of every property in this Island for tax purposes.
- [20] He examined the proposed development and compared the area to Warrens Park North in the parish of Saint James; an area of similar characteristics and values and where a Day Care Centre existed. Having visited the property he saw no disadvantages to the way the property was sited on the lot and opined further that there was no evidence to support the view that the location of the Day Care centre would result in stagnation or reduction in property values.

### **ISSUES**

- [21] This matter primarily raises issues of procedural impropriety. The Court must determine whether or not the decision of the First Respondent was arrived at by a process that was fair and if not whether it should be quashed.

[22] Three issues therefore arise for the Court's determination. Firstly, what considerations must the Chief Town Planner take into account in assessing change of use applications. Secondly, did the Applicants have a legitimate expectation to be consulted prior the First Respondent making his determination? Thirdly, was the decision making process in this application unfair and accordingly, should the decision of the First Respondent be quashed

### **DISCUSSION AND ANALYSIS**

[23] Section 16. 1(a) and (b) of the *Town and Country Planning Act* sets out what the Chief Town Planner must consider when applications for change of use arise. The section provides as follows

“Subject to this section and sections 17 and 18, where application is made to the Chief Town Planner for planning permission, that officer, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application and to any other material considerations; and

(a) may grant planning permission either unconditionally or subject to such conditions as he thinks fit; or

(b) may refuse planning permission.”

[24] The section provides that the Chief Town Planner must have regard to the Physical Development Plan but not to it exclusively. He is required to take into account “any other material considerations” in his determination. There is no argument before this Court that the First Respondent has not so done.

[25] The second issue arising is whether the Applicants had a right to be consulted before the First Respondent made his determination. The evidence before the Court suggested that the TCPD as a normal course of dealings would notify adjoining land owners and those adjoining land owners would have an opportunity to make written representations.

- [26] Where a person was negatively affected by the decisions of a public body or official, they were entitled to a fair hearing if they had a legitimate expectation of being accorded such a hearing. The expectation could be based on a statement or undertaking or in this Court's view on a past course of practice which would make it unfair or inconsistent to deny the affected party the benefit thereof (*Attorney General of Hong Kong v Ng Yuen Shiu*). At the very minimum therefore, the adjoining landowners should have been accorded a hearing. The right to a hearing does not necessarily mean a full oral hearing but in application cases like the instant matter, the minimum standard required is consideration of the parties written submissions that is evidenced. I hold therefore that the practice of the town planning department in notifying adjoining landowners created a legitimate expectation that those persons in the immediate environs would be heard in some way prior to any determination being made. In any event, the defendants do not deny the claimants' procedural legitimate expectation.
- [27] The Court must now determine whether the process followed by the TCPD was unfair and in the result whether the decision of the First Respondent should be quashed. It does not naturally follow that where a procedural impropriety exists, the process was unfair. The Courts will only interfere where a procedural impropriety results in a breach of the law (*Regina v Secretary of State for Transport, Ex parte Gwent County Council* [1988] QB 429). It is incumbent upon the Court therefore to examine the procedure followed by the First Respondent prior to making his determination.
- [28] The available evidence suggests that on the making of the application, the First Respondent wrote to the interested and affected parties and invited submissions. All of the parties including the objectors had an opportunity to present their case in writing for consideration by the First Respondent before any decision was made. That is as far as the evidence goes. There is no evidence upon which the Court can conclude that the first Respondent actually considered the submissions; he is inviting the Court to accept that his consideration took place entirely within the realm of his consciousness.

[29] This Court believes that with a rule as important and vital to good public administration as *audi alteram partem* is, that this is not sufficient. There must be some evidence of actual consideration. The easiest way to accomplish this, in the Court's view, is to have an actual hearing unless this is totally impractical because of, for example, the expense or a vast number of participants. At the lowest level, submissions should be exchanged as between the parties and rebuttals invited. Thereafter a decision should be rendered inclusive of proper reasoning. This removes the taint of unfairness and also provides a proper record for the purposes of precedent. This was not evident in this case.

**CONCLUSION**

[30] The Court holds that the process followed by the First Respondent was indeed flawed and thus unfair. By no means is the Court saying that the decision is incorrect, but it must be arrived at by a fair and transparent process where there is evidence of actual consideration. This would be reflective of good public administration and would allow citizens to adequately participate in the administrative process.

[31] Accordingly, this Court holds that the decision of the Chief Town Planner to grant a change of use for Lot 9 Valley View is hereby quashed.

[32] The Applicants shall have their costs to be assessed if not agreed.

**Jacqueline A.R. Cornelius**  
**Judge of the High Court**