BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 136A/12

In the matter of :-

Abdool Farog Boodhun

Appellant

v/s

District Council of Grand Port

Respondent

DETERMINATION

The present appeal is against a decision taken by the District Council of Grand Port for having rejected an application made by the Appellant for a Building and Land Use Permit (BLUP) for the conversion of the second floor of an existing residential building into a residential Guest House at Daurades Street, BlueBay. The decision of the Council was communicated to the Appellant by a letter dated 26th January 2012, which stated that the Council rejected the application on the sole ground that *"this type of activity is not allowed in the morcellement as per the condition in the title deed."*

The appeal was lodged before the Town and Country Planning Board and subsequently transferred to Tribunal following the coming into force of the Environment and Land Use Appeal Tribunal Act 2012. Both parties were legally represented at the hearing. The Appellant deponed under solemn affirmation and was cross-examined by Respondent's Attorney. The Head Planner, Miss Bosquet, 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 and attorney. The case for the appellant is that there exists many guest houses in the locality and that being given his own premises is currently being used by someone else to operate a guest house, albeit without a relevant BLUP but with an appropriate Tourist Licence, it is his contention that the Council should give him the relevant BLUP. The stand of the Council

is that the title deed of the appellant contains a restriction specifically on this issue. The title deed, produced as annexure to the statement of defence clearly states under "conditions" that *"Il demeure expressement convenu entre parties comme conditions essentielles des presented, savoir:-*

1o.) Que le Morcellement du bien don't la portion de terrain ci-dessus decrite a ete distraite, etant affecte principalement au logement de caratere residential, il est reserve, sauf en ce qu'il s'agit de la zone commercial, aux constructions a usage d'habitation et a celles qui en sont le complement indispensable.- En consequence, toutes constructions d'hotels, de pension de famille, de boites de nuit sont interdites de meme que l'amenagement et l'exploitation de tels etablissements, et ce, meme dans la zone commerciale."

Previously, the Tourism Authority would grant Tourist Licences without any requirement for the production of a BLUP. The policy since around 2012 has been to insist on the production of the relevant BLUP before issuing a Tourist licence.

When deciding whether to grant a BLUP, inevitably the Council has to consider the title deed of the owner of the property in its totality. Therefore, the Council has to also take into consideration all conditions attached to a title deed. But whether the Council is bound by the conditions of a title deed is a separate issue. We are of the view that we cannot get into the merits of the title deed because it is guided by contract law, that is, *La Loi des Parties,* which clearly falls outside our ambit. Suffice it to say that in this case the parties to the *'contrat de vente'* are the promoter of the morcellement and the buyers, that is, the *co-proprietaires*- whose rights are safeguarded under the law of contract. The Council, being the local authority, is not a party to the contract. Besides the language used in the title deed itself when setting out the conditions clearly shows that these are imposed ***on the parties*** to the contract. However, 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. We believe, therefore that the Council is not bound by any condition or restrictive covenant found in the title deed. The title deed being a contrat de vente, the remedy for any breach of the covenant by a *co-proprietaire* is a private action for damages or injunction before the relevant forum since the matter is one of law of contract. The contract binds the promoter and the buyers, not the Council.

This being said, no evidence was adduced as to whether any objections have been received to the proposed development. In our view, should there be an objection by one of the *co-proprietaires* in the Morcellement of Bluebay, 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. Otherwise where there is no such objection or challenge, 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 if planning laws and regulations were to be restricted by private rights and obligations. In the present case, we believe that the Council fettered its own discretion by considering that it was bound by the title deed restriction and by not assessing the planning merits of the application.

Now since it is our function to review the decision of the local authority, what we need to consider is whether when faced with the circumstances of the present case the Council should have allowed the application of the proposed development to gain planning acceptance.

A Guest house serves to accommodate lodgers, whether tourists or locals. Blue-bay being a coastal area having the international airport and hotels in the vicinity is vested with amenities to attract not only tourists but also locals. It can be said that there is a market for operating guest houses in such an area. Infact we have it in evidence from both the appellant and the witness for the respondent, Miss Bosquet, that there are guesthouses in the locality although she stated that as per the records the Council has never issued any BLUP for guest houses in the locality thereby suggesting that the Guesthouses are operating illegally.

Albeit illegal, the morcellement cannot at this point, in our view, be said to contain **exclusively** residential development. If the Council, in the exercise of its supervisory jurisdiction, wanted to uphold the residential character of Morcellement Blue-Bay, it could have prosecuted those operating illegally and sought a restoration order, stop order or other types of relief before other forums. This being said, no evidence has been produced before us to show how many guest houses are operating in the morcellement for us to make a determination whether the "initial destination" of the morcellement has changed or not. It came out in evidence from the Council that the Tourism Authority used to issue Tourist licences without requesting a BLUP. This is also a factor that the Council could have considered to assess whether the overall 'destination' of the Morcellement has changed or not. However, the settled principle in civil cases being that "He who avers must prove", the onus is on the appellant to prove his case. He has not put in any evidence to show whether or not there have been objections to his application, and following the notification process. This, in our view, would be a crucial point because as stated earlier, it would have helped the Tribunal to decide whether someone upon whom the proposed development is likely to have an impact has raised an objection based on his legal right. In our view the appellant should have called witnesses such as a representative of the Tourism Authority and his tenant who used to run the Guest house on his premises. On the basis of such evidence the Tribunal could be in presence of more facts to come to an informed decision on whether the Council, taking all the circumstances into account should have granted the BLUP to the appellant. The appellant made it a live issue that the Council

claims trade fees even from those allegedly operating guest houses illegally in the Morcellement but again we make the same point that no evidence was produced before us nor was any witness from the relevant department called to substantiate the contention of the appellant.

Whilst we do not uphold the basis upon which the Council decided to reject the application, we are not ready so surmise on certain facts, in the absence of evidence, to conclude that the appellant should be granted a BLUP.

For all the reasons mentioned above, we therefore dismiss the present appeal.

Me. Ramdewar's finding:

I, Me R.K. Ramdewar, have arrived at the same conclusion as Mrs Ramful, the Vice President and Mr Seetohul , Assessor, that the appeal should be dismissed the only difference is that I agree with the District Council when the latter rejects the application of the appellant for a BLUP on the ground that the activity proposed by the appellant is not In line or contradicts the conditions laid down in his title deed. Furthermore, I am of the view that the appellant cannot go "outre et contre le contenue d'un act authentique" meaning his title deed.

Determination delivered on ~~19th~~ 23rd March 2015 by

23/3/15

Mrs. J. RAMFUL	**Me. R.Ramdewar**	**Mr. G. Seetohul**
Vice President	**Assessor**	**Assessor**