BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2084/22

In the matter of :-

Pierre Laval Gaetan Hermans

Appellant

v/s

District Council of Black River

Respondent

DETERMINATION

1. This is an appeal against the decision of the Respondent ["the Council"] for having rejected the application of the Appellant for a Building and Land Use Permit ['BLUP'] for the construction of a second floor to his existing building, for residential purposes at Lot.91 Morcellement La Gaulette, La Gaulette. The sole ground for refusal communicated to the Appellant vide a communication on the National E-Licensing System ['NELS'] is:
   "As per conditions attached to the title deeds, construction within the morcellement shall be restricted to ground plus one upper floor only."

2. The grounds of appeal as per the Appellant's Notice of Appeal are as follow:
   "a) There are properties on the morcellement at Le Petit Morne, where the appellant's property is situated that have a second floor as shown on the attached photographs from pages 6 to 13.
   b) There is reason to believe that a permit has been issued for the properties on plots 65 and 75 (see page 9) of the same morcellement for the construction of a second and third floor under roof structure on top of an existing building as shown on the photographs on pages 6,7,8 and 9 that contravenes the Title Deeds.

c) The appellant feels aggrieved and victimized when others have been permitted, allowed or condoned to build a second floor on their properties of the same morcellement.

d)Therefore, the appellant argues that there is a case of Precedent for the Tribunal to upheld this appeal."

3. The Appellant was not legally represented and had no witnesses. The Respondent was represented by its Building Inspector and by its Counsel. We pause here to make a very strong observation. It is a matter of regret that the Council failed to manage this case properly in that it failed to file its Statement of Defence despite several postponements granted by the Tribunal with a view to allow the Council to file it. The record bears evidence of the fact that the Statement of Case was received at the Council on the 09/02/2022 and on not less than three occasions the matter was postponed for lack of any communication from the Council, let alone any motion for postponement.

4. We have duly considered the evidence on record. The Respondent having failed to put in any defence, adduced no evidence. Counsel for the Respondent cross-examined the Appellant. The case of the Appellant in essence is that the Council has granted BLUPs to other property owners within the same morcellement for the construction of an additional second floor to their existing one storeyed building and that by refusing to grant him a similar BLUP he is being unfairly prejudiced and feels victimized. He produced several photographs to show that the other residential properties, within the vicinity of his, had second and third floors as per his version. His grievance was geared towards the fact that he could no longer enjoy the scenic views of the mountains and the sea due to the height of the other buildings surrounding his house hence the need to add one more floor. The Council stated that their stand was that contrary to what has been averred in the statement of case of the Appellant, there are no applications which have been favourably entertained in terms of second floors by the Council. The Council could however not substantiate its stand with evidence.

5. We shall now address the grounds of appeal. The fourth ground of appeal (d), as couched, does not amount to a ground of appeal and is therefore set aside. The remaining grounds of appeal will be considered together because they are all related. The crux of the case of the Appellant, as he argued it, rested on the fact that the Council gave out BLUPs for the constructions of additional second floors and in some cases upto even third floors to other property owners within the morcellement in non-compliance of the conditions of their title deed and hence the same should be applied in his case and the requirement be waived so that he can be granted the BLUP. We do not find an iota of evidence on record to suggest that the Council has given any BLUP for such constructions as the Appellant seems to be suggesting. The Appellant has carriage of his case and if his stand was that the Council has given out BLUPs for these constructions which are not in compliance with the conditions of the title deed then it was for the Appellant to produce that evidence by either producing the relevant BLUPs or calling the relevant witnesses to depone to that effect which he did not do. It may well be possible that there have been such developments as the Appellant has stated but they may have been illegal ones done without the relevant BLUPs having been procured.

6. This being said, we have taken note of the photographs attached to the Statement of Case at pages 6,7,8,9,10,11,12 and 13. It is not contested that these are buildings found in the vicinity of the Appellant's property. The Appellant explained that the two buildings shown on pages 6 and 7 are adjacent properties found on lots 65 and 75 of the morcellement as per page 4 annexed to his Statement of Case and that they are ground plus 2 floors. The first photograph shown at page 8 annexed to the Statement of Case also shows a second floor being erected on existing buildings and it is again not contested that these are buildings found within the morcellement where the Appellant resides. He explained that the buildings found on lots 65 and 75 have no basements. The photograph at page 12 clearly shows at least 3 levels to the building although the note inserted by the Appellant on the picture suggests that there are 4 levels to it as per the latter. Be it as it may, the current state of affairs is that there are several houses in the morcellement which are more than one storeyed.

7. The Council rejected the application for BLUP solely on the basis that there is a condition, a restrictive covenant, in the title deed of the Appellant which restricts construction to a one-storeyed building within the morcellement. At page 4 of the title deed of the Appellant's property it has been stipulated as follows:

"Le Lotissement dont le lot ci-dessus décrit et présentement vendu forme partie ayant une déclivité importante de son point le plus haut adossé à la montagne à son point le plus bas parallèle à la Route Publique et étant orienté vers l'Ouest avec possibilité de vue pour les occupants sur la mer, le Lotisseur afin d'éviter que la hauteur d'une quelconque construction puisse occulter, meme partiellement, la vue des occupants, du ou des lots se trouvant à l'arrière dudit lotissement a établi pour le benefice de l'ensemble des terrains issus dudit Lotissement les servitudes perpétuelles suivantes:
Les bâtiments à être érigés sur les lots sont limités à un Rez de Chaussée et un Etage.
La hauteur maximale autorisée pour les bâtiments ne pourra en aucun cas excéder dix mètres à compter du niveau du sol jusqu'au niveau de la surface du plancher haut de l'étage.
Aux termes de ces servitudes constituées pour autrui chaque lot du Lotissement sera le lot dominant et les autres lots les lots servants et vice versa.
Le non respect des servitudes ainsi établies entraînera pour le contrevenant non pas des dommages et intérêts mais la destruction des bâtiments érigés en contravention desdites servitudes." [stress is ours]

8. In the case of **Davemala Boulahya v District Council of Black River [ELAT 405/13]**, which revolved around fairly similar facts to the present case, the Tribunal observed *"...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."*

9. We believe that the reasoning in the case of **Boulahya** is sound and find no reason to depart from it. The presence of a restrictive covenant in a title deed is not a consideration that is material to the granting of planning permission by the Council. It is not for the planning authority to analyse and apply the legal effect of a covenant. If planning permission is granted, it means the planning authority has merely validated the application for development. The restrictive covenant is a private restriction that exists on the owner's title to the land and which may inhibit any further progress to development. That is a contractual obligation that has been entered by buyer when he purchased the land from the seller, in this case between the Appellant and the promoter of the Morcellement. A neighbour, on the other hand, who is a *co-proprietaire* in the Morcellement and has an enforceable right, could raise an objection and could challenge the proposed development before the proper forum by seeking to have the developer comply with the restrictive covenant. Therefore, objections from adjoining landowners become an important consideration. That is something that the Council can also consider when assessing the planning merits of the case as it also concerns the development *per se*.

10. We believe that the Council was wrong to have invoked as a basis for its decision to reject the application for BLUP the fact that the title deed contains a condition which restricts construction to ground plus one floor only. It should have assessed the application on its planning merits as per the planning instruments. As regards the grounds of appeal (a) and (b), there is no evidence that the Council has granted any BLUP to other developments and therefore these grounds fail.

11. As for ground of appeal (c), the Appellant is faced with a situation whereby the houses around his property have added more floors, hence he can no longer enjoy the scenic views of the mountains and the sea as he originally did and that was why he wanted to add one more floor. His complaint is also that he is aggrieved that the building of a second floor has been condoned on the properties of others of the same morcellement. It may well be that the Council did not grant any BLUP but it also failed in its duty to effect site visits and control illegal development. This cannot however be taken to mean that it has condoned the building of second floors on the properties that the Appellant is alluding to. It can only condone if there is evidence that it was aware that such development of which there is none.

12. None of the grounds of appeal could be substantiated evidentially, however, the reason put forward for refusal of the application for the BLUP should not have been advanced by the Council for the reasons given above. For all the reasons set out above, the present appeal is dismissed. The Appellant can make the application anew which the Council will have to consider as a fresh application to be assessed on its planning merits. No order as to costs.

Determination delivered on the 24th November 2022

Mrs. J. RAMFUL-JHOWRY	**Mr. S. MOOTHOOSAMY**	**Mr. S. BUSGEETH**
Vice Chairperson	**Member**	**Member**