BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : 493/13

In the matter of:

SIDDHARTA HAWOLDAR

Appellant

v.

MUNICIPAL COUNCIL OF QUATRE BORNES

Respondent

DETERMINATION

The appeal is against a decision of the Respondent to refuse the application for building and land use permit submitted by the Appellant in respect of the construction of a building to be used for commercial purposes along St Jean Road at Quatre Bornes. The letter of refusal dated 22nd August 2013 contains the grounds of refusal, which are as follows:

1. On a title deed submitted by the Appellant, bearing reference TV 5176 no. 20 on 'statut de la societe JR' (produced as Document B), it is mentioned that no commercial development should be allowed on the subject site.

2. The title deed TV 1211/14 mentioned as per the application form has not been submitted.

The grounds of appeal submitted by the Appellant are the following:

1. The mention of 'no commercial use' found on the title deed had been inserted many years ago by a Chinese man, who has already passed away, and therefore there is no valid objection for this land to be put for commercial use.
2. The Municipal Council had, in the past given a permit for commercial activity to JRE Company Limited, for the sale of cars on this very land, and this was a clear precedent for this land having been used for commercial purpose.

At the outset, evidence has been adduced in the course of the hearing that no building and land use permit (BLUP) had been delivered in respect of the other land (reference being made here to the land used by JRE Company Limited). This evidence not having been disputed by the Appellant, the second ground of appeal does not need to be addressed and falls altogether.

As regards the first ground, the issue to be determined is what is the impact of such a restrictive clause, contained in the title deed, on the decision of the Respondent?

We shall first consider the evidence adduced by the parties in this regard:

Mr. Boodhun deposed on behalf of the Appellant, and produced the proxy authorising him to do so (Document A). He explained that the owner of the land where the proposed development is contemplated belongs to 'Societe JR' and the land which is of a surface area of 600 square metres has been leased by him to conduct a business. The Respondent has refused to issue the BLUP for the business to run there. He denied having knowledge of any restrictive clause contained in the title deed in respect of the land and stated that the application had been submitted by Mr. Hawoldar, his 'mandant'.

Mr. Ramjug, witness for the Appellant deposed to the effect that the land in question belongs to the succession of his late father and is managed by 'Societe JR'. He is one of the heirs to the succession and, as such, he is one of the 'societaires'. The 'societe' has no objection for the Appellant to operate a business on the land. The whole area surrounding the premises is a commercial one. The 'societe' had even rented the premises to a construction company in the past and had subsequently rented the same premises to JRE Company Ltd., which was running a car showroom in the building next door. They used the premises for the display of cars. He added that the refusal of the Respondent is causing him prejudice in as much as he has lost rental on the land that had been leased to the Appellant.

In cross examination, the witness conceded that the 'Societe JR' was fully aware of the restrictive clause preventing any commercial development on the land.

The representative of the Municipal Council, Mr. Goolaup, deposed to confirm that the reason for refusing the permit applied for by the Appellant is based **solely** on the restrictive clause contained at page 45 of the document produced as Document B, which, incidentally, is not the title deed as such. Nonetheless, it was not disputed by the Appellant, or his witness, that such a restriction exists.

In cross examination, Mr. Goolaup explained that the Respondent, in reaching its decision, has regards to the planning instruments in force for that particular region. These are the Planning Policy Guidelines and the Outline Planning Schemes for the region of Quatre Bornes. He confirmed that the subject site lies in the Central Business

District of the town of Quatre Bornes. Yet, in this particular case, the restrictive clause in the title deed was the decisive criterion.

After having assessed the evidence adduced by the respective parties, the following observations are noteworthy:

1. Reliance was placed by the Respondent on the title deed. We note that the document referred to by the Respondent is not the title deed but it is rather a copy of the 'statuts de la Societe JR' produced as Document B, showing that the land in question had been an 'apport en societe' by the heirs to the succession which created the 'Societe'. In fact, the Respondent itself stated in the refusal letter that 'the title deed TV 1211/14 mentioned in the application form had not been submitted.
2. The exact provisions relied upon by the Respondent from that document are the following: " ***Il est bien convenu entre les parties que l'acquereur, ses ayants droit et ayants cause, s'interdisent le droit de construire sur le terrain presentement vendu aucun batiment pouvant servir a des fins commerciales notamment pour etre loue comme boutiques ou magasin et ce, sous peine de dommages interets.....***
Desquelles stipulations, les comparants aux presents, en leur qualite de nouveaux co-associes, declarent en avoir parfaite connaissance, et obligent la societe a en faire son affaire personnelle, de sorte que les apporteurs de ce bien ne soient jamais inquietes, poursuivis, ni recherché a cet egard."

The issue is whether the provisions of the title deed should be the only matter for the Respondent to consider. It has been submitted on behalf of the Appellant that the Respondent was wrong to have fettered its discretion in the assessment of the present application. Indeed, as pointed above, the Respondent simply relied on Document B to reject the application, as the contents of the 'statut de societe' produced by the Appellant contained a restrictive clause. It appears that abstraction was made of all other factors, namely the planning norms and instruments that normally govern such decisions. Those planning instruments point in another direction, namely, as stated by the witness for the Respondent, that the area is located in the Central Business District of Quatre Bornes.

Was the Respondent right to have directed its mind solely to the restrictive clause in the contract in reaching its decision?

The governing principles of the law of contract are contained in Article 1165 of the civil code, which lays down the principle of *'l'effet relatif du contrat'*, namely that :*"Les*

conventions n'ont d'effet qu'entre les parties contractantes: elles ne nuisent point aux tiers et ne lui profitent que dans le cas prevu par l'article 1121 du code civil."

However, a contract, although binding the contracting parties in its effect, cannot be ignored by others. *"On ne peut meconnaitre que le contrat est un fait social: a ce titre, les tiers ne peuvent ignorer les consequences qu'il cree: Il est opposable a tous/ est 'erga onmes'.*

On this score, the Municipal Council rightly took into account the title deed in respect of the land where the proposed development was applied for. Yet, by resting its decision solely on a restrictive clause, the Municipal Council failed to consider all relevant factors e.g the development of the surrounding area, the classification given to this area in the planning instruments. The policy that is relevant for this particular area is policy CR 1 of the Outline Planning Scheme for the Municipal Town Council Area of Quatre Bornes, public deposit version dated 20 April 2013, which encourages commercial development in established centres as follows: *"Applications for a mix of commercial uses including shops, offices, entertainment and leisure, as well as residential, should be promoted in established commercial centres..."*. Policy CR 1 lengthily explains the rationale for this position.

These being the guiding principles for the Municipal Council's planning role, we cannot but question the overwhelming importance given to a contract between the parties as opposed to the broader duty of the Respondent to take decisions in the light of the policies that govern planning within its jurisdiction.

By subjecting its policy-making and planning role to a private agreement, the Respondent fettered its discretion so much so that it amounts to no decision at all, the more so that the Respondent did not adjudicate on the land use issue, which any application for BLUP calls for and which is within its prerogatives.

We are of the view that even if Document B contains a restrictive clause, as relied upon by the Respondent, such a covenant amounts to an 'accord des parties'. Any breach thereof by either party entails legal consequences which are already provided in the contract, namely by an '*action en dommages et interets*' which any party can resort to.

This being the sanction provided by the contracting parties, we see no reason to read more into the contract than what it provides. The Municipal Council seems to have added more to what the contracting parties had in mind by posing itself as a third party enforcing the contract. It is true that, being a local authority, the Municipal Council has to bear in mind that no decision be taken that breaches obligations of parties. Yet, the decision of the local authority should be based on all factors surrounding the application, the planning instruments being a decisive part. There is no indication both

on the refusal letter or in the evidence adduced by the representative of the Council that this exercise has been done.

The Respondent is duty bound to act within the legal parameters, which are the legal instruments governing planning. These are the Planning Policy Guidance (PPG) and the Outline Planning Scheme which derive their authoritative force in the legislative provisions of the Planning and Development Act. On the basis of this, the PPG ranks higher in terms of legal norms that are applicable to the decisions of the Municipal Council. In addition, it is on record that there has been no valid objection against the application for BLUP.

In view of the above we find that the decision of the Respondent, more particularly, the ground for such decision, cannot be upheld by this Tribunal.

However, we observe that if, on one hand, the Respondent has given limited consideration to the application, the Appellant has, on the other hand, not shed much light on other aspects of his application which could trigger an order in its favour. By this we mean that no evidence has been adduced by the Appellant to show that all other parameters have been observed, in terms of clearances from respective authorities for its operation in that particular spot. This is a matter for the Respondent to consider. Yet, we are in the dark as to whether these elements had been put before the Council at all before it reached its decision. No information has transpired from the evidence on that aspect.

We therefore, whilst not upholding the decision of the Council, remit the present application for a BLUP to the Respondent for its consideration in the light of the observations made by this Tribunal, taking into account the planning instruments, and setting any conditions that would be appropriate for a development of that nature in that particular area.

Determination delivered on 6th November 2014 by:

Mrs. V. Bhadain	Mr. P Thandarayen	Mr. R Ramdewar
President	Member	Member