BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 405/13

In the matter of :-

Davemala Boulahya

Appellant

v/s

District Council of Black River

Respondent

DETERMINATION

The present appeal is against a decision taken by the District Council of Black River (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (BLUP) for the conversion of an existing residential building into a residential Guest House at Lot 149, Phase III, Morcellement Safeland, Flic-en-Flac. The decision of the Council was communicated to the Appellant by a letter dated 29th March 2013, which stated that the Council rejected the application on the sole ground that as per a condition attached to the title deed, the land use of the property is exclusively meant for residential purposes.

The appeal was lodged before the Tribunal on the 12th April 2013. Both parties were legally represented at the hearing. The Appellant deponed under solemn affirmation and was cross-examined by Respondent's Counsel. The Senior Works Inspector, Mr. Dunputh, deponed on behalf of the Council and was also subjected to cross-examination by Appellant's counsel.

We have duly considered all the evidence placed before us including submissions of both counsel.

CONTEXT ANALYSIS

The property in lite is a two-storeyed building within a compound having parking slots located within the third phase of residential morcellement at Flic-en-Flac. As per the title deed, the owners *"ne pourront construire sure le dit terrain que des constructions de caractere residential et celles qui en sont le complement indispensable, mais ils ne pourront eriger toute cahute ou quelque abri precaire a usage d'habitation."*

THE ISSUES

The evidence elicited from the Council's witness is that the Council based itself solely on the restriction contained in the title deed to reject the Appellant's application-its stand therefore is that this condition to the title deed, which has been described as a restrictive covenant, is contractual and hence governed by *"La Loi des Parties"* as per the Civil Code and the only derogation provided under the law to this principle is if it is *"a l'Ordre Public"*. The Appellant took the converse view that if two parties have entered a contract, the Council has no say in the matter if there is no objection received from the neighbours or beneficiaries of the restrictive covenant. It is not denied by the respondent that in this case no objections were received. The issue, in essence, that we are being called upon to adjudicate can be narrowed down to one question, that is, whether the Council is bound by the restrictive covenant in the title deed.

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. In order to reach an informed decision on the issue it may be relevant for us to address our minds to the following questions. Firstly, whether the Council was right to have taken into account the title deed in order to determine the application? The answer to this is in the affirmative. When deciding whether to grant a BLUP, inevitably the Council has to consider the title deed of the owner of the property. The next question that follows is whether the Council should take into account the title deed in its totality, in other words, the restrictive covenant also. The answer is again in the affirmative since the covenant is a condition attached to the title deed. The question that arises then is whether the Council is right to have concluded that it is bound by the restrictive covenant 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. Now, coming back to the main question of whether the Council is bound by the restrictive covenant, in our view the answer is that it is not so in this case.

A restrictive covenant, in essence, is a restriction on the use or development of a portion of land generally imposed by the first owner of the land so that it "runs with the land" when the land is sold however many times. Generally, a restrictive covenant remains enforceable indefinitely and is a private right or interest. *"Les conventions n'ont d'effet qu'entre les parties contractantes"*, **Encylcopedie Dalloz - Contrat Et Conventions, alinea 302,** and so the people entitled to the benefit under the covenant are only those who are parties to the contract. It is only they who have the right to waive it, whether expressly or impliedly. **Alinea 306***" La cour de cassation a, par ailleurs, preciser que si les conventions ne peuvent normalement obliger que les parties, les juges n'en peuvent pas moins rechercher dans des actes etrangers a l'une des parties en cause des renseignments de nature a eclairer leur decision."*The remedy for breach of the covenant by a *co-proprietaire* is a private action for damages or injunction before the relevant forum. This is a matter governed by the law of contract. The contract binds the promoter and the buyers, not the Council. We have it in evidence that there were no objections to the present application.

On the other hand, if there was an objection by one of the *co-proprietaires*, the issue would have to be considered by the Council since one of the parties to the contract would be invoking his right under his title deed. The Council would have to consider this not as a private interest but in the interest of those who will be impacted upon by the development. As well as a consideration of the adjoining landowner's contractual rights, wider questions of planning and the public interest would still have to be taken into account by the Council. Where there is no such objection or challenge, the doctrine of privity of contract dictates, that the Council, being the local authority vested with statutory powers to allow development in accordance with planning permission, cannot fetter its own discretion by invoking a condition to a contract that has not been raised by a party benefitting from the restrictive covenant. It would be contrary to policy, and also absurd, if planning laws and regulations were to be restricted by private rights and obligations.

There are a number of authorities under English Law where planning permission has been granted despite the existence of a restrictive covenant namely **Re Martins's Application (1989) 57 P &CR 119**. The analogy we seek to draw here is that in certain jurisdictions, it has been clearly set out that the local authority is not bound by such restrictions. Similarly in **Zenios v/s Hamstead Garden Suburb Trust (2011) EWCA Civ 1645**, planning permission was granted by the local authority contrary to the covenant.

In Western Australia, the position they have adopted is fairly similar to English law. In a planning bulletin published in April 2000 by the Western Australian Planning Commission

available on the website http://www.planning.wa.gov.au/publications/bulletins, the position is clearly set out:

"Restrictive covenants and planning controls are not related and provide for different forms of restriction. A restrictive covenant is a restriction on title whereas planning controls arise from legislation regarding these and enjoyment of land but which do not create an interest inland. The existence of a restrictive covenant, therefore, is not a relevant planning consideration in the determination of a development application except where the restrictive covenant arises from a planning decision."

Each local authority has a planning department whose function is to assess whether a development proposal can gain planning acceptance based on Planning Instruments. In addition there are Outline Schemes which favour a pro-active as opposed to a restrictive approach towards development. We believe that the Council fettered its discretion in 2 ways. Once it had given due consideration to the title deed, including the restrictive covenant, it should not have come to the conclusion that it was bound by the condition the more so as no objections were received from the surrounding land owners. Furthermore, as the local authority, it should have gone on to assess the planning merits of the application after having taken into account all other relevant factors, instead of limiting itself solely to the restrictive covenant in the title deed as a ground for rejecting the application.

PLANNING MERITS

The Council has assessed the development as a commercial one falling in the "commercial cluster". **Under section 2 of the Tourism Authority Act 2006,** Guest House is defined as *"any premises where lodging and sleeping facilities and breakfast are provided against a payment."*Since the definition of Guest House relates to the provision of services of lodging, we find that the activity falls within the ambit of what constitutes a commercial activity with a proviso that such activity is distinguishable from a planning point of view from retail development which involves a lot of human traffic walking in and out of the premises for the purposes of purchasing goods or services.

It is stated in the **National Development Strategy** the way tourism zone has been defined it depicts an imagery of attraction sites and activities for tourists such as the sea, restaurants, nightclubs and the like. Flic- en-Flac is a coastal zone and a tourism zone where there is much pressure for tourism development and to provide leisure activities. It was borne out in the evidence of the Appellant that there are others operating guest houses and tourist residences in the same morcellement. She produced photographs in support of her contention. The Council denied having granted BLUPs to such types of commercial development and suggested that they are operating illegally. Albeit illegal, the existence of other guest houses or tourist residences in the morcellement was not denied by the representative of the Council. This being

the state of affairs, the question we ask ourselves is whether the presence of these illegal commercial developments has not already caused a departure from the "initial destination" of the morcellement?! We believe it has. The morcellement cannot at this point be said to contain exclusively residential development. If the Council, in the exercise of its supervisory jurisdiction, wanted to uphold the residential character of the morcellement in lite, it could have prosecuted those operating illegally and sought a restoration order, stop order or other types of relief before other forums.

We are alive to provisions of **Section 121 (2) (a) of the Local Government Act 2011** that there is no legal requirement for a fresh application for a BLUP in cases of change in economic activity within the same cluster. But this subsection is subject to the Eleventh Schedule where under the commercial cluster more specifically, certain conditions are provided which enable the local authority to have a wide discretion to decide whether a new application for a BLUP is needed or not. Its discretion is not fettered in anyway.

I take note of the ruling of this Tribunal in the case of **Ismael- Joomun v/s Black River District Council [ELAT 303/12]** submitted by counsel for the Respondent, whilst tribunals are not bound by precedent, the previous decision should be carefully considered, and it might be regarded as persuasive and followed, but in the interests of certainty and clarity in the law, this Tribunal shall depart from the previous ruling.

For all the reasons set out above, we believe the present application is worthy of gaining planning acceptance in that locality. We therefore allow the appeal. No costs.

Determination delivered on 2nd March 2015 by

Mrs. J. RAMFUL	**Mrs. B.Kaniah**	**Mr. Busawon**
Vice President	**Assessor**	**Assessor**