IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No.145 of 1997

IN THE MATTER of an application for an Order for Certiorari and Prohibition

AND IN THE MATTER of the Physical Planning Act [CAP.193]

AND IN THE MATTER of an Application by the named Applicants pursuant to Order 61 of the High Court Rules

BETWEEN: Mr REINHOLD ZUERRER & ROSIE BARKER
First Applicant

MA BARKERS LIMITED
Second Applicant

AND: THE PORT VILA MUNICIPAL COUNCIL
First Respondent

PETER MORRIS, Senior Town Planner
Second Respondent

HARRY TETE, Principal Physical Planning Officer
Third Respondent

GEORGE CALO, Town Clerk
Fourth Respondent

HON. MAYOR PATRICK CROWBY & DEPUTY MAYOR KEN HOSEA
Fifth Respondent

REPUBLIC OF VANUATU COUR SUPREME COURT REPUBLIQUE DE VANUATU

Coram: Mr Justice Oliver A. SAKSAK

Ms Susan Bothmann Barlow for the First and Second Applicants
Mr Jack Kilu for the Respondents.

JUDGMENT

This matter first came before the Court on 12th November 1997. Two separate applications were heard that day: one was by way of a Notice of Motion issued under Order 17, R.1 seeking Orders to strike out the Third, Fourth and Fifth Applicants from the proceedings, and the other was an ex-parte application made pursuant to Order 61 of the High Court (Civil Procedure) Rules 1964 seeking among others an Order for leave to apply for Writs of Certiorari and Prohibition. This application was heard inter partes. The Court allowed both applications and granted the Orders sought on 12th November 1997. The substance of this matter was heard on 20th, 25th (p.m.) and 27th November 1997 respectively. Inspection of the site took place on 20th November 1997 prior to the formal hearing.

The facts of the case are that the Applicants are holders of leasehold interests in land situated on the Erakor Lagoon next door to and adjacent to land titles 11/OC34/008, 11/OC34/009, 11/OC34/011, 11/OC34/012, 11/OC34/013 and 11/OC34/014. On these titles, a tourist development is being constructed pursuant to approvals granted by the Town Planning Committee of the Port Vila Municipality on 19th June 1997 and dated 3rd July 1997. The First Applicants are the beneficial owners of the Second Applicant who reside at the property title 11/OC34/002 which property is immediately next door to title 11/OC34/013. These titles are accessed by way of a single track narrow vehicular access. The Court is told that this was originally an easement enjoyed by a limited number of the properties now held by the Applicants.

The Applicants seek orders to quash the Approvals and the Building Permits granted to Mr John Ayres by the First Respondent on or about 3rd July 1197 to permit the constructions of "Tourist Cottages" upon leasehold titles 11/OC34/008, 11/OC34/009, 11/OC34/011, 11/OC34/012, 11/OC34/013 and 11/OC34/014.

These are their grounds for the Application:-

(a) That the granting of the Approvals and subsequent issuing of the Building Permit by the Respondents is contrary to section 7(1) of the Physical Planning Act [CAP.193] in that the Council granted permission unconditionally to allow the development without having regard to the plan in force and without having regard to other material considerations.

(b) That the granting of the Approvals and issuing the Building Permits is outside the power of the Council to so grant because the terms of the leases granted to the developers provide that the land is to be used for designated purposes only and such purpose is for private residential use in the relevant leases and the Approvals are for a commercial development.

(c) The Act provides for classes of use in Section 1 and provides that there is a material change of use where buildings alter the character of the land from one class to another. The Council Plan of the area pursuant to the Act has zoned the relevant location "Low Density Housing". The class for low density housing is (10) "Single household residence" and the Council has permitted construction of (12) "Boarding or guest house, or an hotel providing sleeping accommodation" or (11) "Multiple occupation or as an apartment building" without due consideration.

(d) The access to the development is by way of simple track narrow vehicular access which was originally an easement enjoyed by a limited number of properties held by the Applicants. The Respondents have acted ultra virus their powers in granting permits to develop a tourist complex without due regard to services and impact on neighbouring properties such matters being "other material considerations" which should have been taken into account.

(e) The Act grants the Minister of Home Affairs overriding supervisory power and an absolute discretion to direct the Council to make an amendments to any plan and therefore the Council is subject to direction by the Minister. In this case the Minister did disapproved of the development.

(f) The Respondents purported to hold a public inquiry without giving the Applicants sufficient time or opportunity to express their objections to

the development and made the decision to grant building permission without taking proper account of the matters raised by the Applicants.

Evidence was adduced by way of affidavits. The Applicants relied on two affidavits sworn by Mr Zuerrer dated 18th September and filed on 8th October 1997 and his second affidavit sworn and filed on 19th November 1997.
The Respondents relied on the affidavit evidence of Mr Peter Morris sworn and dated 18th November 1997.
Both Counsels made lengthy verbal submissions as to facts and law. The Court takes these into considerations when considering the grounds of the Applicant's application.

I now deal with the first ground. The relevant provision of law is Section 7(1) of the Physical Planning Act [CAP.193] (the Act) which reads:

> *"Where application is made to the Council for permission to develop, the Council may grant permission either unconditionally or subject to such conditions as it thinks fit, or may refuse permission, and in dealing with any such application the Council shall have regard to the plan in force and any other material consideration."*

"Plan" defined in Section 1 of the Act means a plan prepared in accordance with Section 3 of the Act.
Section 3 reads:-

> *"3.(1) Whenever a Council declares an area to be a Physical Planning Area it shall prepare a plan for that area.*
>
> *(2) In preparing the plan, the Council shall follow the proceedings specified in Section 2(2).*
>
> *(3) The plan shall specify those areas in which the Council is prepared to consider applications for specified kinds of development, and may contain such other information as the Council may see fit.*
>
> *(4) When it is completed notice of the plan shall be published in the Gazette, together with information on where and when that plan may be reviewed by the public."*

Section 2 of the Act reads:-

> *"2.(1) A Council may declare any area within its jurisdiction to be a Physical Planning Area.*
>
> *(2) In making such a declaration a Council :-*
>
> *(a) shall have due and proper regard for the rules of custom;*
> *(b) shall consider the welfare both of the people in the area affected and of the people of Vanuatu generally;*
>
> *(c) shall ensure that persons affected by the proposed declaration have been given adequate notice of it, and that those people are given an opportunity to make representations to the Council.*
>
> *(3) In declaring an area to be a Physical Planning Area, the Council may in its absolute discretion decide that one or more of the types of development specified in Schedule I shall not require permission for development, and it shall specify those types of development in the declaration.*
>
> *(4) All declarations shall be published in the Gazette."*

For completeness I now refer to Section 4 of the Act which reads:-

> *"4. No person shall carry on development in a Physical Planning Area, except and specified in the declaration of that Physical Planning Area, without having first received permission in writing from the Council."*

From evidence in the affidavit of Mr Zuerrer filed 08th October 1997, it is clear that a Public Notice to declare Port Vila Municipality a Physical Planning Area was issued on 4th September 1987 (Annex "O"). This

Notice was published in Gazette No.30 of 21st September 1987. It is also clear from evidence that Port Vila Municipality was declared to be a Physical Planning Area in accordance with Section 2(1) of the Act on 4th January 1988. The plan showing the zoning is Annexed as "P" in the affidavits of Mr Morris and Mr Zuerrer respectively. It is clear that the area on which the development is taking place is zoned for Low Density Housing.

It is submitted by Counsel for the Applicants that it is this Plan that the Council must have regard of when considering an application for permission to develop in this case as required by Section 7(1) of the Act.

Before considering that point I wish to first deal with certain preliminary issues as follows:-

(a) Is there a Plan in force ?

The answer is in the affirmative. It is in evidence before this Court as Annex "P" in the affidavits of both Mr Zuerrer and Mr Morris. There is no dispute about this.

(b) Is development taking place within the zoning in the Plan ?

The answer is in the affirmative. There is no dispute about this.

(c) Has the development been granted permission in accordance with Section 4 of the Act ?

The answer is in the affirmative and there is no dispute about this. The developer, Mr John Ayres made applications for permission to subdivide to build and for the grant of the Building Permits. Evidence show these are annexed to Mr Morris affidavit as Annex "A", "B" and "C". Mr Zuerrer annexed them as Annex "R" in his affidavit.

(d) Did the Council have regard to the plan in force when considering the developer's applications for permission to develop in the area in accordance with Section 7(1) of the Act ?

The answer must be yes. Although from evidence of the Respondents it is shown that they have relied on the development plans, it is clear in my Judgment that when considering whether or not to grant permission for the development to take place in the area, the Council did take into consideration the plan in force.

The Council approved the developer's application at its Committee meeting held on 19th June 1997. The Council advised the developer of its decision by letter dated 3rd July 1997. In issuing the developer's

Building Permit three conditions were imposed (Annex "E" - Morris affidavit). These no doubt have been complied with. But the development plans did not receive such a good welcome hence this present case.

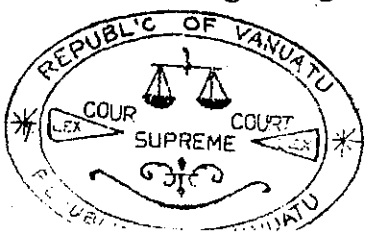
Ms Barlow argued that the Council failed to take into consideration other material conditions one such material consideration was the plan itself. I have already considered this issue and the answer is in the affirmative.

(e) What other material considerations did the Council have ?

The Council having received views from the Applicants objecting to the proposed development very clearly did something to accommodate the objections. There is clear evidence that the original development plans submitted shows plans for 11 buildings, 9 of which were to be tourist cottages and 2 to be private residences. These were reconsidered and a revised plan was requested. This was done and the original plans were superseded. There are now only 9 buildings: 2 for private residential purposes and 7 for tourist accommodation. These were approved some 11 conditions which are is evidence in Annex "H" of Morris' affidavit. In summary they are as follows:-

(a) That development be completed not later than 24 months.
(b) That development comply strictly with plans submitted.
(c) That appropriate soakaways for all surface water be provided.
(d) That the developer ensures proper access into the site to be in concrete and tar sealed to the Council's satisfaction.
(e) That proper sewerage treatment of all wastes be provided.
(f) That adequate car parking spaces be provided.
(g) That because this area is zoned as the low density housing area, the Applicant shall ensure that noise is kept at a minimal at all times. (emphasis, mine)
(h) That swimming pool be fenced off.
(i) That there be no water sport facilities or entertainment.
(j) That the use of buildings be confined to Class 10 of the Use Classes defined in Section 1 of the Physical Planning Act No.22 of 1986 [CAP.193] (emphasis, mine)
(k) That there be no bar and restaurant.

It is clear from condition (g) that the Council was aware of the zoning. That is the reason why they made the conditions regarding noise.



They made clear their reasons for giving those conditions and referred to Sections 6 and 7 of the Act.

The other obvious reason in my Judgment is to accommodate objections from those who objected to the development taking place.
In his submission Mr Kilu made reference to Municipal Bye-Law No.9 of 1979. I have seen the Bye-Law and I am satisfied that the conditions imposed by the Council were in compliance with the Bye-Law and the provisions of Section 7(1) as regards material considerations.
Indeed the Respondents rely on this Bye-Law also to submit that the tourist cottages being built are within the required area of zoning under Part I - Section 2(1) of the Bye-Law. I am satisfied that the development taking place is properly within the planning zone and the legal provisions of the Act and Bye-Law of the Council. Therefore in my Judgment the Applicant's grounds in (b) above must fail. That is to say that the Council did not act ultra vires their powers in granting approvals and issuing building permits permitting the development.

This brings me to the next issue of use. The Applicant argues that what is developing in the area is outside the use as provided for in Section 1 of the Act. They submit that under Class (10) only single household residence are allowed in this area which is designated for Low Density Housing. They made this submission because some of the buildings on the development are one-storied-houses. Site inspection by the Court on 20th November 1997 show that this is correct and the Respondents do not dispute that. The Respondents however say that these are single residential houses regardless that they are not detached. They rely on Bye-Law No.9 of 1979 Section 2(1) which reads:-

"*1 - A Areas:* *Residential and tourist areas.*

All building in A. areas shall be, following rules laid down in Parts II and III, detached houses used as residences and their outbuildings, or building for tourist industry eg. restaurants or shops selling goods mainly for the tourist trade that is luxuries fashion, artefacts, etc.
Hotels may be built as detached houses or not provided that they are any international standard."(emphasis, mine)

This is not a hotel but are tourist cottages-buildings used for tourist industry. This area is within A Area allocated for residential and tourist. That being so, the argument that this use is outside the use as required by Law ie that it is a commercial development within a residential area cannot

stand. Bye-Law No.9 of 1979 must be read as part of or as an aid to Section 1 of the Act. I am persuaded by that argument and I accept the Respondents arguments that these are single household residences regardless that they are not detached. For these reasons it is my Judgment that ground three of the Applicant's application must also fail.

I now deal with the issue of access. The Applicants say that the development is serviced by a single track access which they say was originally an easement. They say further that the Respondents failed to have due regard to the services and impact on neighbouring properties.

On inspection it is clear that this access is a single track roadway. It is now clear that this is a public road. It is clear from evidence that the road is only about 5 meters wide. This is less than the minimum requirement as required by Section 47 of the subsidiary legislation to the Land Surveyors [Act CAP.175]. But the size of the roadway is not the issue here. The issue is did the Council have due regard to this when it approved permission for the development ? To answer this the Court must look at the conditions imposed by the council. Condition 4 reads:-

> "*4. The applicant shall ensure that there is proper access into the site, which shall be concreted, tar-sealed or otherwise sealed to the satisfaction of the Council.*"

With that condition, I am satisfied that the Council did have regard to access when considering approvals and grant of permits. The ultimate responsibility for creating a proper road access rests with the applicant or developer and not on the Council. For this reason grounds of the Applicant's application must also fail.

I deal now with the fifth issue which is a relation to the powers of the Minister. It has been argued and submitted by Counsel for the Applicants that the Minister does have overriding supervisory powers and absolute discretion to direct the Council to make amendments to any plan and that the Council is subject to the direction of the Minister.

Section 9 of the Act is the only provision which gives powers of the Minister. I see nothing in that provision which gives the Minister the powers claimed by the Applicants. It has been submitted to the Court that the Court should have regard to the principles of the United Kingdom legislation and the law in that regard. Vanuatu has a legislation and the Court can only have regard to that legislation. English cases and English law may be persuasive as guidance but they are not binding where

Parliament has legislated for a matter specifically. For these reasons ground 5 must also fail.

Finally the Applicant say that due to the purported public inquiry conducted by the Council insufficient time and opportunity was given to them to express their objections. This cannot possibly be the truth. On evidence there are several correspondences from the Applicants to the Council and vice-versa and from other persons not now part of these proceedings. There is evidence that original development plans were revised and altered following objection. Although it seems that the Council did not give the Applicants an opportunity to be heard in person, it is clear that his correspondences and other persons were effective. The result is that plans were changed. That could not have been if the Council had completely ignored all objections. But in the circumstances I am satisfied that the Applicants had ample opportunity to air their objections indeed to a much greater extent than he would perhaps have expected. There is now no bar and restaurant, no water sport activities etc... Would these have been excluded if the Council had ignored the objections of or by the Applicants ? I doubt it very much. It was discourteous of the Council not to respond directly to some correspondences but that did not mean that they ignored the objections completely. For these reasons grounds 6 must also fail.

There has been some allegations about straddling by one building onto another title. I am satisfied that all titles have been properly subdivided following the application therefor and the grant of approvals thereof. On site inspection there is no evidence of straddling and this allegation cannot be substantiated.

The locus standi of the Applicants was challenged by the Respondents but the Court has placed more weight on the submissions of Counsel for the Applicants in that regard and accept them entirely. Locus standi was an issue to be argued at the application for leave to apply for Certiorari and prohibition. It was a little too late to argue it in the substantive hearing.

Finally the issue of delay was raised by the Respondent. They submitted that the Applicant was guilty of delay and did not deserve the relief sought. Evidence shows that the Applicants were first aware of the development on 17th June 1997. The Applicants deposited their first documents at the Court Registry on 18th September 1997 and were not able to get a date fixed for hearing until 12th November 1997. Whilst it is correct that the Applicants cannot be blamed for delays of administrative nature by the

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Court, it must be noted that litigants have to show a seriousness of their case right from the start. Here the starting date was 17th June 1997. A serious litigant would have taken legal proceedings using the legal avenues through ex-parte proceedings on that date to show his real seriousness and concern. It is true that some cases need to proceed or contain information which require inquiry to be done. But it is equally true that when such inquiry is being made of the person who one intends to sue as the Respondent or Defendant, answers to inquiries cannot be guaranteed. The result of course is delay to the detriment of the inquirer. Here I am satisfied that some delay is attributed to the Applicants but this is not the main reason why his application should fail.

Having said all that, and for those reasons given above, the orders of certiorari and prohibition sought by the Applicants are refused, and their application is accordingly dismissed with costs to the Respondents to be taxed if not agreed.

Dated at Port Vila, this 1st day of December 1997.

Sealed: 5th December 1997.

BY ORDER OF THE COURT

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Oliver A. SAKSAK
Judge