IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Judicial Review No: HBJ 06 of 2020

IN THE MATTER of **DIRECTOR OF THE DEPARTMENT OF TOWN AND COUNTRY PLANNING**

FOR A JUDICIAL REVIEW UNDER ORDER 53 OF THE HIGH COURT RULES

A N D

IN THE MATTER of an application by **DAVID CONRAD PETERSON** and **RUTH ANNE PETERSON** as Trustees of the David Conrad Peterson and Ruth Anne Peterson Trust for Judicial Review and with other relief including an Order for Certiorari of the Director of Town and Country Planning **MADE ON THE 28th SEPTEMBER 2020 BY DIRECTOR OF TOWN & COUNTRY PLANNING** rezoning of the land comprised in Certificate of Title Number 40987 Lot 2 DP 10404 Muavunise Baravi, Nadroga from Residential to Special Use (Tourism Villa) thereby allowing a construction of a three level hotel being constructed on the same.

BETWEEN: **THE STATE**

AND: **DIRECTOR OF THE DEPARTMENT OF TOWN AND COUNTRY PLANNING**

FIRST RESPONDENT

AND: **CHRISTINE BADIA NKANKA aka CHRISTINE SILVIE BADIA**

SECOND RESPONDENT

EX-PARTE: **DAVID CONRAD PETERSON** and **RUTH ANNE PETERSON** as a Trustees of the David Conrad Peterson and Ruth Anne Peterson Trust, both of Maui Bay Estates, Baravi, Korolevu.

APPLICANTS

Appearances: Mr. R. Singh with Ms. Swamy for the Applicants
Mr. J. Mainavolau with Ms. Mary Motufaga Lee for the first Respondent
Ms. Ali for the second Respondent

Date of Hearing: 16 March 2022

Date of Ruling: 18 January 2023

RULING

INTRODUCTION

1. Most of the issues raised in this Judicial Review application before me now, were raised in other Judicial Review cases arising out of Maui Bay. Subject to appeal, it is hoped that this decision will also settle all those other Maui Bay cases.

2. Maui Bay is situated in Baravi, along the Coral Coast, about 15 to 20 minutes out of Sigatoka Town along the Queens Road towards Suva.

3. Baravi falls within the Nadroga Rural Town Planning Area declared pursuant to section 6[i] of the Town Planning Act.

4. The applicants in this case are aggrieved about some planning decisions of the Director of Town & Country Planning (**"DTCP"**).

Maui Bay – Not Covered Under the Sigatoka Town

5. The boundaries of Sigatoka Town (or the town planning area of Sigatoka town) are set out in the *Town Planning (Sigatoka) Order*.[ii] Baravi (Maui Bay) falls just outside the boundaries of Sigatoka town. However, Baravi (Maui Bay) falls under the *Nadroga Rural Town Planning Area*. This, I now reproduce below.

> NADROGA RURAL TOWN PLANNING AREA
>
> All that area of land situated in the tikina of Sigatoka, Baravi, Cuvu and Malomalo in the province of Nadroga and Navosa, extending from the eastern boundary of the said province to approximately two miles south of Momi village, in varying widths, from the high water mark of the sea coast to approximately half a mile inland of the proposed Suva-Nadi Highway including all lands half a mile on either side of Sigatoka Valley Road up to Nakabuta village, and also all the islands within a distance of two miles from the sea coast but excluding the town of Sigatoka, as from time to time declared, and all Fijian villages.
>
> The area is more particularly delineated and shown verged red on Plan P.P.72 deposited in the office of the Director of Lands in Suva and available for inspection at the offices of the Permanent Secretary for Fijian Affairs and Rural Development, the Director of Town and Country Planning, the Commissioner, Western, and the Secretary, Sigatoka Rural Authority.

6. The *Nadroga Rural Town Planning Area* was constituted by the Town Planning (Nadroga Rural) Order[iii]. All the lands constituted in the said town planning area are "rural" lands. They are not part of any "urban" planning scheme.

How Maui Bay Came into Existence?

7. Originally, Maui Bay was a single large piece of freehold land. This land was all comprised in Certificate of Title 2872. At some point, I think in the mid-2000s, or maybe earlier, the owner (developer) of CT 2872 subdivided and developed the land. He wanted to create an up market but low key, residential development in the area to include a single site designated for hotel development. This hotel site would be surrounded by the residential lots.

8. The concept was marketed largely to foreign investors. Amongst those who invested, were US citizens David Conrad Petersen and Ruth Anne Petersen (**"the Petersens"**). They would go on to purchase a foreshore plot[iv] which is all comprised in Certificate of Title Number 36037. The Petersens have since erected a substantial single-story building on their land. This building serves as their residence. For convenience, I shall refer to this plot as **Lot 17**.

9. Immediately to the right of Lot 17, and sharing a common boundary, is **Lot 16**. Lot 16 is also a foreshore plot. It is all comprised in Certificate of Title Number 40987. Lot 16 was acquired by one Christine Badia Nkanka (**"Nkanka"**) years after the Petersens acquired Lot 17.

The Block- Rezoning of Maui Bay

10. Maui Bay was originally zoned residential. After subdivision, all plots (save for the single hotel site) were also zoned "residential"

11. However, for some time prior to December 2009, some owners of the foreshore residential lots were using their properties to provide accommodation to tourists. A few of these people even operated a restaurant and a bar service. Needless to say, these operations were "illegal" as they contravened the permitted land use applicable at the time- according to the zoning of Maui Bay. A few residents were aggravated at how these operations clashed with their amenity – and they complained to the relevant authorities. Faced with that opposition, and with government officials on the alert and keeping the operations on their radar, some of the "illegal operators" then applied to the DTCP to seek approval to rezone their lots from *Residential* to *Special Use Tourism Villa.*

12. On 29 December 2009, the DTCP approved a "block rezoning" of all the foreshore lots in Maui Bay from Residential to Special Use (Tourism -Villa sites). In principle, this block-rezoning allowed the owners to build and operate tourist-villa accommodation services on their respective foreshore plots.

The Special Development Guidelines for Maui Bay ("SDGMB")

13. Notably, a few days before the block rezoning, the DTCP, on 23 December 2009, implemented the SDGMB. It appears that the SDGMB was developed as a response to the illegal tourist operations in Maui Bay. As I have said, there was no town planning scheme applicable in Maui Bay. This meant that there was no clear specific planning guidelines for the area at the time – other than the General Provisions of the Town Planning Act – and the general discretionary powers of the DTCP pursuant to section 7 of the Town Planning Act. That, coupled with the demand from the tourist operators to rezone, and to extend the permissible land use in the area, highlighted an urgency for some clear planning guidelines in Maui Bay.

14. That urgency prompted the DTCP to consult the feuding residents of Maui Bay with the view to drawing up some sort of workable arrangement – if anything – to maintain the peace and for a clearer direction.

15. And so – following these consultations with the residents, the DTCP would go on to collate and formulate the SDGMB. The document sets out some general planning guidelines for the type(s) of land use and developments that were to be permitted on any plot in Maui Bay.

16. At this point, I emphasize that the SDGMB was never advertised or gazetted. I also note - although this may not be at all relevant in this public law case, that there was nothing in the nature of a restrictive covenant signed by the persons who had bought properties in Maui Bay.

Conditions - The Block- Rezoning of 29 December 2009

17. In approving the block rezoning, the DTCP did set some general conditions. These are set out on the approved rezoning plan as follows:

1. *that Lots 1-6 DP 9240 & Lots 1-16,18 & 19 Muavunise, Baravi, Nadroga is (sic) rezoned from residential to Special Use (Tourism- Villa Sites).*
2. *that all development, activities & operations carried out on the site **shall strictly comply** to the Maui Bay Estate Specific Development Guidelines (2009)*
3. *that an Environmental Management Plan (EMP) and an Operational Environment Management Plan (OEMP) shall be submitted to the Director of Environment for determination. The building application relating to the development on the subject sites Lots 1-6 DP 9240 & Lots 1-16, 18 & 19 DP 9022 shall be submitted with the approved EMP & OEMP to the Director Town & Country Planning.*
4. *that no building, development work and activity shall commence on the site unless consented to by the Director Town & Country Planning and approved by the Nadroga Rural Local Authority.*
5. *this approval is valid for two (2) years only.*

18. Notably, the approval was only valid for two years. It expired on 23 December 2011.

What Happened After Expiry of the Block- Rezoning

19. There is no clear evidence as to whether the block rezoning was actually renewed for a further two years after 23 December 2011. Mr. Mainavolau submits that, normally, when approval expires, the zone reverts to the original zone and in the present case, the zoning of the beachfront lots had reverted to residential. That is a logical conclusion and I accept it.

20. However, the reversion of the zoning to "residential" did not preclude individual lot owners who had missed out - from applying later on their own to the DTCP to rezone their individual blocks. I gather that, through the years, since 23 December 2011, a few other owners of foreshore lots have obtained approval from the DTCP to rezone their plots from Residential to Special Use (Tourism – Villa) site.

Nkanka's Application

21. Nkanka applied to have Lot 16 rezoned from Residential to Special Use (Tourism-Villa) Site sometime between 2019 and 2020. On 28 September 2020, the DTCP approved the rezoning

of Lot 16 from Residential to Special Use (Tourism-Villa). The effect of that rezoning is that it allowed Nkanka to further apply for permission to erect a building on her property for Special Use (Tourism-Villa).

22. As it turned out, she did lodge an application for approval to construct a three-level building on Lot 16 and, at various times in 2020, to construct a pool and a concrete wall fence around the property. The DTCP did approve all her applications.

PETERSENS' GRIEVANCE

23. The Petersens' first grievance is about the DTCP's approval of 28 September 2020 for the rezoning of Lot 16 from Residential to Special Use (Tourism-Villa). Secondly, they are aggrieved about the various building approvals granted by the DTCP following the rezoning which allowed Nkanka to construct the three-story hotel on Lot 16 and also to construct a high fence and a swimming pool.

24. The Petersens first grievance centers mainly around the fact that the DTCP's rezoning approval of 28 September 2020 was given on the condition:

> "That all development activities and operations carried out on the site shall strictly comply with the Maui Bay Estate Specific Development Guidelines (2009)"

25. However, according to the Petersens, the structure which Nkanka has erected on Lot 16 fails to comply with the SSDG in many respects.

APPLICATION FOR JUDICIAL REVEIW

26. Leave was granted to the Petersens by Mr. Justice Ajmeer on 09 December 2020. The Petersens then filed an Originating Motion for Judicial Review on 10 December 2020 pursuant to Order 53 Rule 5 of the High Court Rules 1988 and under the inherent jurisdiction of this Court. They seek the following Orders:

1. an Order for Certiorari to remove and quash the decision of the DTCP dated 28 September 2020 approving the rezoning of Certificate of Title Number 40987, Lot 2 DP 10404 containing an area of 1420 square meters from Residential to Special Use (Tourism Villa) thereby allowing the 2nd Respondent to construct a three-level hotel building on the same.
2. an Order of Mandamus directing the DTCP to restrain all construction of a three-level hotel building on the land comprised in Certificate of Title Number 40987 on DP 10404.
3. further or in the alternative, a Declaration (in any event) that the decisions of the DTCP in approving the rezoning of Certificate of Title Number 40987, Lot 2 on DP 10404 made on 28 September 2020 from Residential to Special Use (Tourism Villa) thereby allowing Nkanka to construct a three-level hotel building on the same is inconsistent with:

    3.1 the Specific Development Guidelines for Maui Bay Estate 2009 issue by the DTCP and more particularly clause 3 (b)(i), (ii), (iii), (iv) and (iv); clause 3(c) and clause 4.2

    3.2 Schedule C and Clause 4 of the General Provision made under section 7(4) of the Town Planning Act

27. The Petersens also seek damages and costs on a full solicitor-client indemnity basis.

28. At the outset, I need to point out that, during a site visit which was requested by both counsel and which was held on 25 February 2022 and attended by all parties including officials from the office of the Director of Town & Country Planning as well as officers from the Sigatoka Town Council, I did note that the construction of the three-story building on Lot 16 was nearing completion and was at finishing stage. That, coupled with the fact that Ajmeer J had refused to make a stay order at leave stage – means that the prayer for an Order of Mandamus to direct DTCP to restrain all construction of the three-level hotel building on Lot 17 – is now redundant.

THE FIRST RESPONDENT'S CASE

29. The Director of Town & Country Planning's position might be summarized as follows:

(a) the requirements and processes involved in the creation and administration of a scheme are set out in sections 12 to 26 of the Town Planning Act .

(b) these provisions relate only to a town scheme

(c) Maui Bay is not a scheme given, for example, that the owners of properties in Maui Bay do not pay town rates to Sigatoka Town Council for things such as waste disposal etc.

(d) the General Provisions of the Town Planning Act were created as guidelines for town and urban areas and generally not for areas that fall outside the town area.. The preface of the General Provisions read:

> The General Provisions attached hereto have been approved by the Director of Town & Country Planning and are to be used for the purposes of Section 7(4) of the Town Planning Act as containing provisions proposed to be included in Town Planning Schemes. These General Provisions are to be applied as Interim Developments Control or as guidelines in the following classes of areas and cases

(e) Class 3 of the General Provisions state that the General Provisions may apply to:

> "Any land (not being situated in a Town Planning Area but concerned in an application made to the Director of Town & Country Planning

(f) this means that the General Provisions can, in some instances, apply to areas outside a town but only at the discretion of the Director.

(g) the General Provisions state that they shall prevail over other by-laws made under the Town Planning Act in the event of their own inconsistency with these by-laws.

(h) however, these other by-laws refer to town schemes and not areas failing outside town.

(i) Provision 1 of the General Provisions state that The Approved Planning Scheme shall consist of these General Provisions together with the scheme plan lodged in the office of the local authority and the respective scheme plan and these General Provisions shall be read over with the other.

(j) the approved Planning scheme referred to herein (above) is the Town Planning Scheme. Therefore, any development within an urban or town area shall be guided by the General Provisions.

(k) the question then arises; to what extent does the General Provisions apply to areas outside Town Schemes?

(l) section 7(4) of the Town Planning answers this question (see discussions below)

(m) section 7(4) gives a wide discretion to the Director to refer to any Regulations under the Act, and/or to the General Provisions and/or any other material consideration for the grant of an approval for development.

(n) the Town Planning Act specifically invites the exercise of judgement in decision-making, both in offering no definition of materiality and inviting the DTCP to determine what regard must be paid to those things that she or he does deem to be material This is the foundation of the planning system with regards to areas such as Maui Bay.

(p) section 7(5) gives authority to the Director under the delegated powers of the Minister to make regulations relating to the control of development under section 7.

THE SECOND RESPONDENT'S CASE

30. Nkanka's case might be summarized as follows:

(a) this Judicial Review application by the Petersens is an abuse of process.

(b) they have not come to court with clean hands given the following:

(i) they did lead false evidence about the height of Nkanka's wall and actually adduced a photograph of the said wall to exaggerate the height
(ii) they falsely allege an infraction of the Building Line Restriction as well as the foreshore setback

(c) the distinction between a "town planning scheme" and a "town planning area" must be borne in mind because the DTCP's powers under one is not necessarily the same in the other.

(d) for example, when it comes to an application for re-zoning of a plot of land – in a Town Planning Area such as Maui Bay, all that the DTCP is required to consider are:

(i) the existing use of the land
(ii) any prior re-zonings in the area

(e) on the other hand, in an application for rezoning in a Town Planning Scheme, the DTCP is required to consider also a consultation exercise with stakeholders (people who own or occupy properties within the area covered by the scheme) and take into account their feedback.

(f) hence, when Nkanka applied to the DTCP to rezone Lot 16 in Maui Bay, which is a Town Planning Area, the DTCP was:

(a) only required to consider the existing use of the land and (b) any prior approvals

(g) the DTCP was not required to consult the owners or occupiers of other Lots on Maui Bay or to take into account their feedback before approving the rezoning of Nkanka's Lot 16.

(h) even if, assuming, the SSDG and the General Provisions were relevant in the rezoning, the DTCP has a discretion under the SSDG "to consider any development not listed in the SSDG".

(i) even if Nkanka's three-story development is not a listed development in the SSDG, the DTCP retains a discretion to still consider it

(j) how then, can there be a legitimate expectation, when the DTCP has a discretion?

(k) this is not a case about the relaxation of the General Provisions or the SSDG. Why? Because the DTCP is not required to take either document into account.

(l) Schedule A of the General Provisions of 1999 provides:

> "it is conditionally permissible to build a hotel upon land zoned Residential B or Special Use"

(m) as such, Nkanka could have built the three-story hotel without even rezoning the land.

PRELIMINARY OBSERVATIONS

Is the SDGMB a "Scheme"?

31. Maui Bay is situated in a "rural" area and is not part of any town planning scheme. The term "scheme" is defined in section 2 of the Town Planning Act as:

> **"scheme"** means *a scheme under this Act*, and, save as otherwise expressly provided in this Act, includes a substituted scheme and a scheme modifying or altering an existing scheme;

32. By the above definition, a *fortiori* that any instrument purporting to be a scheme can only be a valid scheme if it was constituted in accordance with the procedures set out in the Town Planning Act. Mr. Mainavolau and Ms. Ali both highlight the procedures in their respective submissions.

How "A Scheme Under this Act" is Prepared?

33. The local authority prepares a "daft" scheme (s. 18(1)). As Jitoko J said in **State v Director of Town and Country Planning** [2008] FJHC 392; HBJ 7J.2006S (24 September 2008):

> … the originator and the repository of any town planning scheme under the Act is the local authority. Every local authority is required by law (section 18(1)), to prepare a scheme in respect of all land within its town planning area . …..
>
> ……..
>
> The reason all preparatory work for amendment to a town planning scheme remains with the local authority is simple. It is the local authority that owns it. It is its planning office that oversees all the developments within its town planning area .

34. After preparing the draft scheme, the local authority must then submit it to the DTCP within such time as the DTCP may prescribe (s.18 (1)). If the local authority fails to prepare and submit a draft within any prescribed time – the DTCP may himself prepare one (s.18 (1)). Any such draft prepared by the DTCP shall be deemed to have been prepared by the local authority and that such had been duly submitted to the DTCP (section 18(2)).

35. The DTCP then reviews the proposed scheme. He may then give a provisional approval, subject to any alteration and/or modification which he feels is required (sections 18(2) and 19(1)).

Public Notification, Inspection, Right of Objection

36. Once DTCP has given his provisional approval of the scheme, the local authority shall then publicly notify it (the scheme) and must also deposit a copy of all maps, plans and other particulars comprised in the scheme – in the local authority office – for public inspection (s.19(2)).

37. Every owner or occupier of land within an area covered by a scheme shall have a right of objection to the scheme (s.20). An owner or occupier who objects must - within three months after the first public notification of the scheme - write to the local authority to give notice of the objection – and the grounds of his objection (s.20). The local authority must then assess the merits of the objections – and then forward its opinion to the DTCP as soon as practicable after receiving the objections (s.21).

Hearing of Objections & the Finally Approved Scheme

38. The DTCP must then convene a hearing of the objections (s.22 (2)). At the hearing, the local authority or any objector may engage a lawyer to represent them (s.22 (2)) and at the conclusion of the hearing, the DTCP may either uphold the objection in whole or in part or may dismiss the objection in entirety (s.23).

39. After having considered all objections, and after all requirements by the DTCP for modification have been complied with – the DTCP may then finally approve the scheme by signing it (s. 24(1)). The local authority must then publish the scheme. Thereafter, the local authority shall publicly notify the scheme in accordance with the Regulations (s.24(2)).

40. The approved scheme and a copy of all maps, plans and other particulars must be exhibited in the DTCP's office and in the office of the local authority and be open for public inspection free of charge (s. 24 (3)).

41. Sections 25 and 26 of the Act provide for the procedures to be followed in any subsequent elaboration, enlargement, modification, alteration or suspension of a scheme.

Where Does That Place The SDGMB?

42. Mr. Mainavolau and Ms. Ali both suggest that the above procedures were not followed when it came to the SDGMB. Mr. Singh does not raise any issue with that assertion. Given that there is no evidence before me that the SDGMB was ever constituted in accordance with the procedures outlined above, I must accept the submission of both counsel for the first and second Respondents that the SDGMB is, therefore, not "*a scheme under this Act*" as per the section 2 definition of "scheme".

ISSUES

43. Firstly, if the SDGMB is not a scheme, then what is it? How "strict" is the SDGMB in terms of the building and planning guidelines which it contains? Does the document set out any particular set of permissible land uses for Maui Bay?

44. Secondly, even if the SDGMB is not a scheme, can a legitimate expectation arise out of it considering the circumstances in which it was created and the need for which it was formulated?

45. Thirdly, was the DTCP's decision of 28 September 2020 in approving the rezoning of Lot 16 from Residential to Special Use (Tourism Villa) - flawed, or unlawful? If so, how?

46. Fourthly, assuming the said decision was flawed and/or unlawful, does the court retain a residual discretion to quash or not to quash the said decision?

47. Underlying all these questions, is a dialectic. Should the SDGMB be interpreted as imposing and demanding a strict level of "certainty" and compliance in its guidelines? Or, does the DTCP retain some discretion to approve developments which depart from strict compliance with the SDGMB? If the DTCP has a discretion, how might he exercise that discretion? To what extent might a proposed development be approved despite some anticipated loss of amenities to an owner or occupier of an adjoining land? Is the loss of amenity – if any, and however slight – reason enough to refuse a development application?

A CERTIORARI TO QUASH SEPTEMBER 2020 REZONING APPROVAL?

General Position in Law

53. The law books are abound with case authorities that a quashing Order is given at the discretion of the Court. Generally, where a finding is made that an administrative decision is flawed, or unlawful, the Court will exercise the discretion in favor of granting a *certiorari*.

54. In **R (Edwards) v Environment Agency** [2008] UKHL 22 [2009] 1 ALL ER 7 at [63], Lord Hoffman said:

> 63. It is well settled that "the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary" (Lord Roskill in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd** [1982] AC 617, 656.) But the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it. So, in **Berkeley v Secretary of State for the Environment** [2001] 2 AC 603 it was conceded, and the House decided, that the Court of Appeal had been wrong to refuse to quash a planning permission granted without the impact assessment required by the EIA directive on the ground only that the outcome was bound to have been the same. The relevant domestic legislation provided that in such a case the grant of permission was to be treated as not within the powers of the Town and Country Planning Act 1990.

55. In **Tata Steel UK Ltd v Newport City Council** [2010] EWCA Civ 1626 at [15] Lord Justice Carnwath said:

> 15. …. a planning permission is a public act and if it is found to be unlawful the normal result is it should be quashed and the matter should be regularised. …It is a matter of public concern. That is why there are plenty of authorities which say that a normal rule is that unlawful permission should be quashed.

56. In **Associated Picture Houses Limited v Wednesbury Corporation** [1948] 1KB 223, Lord Green MR said that a decision is illegal if the decision maker had taken into account irrelevant matters or if he failed to take into account relevant matters.

> What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local

authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

57. Having noted all the above, I am mindful of the following observations of Peter Cane **Administrative Law** (4th edition) Ed. Peter Birks, Oxford University Press, 2004 at page 91:

> Quashing, prohibiting, and mandatory orders, declarations and injunctions are all discretionary remedies. This means that even if the claimant has standing, has made the application in good time, and can establish that the defendant has acted illegally, relief may be denied if the court thinks, for some reason, that it should not be granted (T. Bingham, **"Should Public Law Remedies be Discretionary"** [1991] PL 64. The fact that a decision is void because of some action or inaction or is illegal does not impose on the court any obligation to award a remedy to the claimant.....and so it is sometimes said that the whole judicial review jurisdiction is discretionary, not just the remedies.

Whether the Re-Zoning Approval of 28 September 2020 was Flawed &/Or Unlawful?

58. The question is whether the DTCP acted outside his statutory powers or took into account irrelevant matters when granting the rezoning approval to Nkanka. As I have said, Maui Bay is located within the "Nadroga Rural Town Planning Area". It does not fall within any town planning scheme. The DTCP's power to grant a rezoning approval in these types of areas is derived from section 7 of the Town Planning Act.

59. Section 7(1) of the Town Planning Act provides:

> **7.**-(1) Subject to the provisions of this section, the permission of the local authority shall be required in respect of any development of land carried out within a town planning area during the period before a scheme affecting such area has been finally approved.

60. Section 2 of the Act defines "development" to include:

> "…. any use of the land or any building, either wholly or in part, which is materially different from the purpose for which the land or building was last being used"

61. In essence, a "rezoning" entails an assigning of change in the land use to one which is materially different from the current use. Hence, an application to rezone a Maui Bay plot must be made under section 7(1).

62. But while section 7(1) prescribes that the permission of the local authority is required for such an application, the local authority is ultimately accountable to the DTCP, who grants the final approval/refusal as per section 7(3) of the Town Planning Act.

> 7.-(3) The local authority shall not grant or refuse permission under this section without the prior consent of the Director and the Director may approve such grant or refusal either unconditionally or subject to conditions and may prohibit such grant or refusal.

63. The factors which a local authority or the DTCP must take into account in dealing with any application to develop land, including a rezoning, are set out in section 7(4) as follows:

> 7.-(4) In dealing with applications for permission to develop land under this section, the local authority and the Director shall have regard to the matters set out in the Schedule, to provisions proposed to be included in a scheme and to any other material considerations.

64. It is noteworthy that the *General Provisions For Town Planning Schemes And Areas -1999* were approved by the DTCP and are to be used for the purpose of section 7(4). However, as I discuss below, I agree with the submission that the General Provisions do not apply as a matter of law in relation to any development in an area such as Maui Bay – although – the DTCP may – in his own discretion – selectively apply the provisions therein – if he considers them material in any particular application before him – in an application in an area such as Maui Bay.

65. Under section 7(3), the DTCP, whose final consent is required, may approve the local authority's grant or refusal of an application for rezoning – subject to conditions.

Applicant's Submissions

66. Mr. Singh submits that all Maui Bay plots are zoned "Residential". Any plot owner wishing to have his or her property rezoned to any other use, must first apply to the DTCP for approval to rezone as such. When the application to rezone is placed before the DTCP, there is every expectation that the DTCP will screen the application against the SDGMB. Should the DTCP grant approval, there is every expectation that the SDGMB will be adhered to.

67. Mr. Singh concedes that the DTCP has powers to relax or waive the SDGMB. However, he submits that this case does not concern a "relaxation". Rather, this case concerns a "rezoning" application. In any event, even if Nkanka had applied for a relaxation of the SDGMB, the DTCP would still be obliged to consider the SDGMB and grant approval only if the proposed development shall strictly comply with the SDGMB or is in accordance with the tenor of the SDGMB.

68. He further submits that if the DTCP has power to make the SDGMB, a *fortiori*, the DTCP must follow the SSDG. The DTCP cannot simply just ignore the SDGMB and grant a relaxation under the cloak of "discretion". The Petersens expect the DTCP to comply with the SDGMB/policy. If the DTCP is inclined to grant a relaxation, but before he grants approval, he must first consult stakeholders. The law imposes upon the DTCP a duty to consult based on (a) the common law and (b) Provisions 6 and 7 of the General Provisions.

Respondents' Counter-Submissions

69. Mr. Mainavolau however submits that - at face value - the General Provisions only apply as guidelines for town and urban areas and not areas falling outside these such as Maui Bay.

70. I think there is some merit in that argument. The General Provisions are intended as Interim Development Control or as Guidelines in areas and cases which fall into either Class 1, Class 2 or Class 3 as set out in the Preface.

71. Because Maui Bay does not have an approved scheme, it does not qualify under Class 1.

72. Unless the SDGMB can be classified as a *"draft scheme"*, or a *"scheme in preparation"* or a *"provisional regional scheme"* or a *"draft regional scheme"*– Maui Bay will not qualify under Class 2 of the General Provisions.

73. Class 3 covers any land "not being situated in a town planning area" – which Maui Bay is not because it is situated in the Nadroga Rural Town Planning Area.

74. That said, I have a lot of misgivings as to whether Provision 6 and Provision 7 of the General Provisions apply to Maui Bay. Provision 6 makes provision for relaxations from General Provisions. Provision 7 makes provision for public notification of relaxations by advertisement in two issues of a local newspaper and in the Government Gazette and giving a right of objection to every owner and occupier of property within the area covered.

75. I do note that Provision 7(b) gives the right of objection to *"every owner or occupier of property within the area covered by a Scheme.. "*. However, as I have said above, Maui Bay is not an area covered by a scheme. Accordingly, it would appear that Maui Bay is excluded – which means that no owner or occupier of property in Maui Bay could derive a right to be consulted or a right of objection from Provision 7(b).

76. Ms. Ali submits that a rezoning application is not a relaxation and so the obligation on the part of DTCP to make a public notification and to allow and hear objections, does not arise here. She then draws attention to Provision 9 of the General Provisions and the various Schedules A, B and C therein to argue *inter alia* that:

(a) a hotel such as the one constructed by Nkanka may be a conditional development on a Residential B or Special Use zoned property
(b) Nkanka's development complies with the maximum density and car-parking requirements as per Schedule C of Provision 9 of the General Provisions.

Comments

77. The submissions of counsel are at loggerheads as to the applicability of the General Provisions to areas such as Maui Bay. I am inclined to the interpretation suggested by the Respondents 'counsel – for reasons I have stated above.

78. I reiterate that the source of the DTCP's wide discretionary powers to consider "any other material considerations" when deliberating on an application for permission to develop land in an area such as Maui Bay – is section 7(4) of the Act.

79. The phrase "any other material considerations" is not defined in the Act. The effect of that lack of definition is that it confers a rather wide discretion and requires the DTCP to exercise judgement when deliberating on an application for development – including an application for rezoning. The question of what is "material" is left to the judgement of the DTCP.

80. In my view, the wide discretion given to the DTCP under section 7(4) to determine "materiality", allows the DTCP to take into account aspects of the General Provisions which he considers material in any application in an area like Maui Bay. This is purely a planning matter. This is the essence of the submissions by both counsel for the Respondents.

81. If the DTCP should decide that to take into account any aspect of the General Provisions in any given application, he would do so – not because he is mandated so under the General Provisions – but because he is exercising judgement and a discretion under section 7(4).

82. Indeed, the SDGMB is part of the material considerations which I think the local authority/DTCP would be required to take into account – considering that the SDGMB was formulated by the DTCP on his own initiative after consultation with the owners or occupiers of plots in the Maui Bay area. However, I am unable to agree with Mr. Singh's submissions that the SDGMB binds the DTCP to strict compliance.

83. In my view, the SDGMB is merely part of the range of factors which the DTCP must take into account. To elevate the SDGMB to a level requiring strict compliance, would amount to a fettering of the discretion in section 7(4). As Ms. Ali alludes, that would render the discretion unadaptable to the changing times, and to changing preferences in land use, and make the SDGMB akin to a set of restrictive covenants which they are not.

84. In any event, I am of the view that the DTCP did take that into account. This is evident in his setting the rezoning condition:

> "That all development activities and operations carried out on the site shall strictly comply with the Maui Bay Estate Specific Development Guidelines (2009)"

85. Having said that, when it comes to considering building approvals – the DTCP may still exercise his discretion under section 7(4) to consider the General Provisions.

Should I grant a Certiorari?

86. In my view, the DTCP's decision was not flawed or unlawful. I refuse to grant a certiorari. In reaching this conclusion, I am also influenced by the fact that the DTCP had, in December 2009, granted a block rezoning of all foreshore lots in Maui Bay. This, in itself, is evidence of a prior rezoning approval which, it appears, was a factor in the DTCP's exercise of the section 7(4) discretion.

WHETHER ALLOWING NKANKA TO CONSTRUCT A THREE LEVEL HOTEL BUILDING ON LOT 16 IS INCONSISTENT WITH THE SDGMB 2009 ISSUED BY THE DTCP & MORE PARTICULARLY CLAUSE 3 (B)(I), (II), (III), (IV) AND (IV); CLAUSE 3(C) AND CLAUSE 4.2.?

87. As I have said above, the SDGMB is one of the factors which the DTCP may take into account under section 7(4) of the Act, when considering an application for development under section 7(1). It is open to the DTCP to "borrow" concepts and principles from the General Provisions – not because he is obliged to by the General Provisions – but because he has a wide discretion

under section 7(4) to consider "any other material considerations". In other words, the General Provisions per se do not bind him – but the concepts and principles therein may be a material consideration.

88. Hence, while the SDGMB may not be a "scheme under the Act", the evidence is that the DTCP did consider it when directing his mind to Nkanka's application for rezoning. As I have said, the DTCP did impose the condition that all developments on Lot 16 comply strictly with the SDGMB.

89. The questions that arise are (1) whether or not the three-story building which Nkanka erected on her property following the DTCP's rezoning approval – actually complies with the SDGMB and (2) whether it is imperative that Nkanka comply with the SDGMB and (3) in any event, whether or not there is a legitimate expectation that the building should comply with the SDGMB?

90. Clauses 3 (B)(I), (II), (III), (IV) and (IV); 3(C) and 4.2 of the SDGMB provide as follows:

3.0 b) DEVELOPMENT TYPE

I) The precinct is intended to be developed as an up market low key and scale mixed residential and Special Use (Villa) with Hotel development and ancillary services and amenities,

II) In order to maintain the up market nature and expected quiet living environment of this precinct as well as to offer up market tourist accommodation in a private living setting, the following types of tourist accommodation are strictly not permitted:

- Budget type accommodation
- Dormitory type accommodation
- Backpacker accommodation in tents etc.

III) That the Villa units shall not operate any licenses restaurant or bar at any time.

IV) The following category of developments shall not be permitted on the site:

- General and Local Commercial
- Dairy
- Hotel
- Noxious, Heavy & General Industry,
- Light Industrial "A" or "B"
- Service Station
- Tavern
- Night Club & Public Bar
- Conference facility
- Signboard
- Civil Developments

1)These are the uses classified and defined in the current Town Planning Act General Provisions and it also includes Conference Facility for (sic) *letting out*
2)Any development not listed or prescribed above may be considered at the discretion of the Director of Town and Country Planning
3) Any relaxations to the above provisions and requirements shall require the prior approval of the Director of Town and Country Planning

3.0 c) DEVELOPMENT DENSITY

I) Plot Ratio : 0.2:1

II) Number of Bedroom Units and Carrying Capacity permitted per site are as follows:

Table 1.0

Site Area	No. of Bedrooms	Carrying Capacity (maxm)
1000 – 1500 sq meters	3	6 persons
1501 – 2000 sq meters	4	8 persons
2001 – 3000 sq meters	5	10 persons
3001 – 4000 sq meters	6	12 persons
4001 + sq meters	6	12 persons

Notes:

1) The plot ratio is as defined and will include floor areas defined in the prevailing Town Planning Act General Provisions.
2) The total number of bedrooms includes those in the private residence of the owner if it is a separate building on the site, a caretakers unit and those let out to guests/tourists for villa developments.
3) Multi-unit development containing more than two dwelling units (including the caretaker's residence) is not permitted.

4.0 **DESIGN PRINCIPLES**

4.1 Site Layout Principles

.....

4.2 Building Design Guidelines

- The buildings should depict cottage/villa/bure designs that blend in well with the rural environment setting
- Detached bedroom units may be allowed depending on the proper buildable spaces available and the design of the bedroom unit. Individual kitchens are not permitted for the detached bedrooms. Bedrooms shall be connected to the main building by covered walkways.
- The maximum floor area of any detached bedroom shall be 30 square meters

91. Ms. Ali highlights in her submissions that the three story building does comply with the relevant provisions in the General Provisions – which would suggest that the DTCP – although had insisted that the SDGMB be strictly complied with – had then deviated from that later and granted building approvals in line with the General Provisions.

92. I reiterate that section 7(4) of the Act gives the DTCP a wide discretion. The wording of section 7(4) underscores the great complexity and breadth involved in planning decisions. A proposed development in Maui Bay may be contrary to some expectations to preserve the residential character of the neighborhood – and yet be conducive to the promotion of tourism-activities in the wider Coral Coast area of which Baravi/Maui Bay is a part.

93. As I have said, it is perfectly within the discretion of the DTCP to do so under the wide discretionary powers given to him under section 7(4).

94. However, when one considers the background as to how the SDGMB came into being, following consultation with the residents, and how it was created at the DTCP's discretion out

of a need to fill a lacuna in the planning laws relating to areas such as Maui Bay – it is arguable that the document is indeed capable of raising a legitimate expectation in the residents of Maui Bay.

95. The legitimate expectation – at best – is not that the provisions of the SDGMB will be strictly adhered to. As I have said, if it were so, then that would most certainly amount to a fettering of the DTCP's wide discretion under section 7(4).

96. Rather, the legitimate expectation is that – when exercising his discretion under section 7(4), over a particular development application which, if approved and carried out, entail a departure from the standards raised in the SDGMB - that the DTCP will at least consult the Maui Bay residents, and hear them out, before making a decision.

Legitimate Expectation

97. Mr. Singh submits that, because all lots in Maui Bay are zoned residential, and because an application for rezoning and an approval of such an application in essence – would entail a departure from the current zoning – and also because the SSDG is designed to preserve the up-market "residential" character of Maui Bay – there is:

> "...an expectation that when rezoning is approved, the guidelines would be adhered to. Failing which it will be submitted that there would be absolutely no purpose for the formation of the SSDG, if not being a guideline for the entire subdivision"

98. At common law, there has always been a rule that a statutory authority with power to affect the rights of a person, is bound to hear him, before exercising such power[v] The rule recognizes that - every single activity of a citizen is affected by government policy, action, or decision. People plan their lives around policy decisions – or promises made. When government departments change these at their whims, without informing people, or giving them an opportunity to be heard, people suffer substantial prejudice or hardship.

99. In **Cooper v Wandsworth Board of Works** [1863] 143 ER 414, Cooper was late in giving a notice of building. The relevant statute required 7-days advance-notice. He only gave 5 days advance- notice. The Board of Works, without notice to him, ordered his half-built house be demolished. The Board argued that their power was "arbitrary" and to be exercised without any legal control. Even if Cooper was given an opportunity to be heard – it would not change anything. It was held that the Board should have notified Cooper before taking any action. A person should be heard before steps adverse to his property rights were taken. If the relevant legislation had not made it clear, then the court would take it upon itself to do so.

100. In in **Schmidt v. Secretary of State for Home Affairs** [1969] 2 Ch.149 at 170, Lord Denning MR said:

> ....an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say.

101. Procedural legitimate expectation arises generally when there is a promise that a certain procedure will be followed before a decision is made.

102. Most commonly, this applies where a public authority has promised A that A will be granted a hearing before a decision is made, or, that some other procedure will be followed before a decision is taken.

103. The Fiji Court of Appeal in **Pacific Transport Ltd v Khan** [1997] FJCA 3; Abu0021u.1996s (12 February 1997 said legitimate expectation arises where: (a) an express representation has been made to the person concerned, or to a group of which A is a member, that a certain procedure will be followed before a decision is made (**Attorney General of Hong Kong v. Ng Yuen Shiu** [1983] 2 A.C. 629 P.C.; **Attorney-General of New South Wales v. Quin** (1990) 170 C.L.R.1); or (b) there is a longstanding practice of following a certain procedure before a decision is made (**Council of Civil Service Unions v. Minister for the Civil Service** [1985] A.C. 374 H.L.)

104. Such protection is procedural protection. The decision maker is not bound to exercise his discretion in a particular way. He is only bound to grant a hearing to the person affected.

CONCLUSION

105. In the final, I refuse to grant any of the relief sought. However, I would urge the Director of Town & Country Planning, to consider my observations in paragraphs 94 to 96 above – when, in future, considering an application for development from an applicant in Maui Bay.

106. I do not think that indemnity costs are warranted in this case. The issues and arguments raised by counsel are a novelty – for which I am grateful. As Ms. Ali noted in her submissions – she found no case authority on point in Fiji

107. I summarily assess costs as follows:

(i) $2,500 in favour of the 1st Respondent
(ii) $2,500 in favour of the 2nd Respondent

108. Parties at liberty to apply.

HIGH COURT OF FIJI LAUTOKA

.....

Anare Tuilevuka
JUDGE
Lautoka

18 January 2023

[i] Section 6 provides:

> Constitution of town planning areas
>
> 6.-(1) Upon application in that behalf made by the Director, or by any local authority with the approval of the Director, the Minister may order that any area shall be a town planning area, or that a town planning area which has already been constituted by order under this section or any similar enactment preceding it shall be varied as to its limits or shall no longer be a town planning area.
>
> (2) Such order shall be published in the Gazette and a newspaper published in Fiji, and shall be posted at the office of the Director, at the office of the Commissioner for the Division in which the town planning area is situated, and at the office of the local authority.
>
> (3) The limits of a town planning area shall be fixed by the Director, or by the local authority with the approval of the Director, and shall be stated in the order referred to in subsection (1).
>
> (4) The provisions of this Act relating to town planning areas shall, from the date of any order under this section declaring an area to be no longer a town planning area, cease to apply to such area:
>
> Provided that nothing in this section shall be deemed to prohibit the Minister in accordance with the provisions of this section, from again constituting such area a town planning area.

[ii] The Town Planning (Sigatoka) Order states:

> **TOWN PLANNING (SIGATOKA) ORDER**
> 1 . This Order may be cited-as the Town Planning (Sigatoka) Order.
> 2. The area comprising the town of Sigatoka shall be and is hereby constituted town planning area to be known as the Sigatoka Town Planning Area.
> 3. The limits of the town planning area hereby constituted shall be the limits and boundaries of the town of Sigatoka as from time to time declared.

[iii] The Order is as follows:

> TOWN PLANNING (NADROGA RURAL) ORDER
>
> Orders 16th September, 1960; 14th July, 1965
>
> 1. This Order may be cited as the Town Planning (Nadroga Rural) Order.
>
> 2. The area set out in the Schedule is hereby constituted a town planning area to be known as the Nadroga Rural Town Planning Area.

[iv] in the name of the *David Conrad Petersen and Ruth Anne Petersen Trust.*

[v] See (**Twist v. Randwick Municipal Council** (1976) 136 C.L.R. 106, 109 per Barwick C.J. **Cooper v. Wandsworth Board of Works** [1863] EngR 424; (1863) 14 CB (NS) 180 (143 ER 414) and **R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co.** (1920) Ltd. (1924) 1 KB 171, at p 205 .)