

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 895/15

In the matter of :-

Bhavesb Mungur

Appellant

v/s

District Council of Savanne

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having rejected the application of the Appellant for a Building and Land Use Permit for the construction of a house at Lot No.67, Morcellement Blu Gold, Tyack. The grounds for rejection communicated to the Appellant in a letter dated 13th March 2015 are set out below:

"The proposed development is located within a morcellement approved for agricultural purposes by the Ministry of Housing and Lands Ref: MHL/M/15379 with the following conditions attached in the title deed/Act de Societe with TV No. 201405/000489:

- (i) *No fixed/concrete structure shall be allowed on site.*
- (ii) *No residential development shall be allowed on the respective lots.*
- (iii) *The morcellement shall not be developed for residential purpose as agreed by the Bel Air Sugar Estate Limited in its letter of 28 January 2011.*

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Also after checking the structural drawings, it has been noted that the following have not been submitted:

- *Reinforcement details of combined base.*
- *Reinforcement details of roof slab.*
- *Reinforcement details of suspended beams.*
- *Reinforcement details of staircase.*
- *Details of absorption pit.”*

2. The Appellant deponed under solemn affirmation. In essence he submitted as per his statement of case, and was cross-examined by Respondent’s counsel. Mr. Saddul, Head of Land Use and Planning Department, deponed on behalf of the Council and was cross-examined by the Appellant’s counsel. We have duly considered all the evidence placed before us as well as submissions of both counsel.

I. CONTEXT ANALYSIS

3. The subject site is located within an agricultural morcellement at Tyack. The proposed development is a residential building of only ground floor where the Appellant intends to reside. Amenities such as electricity and water are available and there are roads within the morcellement. As per the title deed, the morcellement is designed for agricultural purposes only. The title deed makes reference to the Morcellement Permit, at Page 4 of the title deed, issued by the Ministry of Housing and Lands bearing reference MHL/M/15379 and registration number A805/744 and some of the conditions of the Morcellement Permit are reproduced exactly in the title deed : no fixed/concrete structure shall be allowed on site, no residential development shall be allowed on the respective lots and the morcellement shall not be developed for residential purpose as agreed by the Bel Air Sugar Estate Limited in its letter of 28 January 2011.

II. THE PLANNING INSTRUMENTS AND THE LAW

4. The site being situated in Union Park the applicable outline scheme is **Planning Scheme of Grand Port/ Savanne** and the applicable Planning Policy Guidance is **PPG1** issued under the **Planning and Development Act 2004**.

III. THE ISSUES

5. The crux of the submissions of the appellant's counsel was that the Council fettered its own discretion by not assessing the merits of the application but merely rubber stamping the decision of the Ministry of Housing and Lands to the effect that the application cannot be approved as the subject site lies within an agricultural morcellement, not a residential one. Counsel for the respondent submitted that the appellant was aware that the plot of land was for agricultural purposes only, that the plot is outside settlement boundary and that there is a procedure to be followed if agricultural land is to be converted for residential use.
6. There is on record an approval for exemption of land conversion permit in favour of the appellant emanating from the Ministry of Agro-Industry dated 3 November 2014 but the exemption *"is conditional to the said land being located in an area where development is permissible in accordance with the Outline Scheme or Strategic and detailed policies of a development plan."* The representative of the Council, Mr. Saddul, agreed that the Council refused the BLUP on the basis of the non-clearance from the Ministry. He also stated that the Council found the application to be non-compliant with important features missing. After perusal of the grounds for refusal as set out in the refusal letter, we cannot ignore the fact that the Council did include some features that were missing from the application which suggests that it may have assessed its merits to some extent. However, this aspect was contradicted by the Council's own witness in cross-

examination when questions were put to him concerning the conditions as laid down by the Ministry of Housing, he stated that the Council *“fine assess so dossier lerla nous fine trouver tout sa bane condition la, nous capave refuse li baze lorla. Suite a sa npus fine retire so letter refusal plus tout sa bane discrepencies la. Alors li pas pou gagne droit vine depose sa bane documents la parcequi déjà en refusal lorla.”*

7. Coming to the point made by the appellant that the Council fettered its own discretion by not assessing the merits of the application but merely rubber stamped the decision of the Ministry of Housing and Lands, we believe that the question of the legality of the decision-making process, that is, that the council fettered its discretion is an issue that is only challengeable by way of judicial review before the Supreme Court. The jurisdiction of this Tribunal is set out clearly under **section 4 of the Environment and Land Use Tribunal Act 2012**. An appellant contesting the decision-making process as opposed to the ultimate decision itself and the basis upon which that decision was made, then it is a point of judicial review. A distinction needs to be drawn between the merits of a decision as opposed to the manner in which it was made. If the challenge by the appellant is not on the merits of the decision then this tribunal will have no alternative than to dismiss the appeal for **want of jurisdiction**.
8. The appellant’s counsel submitted the Privy Council case of **Fun World Co. Ltd v/s The Municipality of Quatre Bornes no.46 of 2008** in support of the appellant’s contention that the Council should not fetter its discretion. While this Tribunal can appreciate the principles set out therein, it cannot usurp the powers of the Supreme Court by reviewing the decision-making process of the Council solely. Infact, this judgment which addressed the issue of the judge in chambers acting beyond his powers, also supports the contention that a particular jurisdiction should only act within the powers conferred to it by law, anything beyond that may be *ultra vires*.
9. It is apposite to note that the jurisdiction of this Tribunal is to decide upon whether the Council was right or wrong to have rejected the application based on whether the

Council took all relevant criteria into account. The appellant has also contested the decision reached by the Council. Grounds I, II and III as set out in the statement of case of the appellant do not amount to grounds of appeal as they purport to set out the personal circumstances of the appellant. Ground IV in essence stipulates that the appellant is aware of the restrictions imposed by the Ministry of Housing and Lands with regards to the Morcellement but urges the Tribunal to take into account other owners of plots within the same morcellement have been allowed to erect buildings. There is on record a notice dated 26.08.14 sent by the Council to one Mr. Assiff Bodhoo requiring him to stop all activities regarding construction of a building and requesting him to abide by the provisions of the law. We believe there is lack of evidence to make a finding that the Council “allowed” other owners to construct or that the Council granted any BLUP for residential buildings within the morcellement.

10. We believe at this juncture that the issue of restrictions/conditions imposed by the Ministry of Housing, as addressed under grounds of appeal VI, VII, VIII and IX needs to be addressed. When deciding whether to grant a BLUP, inevitably the Council has to consider the title deed of the owner of the property. Should the Council take into account the title deed in its totality, in other words, any conditions contained therein also? The answer is in the affirmative since the condition attached to the title deed, the former cannot be segregated. The question that arises then is whether the Council is right to have concluded that it is bound by the attached conditions and thereby precluded from considering the merits of the application. We cannot get into the merits of the title deed, suffice to say that the point raised by the Respondent is *La Loi des Parties*. In this case the parties to the ‘*contrat de vente*’ are the promoter of the morcellement and the buyers, that is, the *co-proprietaires*- their rights are safeguarded under the law of contract. The Council, being the local authority, is not a party to the contract. Yet, in view of the wide powers vested in it by law, it has a supervisory and regulatory jurisdiction over all development whether private or public. The Council thus decides on applications using planning law principles.

11. In the present case, the circumstances are peculiar in that the conditions attached to this particular title deed seem to be literally “picked out, word for word” from the morcellement permit, as stipulated in the title deed itself. A morcellement permit is a permit granted by the Ministry of Housing and Lands by law for a specific land use as intended by the Government. Can the Council, the authority which regulates development, grant a permit contrary to a land use specified by Ministry of Housing and Lands? We believe it would be usurping its powers if it did so. We are alive to the fact that there is on record a clearance given to the appellant from the Ministry of Agro-Industry and Food Security, as addressed in ground V of the grounds of appeal, but as stated above, it contains a caveat that the exemption for Land Conversion “*is conditional to the said land being located in an area where development is permissible in accordance with the Outline Scheme or Strategic and detailed policies of a development plan.*” We have it on record that the Council’s representative stated that the plot is Outside Settlement Boundary, as per the applicable Outline Planning Scheme. Therefore, upon application of the planning scheme, the application is found not to satisfy the exemption requirements.

12. For all the reasons set out above, we believe that this appeal is devoid of merit and is accordingly set aside.

Determination delivered on 7th December 2017 by

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SSA

Mrs. J. RAMFUL
Vice Chairperson

Mr. Cheong Wai Yin
Member

Mr. Guiton
Member