IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Judicial Review No. 06 Of 2012

BETWEEN	:	**THE DIRECTOR of the DEPARTMENT OF TOWN & COUNTRY PLANNING** 4 Gladstone Road, Government Buildings, Suva
		1ST RESPONDENT
	:	**THE SECRETARY, NADROGA RURAL LOCAL AUTHORITY**
		2ND RESPONDENT
	:	**FRANCIS COLIN KUMAR** of Lot 95, Maui Bay West Road, Maui Bay, Fiji, Company Director.
		3RD RESPONDENT
	:	**MAUI BEACH VILLAS LIMITED** C/o Aliz Pacific, Level 8, Dominion House, Suva.
		4TH RESPONDENT
AND	:	**CRAIG DE LA MARE & EVETTE DE LA MARE** of Lot 114 East Road, Maui Bay, Fiji.
		APPLICANTS

Counsel Appearing	:	Applicants in Person
	:	Ms. Mary Motufaga-Lee for the 1st and 2nd Respondents
	:	Mr. S. Krishna for the 3rd and 4th Respondents
Date of Ruling	:	27 February 2023

RULING

INTRODUCTION

1. This judicial review case concerns Lot 7 on DP 9240 on Certificate of Title No. 36183 (**"Lot 7"**) in Maui Bay. Lot 7 is a foreshore lot. It belongs to Maui Beach Villas Limited (**"MBVL"**). Colin Francis Kumar is one the directors/shareholders of MBVL.

2. Maui Bay is located along the Queens Highway in the Coral Coast in Nadroga about fifteen to twenty minutes from Sigatoka Town towards Suva. In an affidavit sworn on 11 April 2017, the then Director of Town & Country Planning (**"DTCP"**) described Maui Bay as[i]:

   .. [falling] outside the municipal boundaries and town planning schemes of Sigatoka. The zoning of Maui Bay and any area outside of municipal boundaries and town planning schemes

is determined by the designated use that has been approved to survey, while the development is bracketed i.e. Special Use (Villa) or Special Use (Hotel) or Special Use (Tourism Villa).

3. That Maui Bay is designated as a tourism zone appears to be widely accepted. This designation is confirmed as follows by the DTCP at paragraphs 4 and 5 of her 11 April 2017 affidavit.

    1. **Tourism is a special zone** as **it does not fall under Commercial or Residential zone**; it is a designated zone, specifically for tourism.

4. Generally, all foreshore lots in Maui Bay were zoned Residential. On 29 December 2009, the Director of Town and Country Planning (**"DTCP"**) approved a "block rezoning" of all the foreshore lots. This allowed the owners to apply to have their individual foreshore lot(s) rezoned from Residential to Special Use (Tourism -Villa sites).

THE DECISION WHICH THE DE LA MARES ARE AGGRIEVED ABOUT

5. As stated above, this judicial review case concerns various development approvals which the DTCP made concerning Lot 7.

6. On 22 March 2012, the DTCP approved MBVL's application to subdivide Lot 7 into Lots 1 and 2 on DP 9979. This decision to subdivide Lot 7 was accompanied by an approval to reduce the street frontage on Lots 1 and 2 to a length of less than twenty-meters each, twenty-meters being what the De La Mares insist is stipulated under the SDGMB.

7. Following the above approvals, MBVL would construct a resort-type Special Villa on Lot 1 and a swimming pool in Lot 2. According to the De La Mares, the swimming pool is at a height above ground level which violates the maximum height allowable. They say that there is an open deck which is built beyond the allowable setback which does not comply with relevant planning regulations and/or the SDGMB. These developments were allegedly approved by the DTCP without any consultation.

8. The De La Mares say that the resort-type Special Villa development on Lot 1has diminished the value of their hotel site. This is because the Special Villa provides competition for their hotel site which, under the SDGMB – was intended to be the only hotel site.

9. The De La Mares also submit that all development and construction work on Lots 1 and 2 do not comply with Fiji's environmental laws. There is no environmental management plan (EMP) or Operational Environment Management Plan (OEMP) accompanying these developments.

10. Incidental to these approvals, the DTCP granted a foreshore easement to MBVL. The easement, according to the De La Mares, gave MBVL exclusive use of the foreshore fronting Lot 7. This has allowed MBVL's development to encroach onto the foreshore. The De La Mares argue that the DTCP does not have the authority to grant an easement over that part of the foreshore fronting Lot 2 without following due process as stipulated in Cap 139 General Provisions for Town Planning Schemes and Areas" and also under the SDGMB. The approval has overstepped the De La Mares' (as well as other lot owners') right to the foreshore which was originally intended to be a public amenity accessible to all.

11. One of the contentious points which the De La Mares raise concerning the EMP is the location of the high-water mark. Mr. De La Mare would rely on material already annexed to the affidavit of Yvette De La Mare while MBVL and Kumar would rely on a Wood & Jepsen Report which they had "commissioned". I did give directions in Court for the Office of the Attorney General to identify a Government Surveyor to carry out survey on Lots 1 and 2 to identify the high-water mark and also the location of the building on Lots 1 and 2.

12. On 25 September 2013, a Mr. David Chang (Government Surveyor) was present in Court to take survey instructions. Mr. De La Mare agreed to bear the survey costs and the case was adjourned to 30 October 2013 with directions to the AG's Office to file a supplementary affidavit annexing the survey report.

13. The De La Mares submit that MBVL's development also does not comply with the density provisions in the SDGMB. They say that DTCP granted approval to MBVL to build four bedrooms for 8 people, even though their site is only 1044 square meters. The DTCP agrees that she granted approval to build four bedrooms for 8 people, even though their site is only 1044 square meters. DTCP acknowledges in her affidavit that the development density is in terms of the plot ratio of 0.2:1 as outlined by the De La Mares. However, she refutes the allegation that she acted ultra vires. She adds that:

> *..the outline application consented to on 7 October 2011 did have 4 bedrooms and this was reflected in the detailed drawings. However, additional conditions were imposed on 2 July 2012 in keeping with the SDGM which states,*
>
> > *"the maximum number of occupants at any one time on the tourism villa shall strictly be 6 persons"*

14. The DTCP further deposes that the conditions of consent for building plan granted on 04 June 2012 clearly states at clause 2 that:

> *"the consent excludes the bure on the pool deck. The pool bure shall be deleted from the plans prior to the issuance of building permit"*

15. The De La Mares also allege that the DTCP had permitted MBVLS to build over the legally permissible boundary setbacks and that the boundary wall height permitted by DTCP exceeds the maximum allowable height as well as setback and that there is a two-meter wall encroaching onto the foreshore line.

RESPONDENTS' POSITION

16. In response to the above, the DTCP maintains that the 10-meter foreshore access reserve from the high-water mark is clear. MBVL maintains the same position. Apparently, on the requisition of the DTCP, Kumar did engage Wood & Jepsen, a reputable firm of registered surveyors, to verify the boundary pegs. Annexed to the affidavit of the DTCP is the following letter dated 21 June 2012 by Wood & Jepsen:

> *This is to confirm that upon request of Maui Bay Estates, we carried out the above redefinition on the 18th June 2012.*
>
> *The extent of the boundaries has been redefined and all boundary marks on the above lot have been redefined and are in correct positions as shown in the Survey Plan with the Surveyors Regulations and that it is correct as to survey.*

Copies of the locality diagram and Survey Plan is attached for your information.

Yours faithfully
WOOD & JEPSEN CONSULTANTS

Sgd Pumale Reddy (Registered Surveyor)

17. With regards to the pool, the DTCP deposes at paragraph 17 that:

> ....the height of the pool was overlooked when the detailed plans were considered, assessed and approved....... the pool lies within the 20 m while its shoulders lie outside the 10m building line setback.

18. And in paragraph 19, the DTCP deposes:

> .....that the wall is part of the pool development and does not lie within 10 m foreshore access reserve and building line setback.

19. As to the environmental laws compliance, the DTCP deposes the following:

> *...there is no requirement for Environment Management Plan (ËMP") from Kumar, since EMP for entire Maui Bay Estate was prepared and approved by the Director of Environment. .....the approved outline application required Mr. Kumar to provide Operational Environment Management Plan (ÖEMP") with the detailed plans, however the OEMP was not lodged with the detailed building plan. The first Respondent in keeping with the SDGM put a condition in the detailed plan that, "...an endorsed copy of the OEMP shall be submitted to Local Authority and DTCP prior to issuance of the completion and occupation certificate.*
>
> *...in her letter "TR 5" Mr. Kumar was required to comply with an additional condition which states that, "no completion certificate, occupancy certificate nor hotel licence shall be issued prior to approval of the OEMP by the Director of Environment*
>
> *...OEMP relates to tourism operation rather than building itself, the building can be constructed but no licence can be issued to carry out tourism operations unless approved OEMP is submitted thus the requirement for OEMP is not waived.*
>
> *...the Director of Town and Country Planning in imposing the conditions of consent to develop Lot 1 on DP 9979 took into account the environment laws.*

20. Further to the above, at paragraph 15 of her affidavit, the DTCP deposes that she:

> *....wrote to the Nadroga Rural Local Authority ("NRLA") on 22 June 2012 advising them to issue stop work order to Mr. Kumar until boundary peg is verified by a registered surveyor.*

21. The said letter to the Secretary NRLA states *inter alia* as follows:

> *RE: Proposed Villa Development At Lot 1 DP234, MAUI BAY ESTATES, MAUI BAY, NADROGA BY MR. FRANCIS KUMAR*
> *(first paragraph0*
>
> *Your office is requested to instigate legal action by issuing a stop work order on the construction currently being carried out on the site. Whilst acknowledging that the application*

had been consented to and approvals given to facilitate issuance of building permit, the work shall cease with effective (sic) from today.

.......my officers ..had visited the site with your office, 2-3 weeks ago and noted works carried out close to the foreshore. In enquiring with Mr. Francis Kumar yesterday on boundary verification, it is deduced that whilst there may have been one done by a surveyor engaged by Maui Bay Estates, there is no boundary verification carried out to the knowledge of the Nadroga Rural Local Authority. The condition of consent is clear that:

> *All boundary pegs shall be verified by a Registered Surveyor prior to commencement of any work.*

The Secretary, Vimal, in my tele-discussion with him yesterday (Talei/Vimal) stated there being no boundary verification done to their knowledge. The condition of consent is clear that the boundary pegs shall be verified by a Registered Surveyor prior to commencement of any work. In this regard, the Nadroga Rural Local Authority is directed to issue a stop-work order on the works currently being carried out on the site until the boundary pegs have been verified; a copy of which shall be issued to the local authority. Only then, can pegs be confirmed to indicate encroachment of development along the foreshore.

Mr. Kumar in response to my request for an audience with him has enquired as to purpose of the meeting. Our office is seeking the meeting with Mr. Kumar to discuss developments relating to his villa proposal and relaxation issues. Mr. Kumar has availed himself for next Wednesday 27/06/2012.

Queries have been made on the application of the Site Specific Guidelines for Maui Bay Estate. Your attention is drawn to the following:

- *(i) The provisions and standards outlined form (sic) the Town Planning General Provision specifically for all the lands on the costal side of Maui Bay Estate. Hence, the legal standard, hence regulation to specifically control development of Special Use (Tourism-Villas) in Maui Bay, Nadroga.*
- *(ii) The Site Specific Guidelines for Special Use (Tourism-Villas) are the conditions and requirements imposed in conjunction with the Zoning of the coastal lands of Maui Bay Estate, Nadroga.*
- *(iii) Any proposal for special use-tourism villa shall be subjected to the requirements and standards specified in the Site Specific Guidelines for Special Use (Tourism-Villas) in Maui Bay Estates, Nadroga.*
- *(iv) It is important that all new developments carried out thereafter 26/12/2009 strictly conform to the Site Specific Guidelines given the state of the environment of Maui Bay.*

At this juncture, the Nadroga Rural Local Authority is advised that the Director shall not entertain any more tourism development proposals in Maui Bay until the conditions of the OEMP for those previously consented to is complied with i.e. the establishment of the Monitoring Committee, members of which shall be representatives of DOE, DTCP, Maui Bay Estates, residents representatives and operators representative.

[last closing paragraph]

Yours faithfully.

Sgd.
T. Rokotuibau
Director of Town and Country Planning

22. Following the above letter, MBVL then engaged Wood & Jepsen whose report is set out above[ii]. As to the borehole, the DTCP deposes that it has been in existence well before the SDGMB and certainly at the time when Kumar lodged his outline application for development. According to DTCP, the street frontage for special use lots are at the discretion of the DTCP[iii].

23. The De La Mares' grievances and the DTCP's response to each do raise the following key questions:

    is the SDGMB a scheme or is it merely a set of guidelines?
    whether the DTCP is obliged to adhere strictly to the SDGMB?
    regardless of whether the SDGMB is a scheme or is merely a set of guidelines, does the DTCP have a discretion to approve relaxations from the scheme/guidelines?
    assuming the DTCP does have a discretion to approve a relaxation from the scheme/guidelines, what is the correct procedure which he must follow?
    even if the SDGMB is merely a set of guidelines, is it capable of raising a legitimate expectation on the part of any lot owner in the MBDE such as the De La Mares?

24. For the record, the De La Mares had sought a mandatory injunction in their original application to compel DTCP and NRLA to withdraw building permissions granted to MBVL and that new plans be submitted strictly in line with the SDGMB. I dealt with this by declining stay when I granted leave on 26 March 2013.

MBVDL'S PRE-2009 & POST-2009 APPLICATIONS

25. Notably, before Maui Bay was subdivided, the developer had sold off portions of his land on a piecemeal basis. I imagine that he would have simply surrendered these portions of his land in the process. MBVL was one of those purchasers. It purchased Lot 7 on 11 July 2006. By an affidavit Kumar swore on 05 July 2013, I extract the following chronology.

11.07.06	Colin Francis Kumar (**"CFK"**) purchased Lot 7 on CT 36183 on 11 July 2006.
24.04.07	**CFK** applies for DTCP approval to subdivide Lot 7 into two lots for Special Use Villa Development. According to DTCP Affidavit s/o 11.04.17, CFK applied on 20.04.07
19.06.07	DTCP forwarded copies of application to NRLA
13.04.08	application approved (according to CFK). According to DTCP Affidavit s/o 11/04/17, this was approved on 14.04.08.
17.09.09	Subdivision approved as to survey by DTCP as to subdivision of Lot 7 into two lots as Lots 1 and 2 on DP 9979 designated for Special Use (Villa Development). Confirmed by DTCP Affidavit s/o 11.04.17.
23.12.09	DTCP approves SDGMB. DTCP Affidavit s/o 11.04.17 says SDGMB "came into force on 23.12.09".
29.12.09	Rezoning of beachfront Lots from residential to Special Use Tourism Villas
15.06.11	Lodged an outline application to develop lots 1 and 2 on DP 9979 at NRLA
02.09.11	NRLA received letter from DTCP outlining proposal for amendments
07.10.11	NRLA consented to application
12.12.11	Detailed building plan lodged with DTCP
22.03.12	**DTCP approves sub-division**
04.06.12	DTCP approved building plan

13.04.12	Letter by NRLA to Kumar requesting that amendments be made to building plan
22.06.12	Letter by DTCP to NRLA recommending NRLA issue stop work order on
26.06.12	Letter by NRLA to Francis Colin Kumar attaching conditions and requiring Kumar to endorse the conditions of consent for the outline villa development. Condition 4 notably requires Kumar to submit an OEMP Plan of the villa development to be submitted with the detailed plans.
__.06.12	Letter by Wood & Jepsen To Whom It May Concern to say that "the boundaries have been defined and the boundary marks are in the correct position as shown on the Survey Plan Lot 1 and 2 on DP 9979.
01.03.16	DTCP approves CFK's rezoning of Lots 1 and 2 from Special Use (Villa Development) to Special Use (Tourism-Villa) in 2016.

26. It is to be noted that MBVL acquired Lot 7 in 2006. This is some three years or so before the De La Mares bought into their lots in Maui Bay. This is also well before the SDGMB came into force. At paragraph 12 of her affidavit of 11 January 2013, the DTCP deposes:

> .....the SDGMB was created in 2009 **as part of the conditions of rezoning of foreshore lots from residential to special use Villa Development.** However, Mr. Kumar's foreshore lot was already subdivided and rezoned to special use Villa Development before the SDGM came into existence.

27. In December 2009, some three months or so after the DTCP approved Kumar's/MBVL's subdivision application, two key things happened.

28. Firstly, on 23 December 2009, the DTCP implemented the **SDGMB.** This document was developed in conjunction with the block rezoning which would happen a week later on 29 December 2009. As noted above, the SDGMB was created as part of the conditions of rezoning of foreshore lots from residential to Special Use Villa Development.

29. Secondly, as stated, the DTCP approved a "block rezoning" of all the foreshore lots in Maui Bay on 29 December 2009. 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.*

RELIEF SOUGHT

30. The De La Mares seek the following relief:

    1. That the **DTCP** be instructed to put in place an Urgent Immediate Stop Work Order to stop all construction on Lot 1 & 2 DP 9799, CT 36183, until the Judicial Review is completed and new plans be submitted in line with the SDGMB along with an approved OEMP and or a full EIA.

    2. That the DTCP be ordered to produce before the Court the Approved Scheme and copies of all maps, plans and other particulars for Maui Bay, thereafter the Approved Scheme be open to public inspection as required by law.

    3. That a certiorari be issued to quash all decisions made and a mandamus to order the DTCP and the NRLA to revert Lot 1 and Lot 2 to its original amalgamated state of 1 (one) Lot 7 as per the approved Scheme Plan and Subdivision.
    4. That the DTCP and the NRLA be ordered to withdraw all building permissions as defectively granted to Lots 1 & 2 DP 9979, CT 36183.

    5. That a Judicial Review be carried out on all building plans and outline applications on Lot 1 & 2 and that new plans be submitted in line with the SDGMB.

    6. That the DTCP and the NRLA be ordered to engage a government surveyor to verify all site boundaries and building pegs and ensure that they comply with the SDGMB before building commences.

    7. That the DTCP and the NRLA be ordered to demolish all building work carried out in violation of the SDGM including, but not limited to all structures built on the foreshore within the 20m building line, and the upstairs 4th bedroom.

    8. That a writ of mandamus compelling the DTCP and NRLA to perform their duties correctly and abide by the Town Planning Act Cap 139, Subdivision of Land Cap 140, General Provisions of Cap 139, Environmental Management Act 2005 and the SDGM is issued for all future subdivisions, approvals of Outline Plans and Building Plans, for the Maui Bay Estate Development Precinct.

    9. That the DTCP and NRLA be ordered to seal all the boreholes in the Special Use Zoned properties, on the foreshore of the Maui Bay Estate Development in line with the SDGM.

    10. That the DTCP pay punitive damages for breach of trust, stress and emotional suffering to the plaintiffs as the Court deems necessary in order to stop this type of abuse of office and dereliction of duty from happening again.

    11. That the defendants pay costs as the Court rules.

GROUNDS OF REVIEW

31. The De La Mares base their judicial review application on the following grounds:

1. that the DTCP's decision to allow the subdivision of Lot 7 into two Lots 1 and 2 of DP 9979, CT 36183 with a street frontage of less than 20 meters for each Lot, is an error of law.

   (a) relaxations have to be advertised in the prescribed manner allowing for objections. The subdivision is illegal. The DTCP acted *ultra vires* in the grant of the subdivision by granting a major relaxation without following due process.

   (b) the Department failed to advertise relaxations as prescribed by law, thus failing to take relevant considerations into account, acted in breach of natural justice, acted in breach of the plaintiff's legitimate expectation.

2. the DTCP and the Secretary of the NRLA, in approving the outline application and the Detailed Building Plans, acted in direct violation of the SDGMB, the Town Planning Act Cap 139, Provisions and Environment Act 2005 – and therefore, had acted:

   (a) contrary to law (ultra vires)
   (b) contrary to the SDGMB
   (c) failed to advertise relaxations as prescribed by law, thus failing to take rel considerations into account, acted in breach of natural justice
   (d) claim to discretionary powers when none exist

3. that the DTCP and the Secretary of the NRLA acted illegally, irrationally and with no procedural fairness in terms of the Town Planning Act Cap 139, General Provisions of Cap 139, Subdivisions of Land Act Cap 140, SDGMB, and the Environment Act.

BASIC ISSUES

32. At the heart of all the issues raised by the parties, the fundamental questions to ask are :

    (i) is the SDGMB a scheme or is it merely a set of guidelines?

    (ii) whether the DTCP is obliged to adhere strictly to the SDGMB?

    (iii) does the DTCP have a discretion to approve development in the MBDE even if it departs from certain provisions of the SDGMB?

    (iv) assuming the DTCP does have a discretion as such, is he under any legal obligation to engage any public consultation exercise such as calling for objections, before approving any development in the MBDE which departs from the SDGMB?

    (v) even if the SDGMB is merely a set of guidelines, is it capable of raising a legitimate expectation on the part of any lot owner in the MBDE such as the De La Mares?

IS THE SDGMB A SCHEME?

33. The SDGMB was developed because of clashes between lot owners in Maui Bay. The clashes arose out of their different expectations on what sort of development(s) should be allowed in Maui Bay.

34. On the one hand, was the expectation of some lot owners that the Maui Bay will retain its largely residential character with one designated hotel site. This was what the developer had promised.

35. On the other hand, was the expectation of the owners of the foreshore lots, of the tourism potential of their properties – given their strategic location in the heart of the tourism belt along the coral coast.

36. Against that background, the then DTCP took it upon herself to develop the SDGMB. She did this after consulting the lot owners. Notably, the SDGMB does make reference to the single hotel site, while making allowances for Special Use (Tourism Villa) sites.

37. I am of the view that the SDGMB is not a scheme in terms of section 2 of the Town Planning Act – nor is it a *draft scheme"*, or a *"scheme in preparation"* or a *"provisional regional scheme"* or a *"draft regional scheme"* in terms of the Preface to the General Provisions.

38. A "scheme" is defined in section 2 of the Town Planning Act as follows:

    "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;

39. Maui Bay is part of Baravi and falls within the Nadroga Rural Town Planning Area declared pursuant to section 6 of the Town Planning Act. All lands in the said Area are "rural" lands. They are not part of any "urban" planning scheme.

40. A "scheme" can only come into existence if it was created following the consultation process set out in the Town Planning Act. That process begins with the local authority preparing a "daft" scheme. After preparing the draft, 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 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)).

41. 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)).

42. Once DTCP provisionally approves 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)).

43. 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).

44. 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).

45. 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)).

46. 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)).

47. 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.

48. There is no evidence before me that the SDGMB was ever constituted in accordance with the procedures outlined above. Accordingly, I must accept find that the SDGMB is, therefore, not "a scheme under this Act" as per the section 2 definition of "scheme". This means, inter alia, that the De La Mares' plea that the DTCP be ordered to produce the Approved Scheme and make it available for public inspection as required by law – must fail. That requirement of the law only applies to a scheme created under the Act which the SDGMB is not.

49. In my view, a draft scheme or a scheme in preparation is one that is being drawn up or has been drawn up within the context of the above process – but which has not been finally approved by the DTCP. This point is relevant in the discussion below on whether or not the General Provisions apply to Maui Bay.

WAS THE DECISION TO SUBDIVIDE AN ERROR OF LAW?

50. The SDGMB provides at Clause 3.0 a) that:

> The minimum lot size allowed is 1000 square meters and the need to further subdivide any existing allotments will strictly take into consideration the physical features (topography, foreshore areas), sufficient building area and merit issues of the subdivision. In as far as possible and to retain the low key and scale features of the precinct, further subdivision may not be entertained if it does not provide proper building areas

51. Part (3) of the SDGMB is headed "Development Concept". This part has three subheadings which are numbered 3.0(a) and (b) and 3(c). Part 3.0(b) is headed *Development Type.* It has the following three conditions:

1) *These are the uses classified and defined in the current Town Planning Act General Provisions and it also includes Conference Facility for letting out.*
2) *Any development not listed or prescribed 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.*

52. The De La Mares appear to argue that the decision to allow MBVL to subdivide was an error of law because (i) the subdivision in question was a relaxation of the mandatory requirements of the SDGMB and (ii) as such, the DTCP should have advertised the application first and (iii) the DTCP failed to take relevant considerations into account.

53. The powers of the DTCP in relation to any application for development in an area where there is no scheme in force, like Maui Bay, is to be found in section 7 subsections (1) to (4) of the Town Planning Act. Section 7(1) 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

54. 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"

55. Because a "subdivision" will entail a material change in land use from the current use, it follows that a proposed subdivision of a Maui Bay plot will require the permission of the local authority under section 7(1), who is, of course, ultimately accountable to the DTCP, who grants the final approval/refusal as per section 7(3).

> **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.

56. In dealing with any application to develop land, including a subdivision, a local authority/DTCP must take into account factors set out in section 7(4):

> 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.

57. Notably, the *General Provisions For Town Planning Schemes And Areas -1999* were approved by the DTCP to be used for the purpose of section 7(4)[iv]. However, the General Provisions do not apply as a matter of law in relation to any development in a rural area such as Maui Bay which is not covered under any town planning scheme, although it is part of a town planning area – but for which no *draft scheme* or *scheme in preparation* is in force either (see in **State v**

Director of the Department of Town and Country Planning; Ex parte Peterson [2023] FJHC 2; HBJ06.2020 (18 January 2023) (**Petersens'** case) case).

58. However – having said that, the DTCP may, in his own discretion, selectively apply the General Provisions when considering a development application in an area such as Maui Bay, if he considers any particular part of the General Provisions to be material.

59. The relevant provisions in the General Provisions relating to relaxations and notification of relaxations are Provisions 6[v] and 7[vi].

60. In my view, as I have said in the **Petersens**' case, the General Provisions including Provisions 6 and 7 - do not apply as a matter of law in relation to any development in an area such as Maui Bay for the following reasons:

    (a) 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.

    (b) Maui Bay does not fit neatly into either of these three Classes

    (c) because Maui Bay does not have an "approved scheme" it does not qualify under Class 1.

    (d) because the SDGMB cannot 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.

    (e) because 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 – Maui Bay does not fit into Class 3.

61. Accordingly, because the General Provisions do not apply as a matter of law to areas such as Maui Bay, the DTCP could not be said to have breached its provisions if he chooses in his discretion not to follow it in relation to a development application from Maui Bay. It also cannot be said that the DTCP will commit an error of law if, in his discretion, he chooses to modify the General Provisions to the extent that he thinks is "material" with regards to a particular development application from Maui Bay.

62. That discretion stems from section 7(4) which I set out above. This section gives the DTCP such a wide discretion to consider "any other material considerations" when deliberating on an application for permission to develop land in an area such as Maui Bay.

63. 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 subdivision. The question of what is "material" is left to the judgement of the DTCP.

64. It is for the DTCP under section 7(4) to determine "materiality". That gives him power 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.

65. If the DTCP should decide that he should 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).

66. 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 the De La Mares' submissions that the SDGMB binds the DTCP to strict compliance.

67. 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). That would render the discretion unadaptable to changing times, and to changing preferences in land use, and make the SDGMB akin to a set of restrictive covenants which they are not.

68. I also do not think that the approval to subdivide was a "relaxation" of the General Provisions when the General Provisions do not legally apply in Maui Bay in the first place.

69. In addition to these, but quite separate from these, I remind myself that MBVL actually first applied for subdivision on 24 April 2007 – and which application was approved on 13 April 2008. This was well before the SDGMB came into being. Clearly, that approval had lapsed, which then caused Kumar/MBVL to lodge another application. This is evidence of a prior approval which DTCPL was entitled to take into account in exercising his discretion to approve the second application in 2012.

WHETHER THE DTCP AND THE SECRETARY OF THE NRLA, IN APPROVING THE OUTLINE APPLICATION AND THE DETAILED BUILDING PLANS, ACTED IN DIRECT VIOLATION OF THE SDGMB, THE TOWN PLANNING ACT CAP 139, PROVISIONS AND ENVIRONMENT ACT 2005 – AND THEREFORE, HAD ACTED CONTRARY TO LAW (ULTRA VIRES), CONTRARY TO THE SDGMB, FAILED TO ADVERTISE RELAXATIONS AS PRESCRIBED BY LAW, THUS FAILING TO TAKE RELEVANT CONSIDERATIONS INTO ACCOUNT, ACTED IN BREACH OF NATURAL JUSTICE AND CLAIMED TO HAVE DISCRETIONARY POWERS WHEN NONE EXISTS?

70. I repeat my views above.

71. Part 13.0 of the SDGMB provides the following:

> *That the need for an Environmental Management Plan ["EMP"] and an Operational Environment Management Plan ["OEMP"] for Villa developments providing more than 4-bedroom units be determined by the Director of Environment (DOE). If that is required then the documents be prepared and approved by DOE before detail (sic) plans are approved.*

72. The language of Part 13.0 appears to leave it open for the assessment and the determination of the DOE as to whether an OEMP is required before the detailed plan of any proposed 4-bedroom plus development is approved by the DTCP.

73. However, as is evident in a letter by the DTCP to the Secretary NRLA dated **02 July 2012**, the DTCP makes it a requirement that every detailed plan for any proposed development submitted for approval <u>must</u> contain an OEMP. Thus, , the DTCP said *inter alia* as follows:

> *I have noted that the Outline Consent had specifically conditioned an approved Operational Environment Management Plan (OEMP) be submitted along with the Detailed Plans. In having to facilitate approvals, our Western Division when considering the Detailed Plans carried forward this condition as part of conditions of consent to the detailed plans. Thus, the additional condition to ensure compliance to the Special Use Tourism Villa Zones shall be read as follows:*
>
> > *(ii) No completion certificate, occupancy certificate nor hotel licence shall be issued prior to approval of the OEMP by the Director of Environment.*
>
> *You will acknowledge in our discussion our concern on there being an absence of the Monitoring Committee as required in the approved OEMP for the existing four (4) villa developments.*
>
> *To date, there has been none established to serve its purpose as a monitoring mechanism to ensure compliance of the requirements for tourism villas in the coastal side of Maui and as per condition of the approved OEMP. By a copy of this letter, the Director of Environment is requested to facilitate and ensure that this condition is fully complied with given our experiences in Maui Bay as well deliberating with villa developments in Fiji.*
>
> *The position of the Department of Town and Country Planning has also not waivered in that the Director shall not entertain any new more tourism development proposals for Maui Bay until the conditions of the OEMP for those previously consented to is complied with i.e., the establishment of the Monitoring Committee, members of which shall be representatives of DOE, DTCP, Maui Bay Estates, residents' representatives and operators' representative.*

<u>GIVEN THAT THE SDGMB IS NOT A "SCHEME UNDER THE ACT" – CAN A LEGITIMATE EXPECTATION ARISE OUT OF IT</u>?

74. Given that the SDGMB is not a "scheme" then what is it? Maui Bay is a locality or area which falls under the *Nadroga Rural Town Planning Area* – so it is part of a town planning area.

75. However, there is no "scheme" affecting the Maui Bay. In my view, given (a) the circumstances under which the SDGMB was created, and (b) the fact that it was not created in accordance with the section 18 to 26 processes set out above, and (c) that the name of the document itself suggests that it is a "guideline", it would appear that the document was intended to be a temporary guideline specific to the Maui Bay locality, in response to the changing and emerging planning issues and demands of the Lot owners in the area.

76. Part 1.0 of the SDGMB captures the essence of it all as follows:

> *Maui Bay Estate was subdivided as a large up market residential area with residential lots ranging from 1000 square meters up to over 4000 sq meters. Such lot sizes qualify for Residential "A" type developments. The location of this development area within the Coral*

Coast Tourism Zone warrants ***<u>the need to create specific flexible planning environment wherein development parameters, performance criteria and guidelines</u>*** *(sic). These are set in accordance with the need to keep the estate as a predominant low key up market residential area with the provisions of Special Use (Villa) developments of up market. Low key and low scale developments that blend in well and compatible with the residential development.*

77. Whether a legitimate expectation can arise out of the SDGMB, one has to first understand the De La Mares' grievance, and their expectations of the SDGMB. The following letter dated 15 April 2012 to the DTCP gives us some perspective:

We would also like to thank you for clarifying that the Specific Development Guidelines for Maui Bay Estate is a ratified document and that the Department of Town and Country are going to ensure that all Villas that have been built since its ratification on the 23 December 2009, will have to follow those guidelines.

There have been a few ongoing questions between residents of the Maui Bay Estate, regarding the Specific Development Guidelines for Maui Bay Estate. Due to confusion and disagreement, Maui Bay Estate became a very volatile and unpleasant place to live. Some individuals have resorted to bribery, and some have even gone as far as assaulting other residents.

It has taken quite some time, but we (the residents) finally feel that everyone living here has accepted the Specific Development Guidelines for Maui Bay Estate and we understand that some of the first sights (sic) have been accepted as they were and grandfathered in order to bring order to the development, and make illegal developments legal. Having this document has been a blessing, as it allows everyone to be protected, the residents, the Hotel site, and the Special Villa operators as fairly as possible.

<u>Unfortunately, every time a new lot owner decides to develop here at Maui Bay, and especially on the foreshore, they inevitably try to rehash the rules and regulations and find ways in which to by pass them</u>. *It is for this reason, that we feel our best way to preserve the long-term peace here at Maui Bay, is to ensure that all lot owners are informed about the Specific Development Guidelines for Maui Bay Estate as early in their planning stage as possible and are informed that they will be enforced, as many people have the old belief of "this is Fiji, who is going to stop me".*

We thank you for responding to our questions and taking the time to clearing matters up for us.

The following questions were brought up at our meeting:

(a) Are the guidelines only a guide but not a rule?
(b) Will the lots on the Hillside be permitted to rezone?
(c) Who will enforce these guidelines?
(d) Why is the Saw Mill still running?
(e) Are other business / services permitted to be run from Special Villas, e.g. Meke shows, fishing charters, spa treatments, car hire and airport transfers?

As per our meeting, it is our understanding that the answers to these questions were as follows:

(a) The guidelines are a guide line as each person will build to different plans, but that all buildings on the foreshore, must be within the guidelines, unless they wish to rezone to residential only.
(b) No lots on the hill side will be rezoned special use villa.

(c) *Laws are in the process of being put into place to ensure that the authorities have the ability to deal with law breakers.*

(d) *It is understood that the Saw Mill will be removed by the given date on their notice, which we believe was 1 month.*

(e) *Absolutely No other business or service is permitted to run from Special Villa's, as they are for accommodation only.*

As discussed at our meeting, ***we would like to take this opportunity to reinforce the need for these guidelines to be adhered to by all equally. We realize that the document notes on page 3 that the Director of Town and Country Planning has the discretion to make relaxations on this document. We plead with the Director of Town and Country Planning and the Minister, not to make any relaxations with regards to this document as it will only disrupt the harmonious living that we have finally managed to reach and it will start the fights between residents all over again.***

*Our concerns for this are very real, as we already have a new lot owner, Mr. Francis Kumar, who refuses to follow the guidelines and argues that they are not ratified. He also states that the Minister in Charge of Town and Country Planning has given him permission to go ahead and has approved his plans. This is of great concern to the residents here. When we object, Mr. Kumar simply states, "****who is going to stop me?****"*

We would like refer to sections in the ***Specific Development Guidelines for Maui Bay Estate****, which we believe needs to be addressed, either with Government Departments, or with Lot owners. We humbly request the following be addressed, to assist us in keeping the Maui Bay Estate, legal, calm and a beautiful place for all people alike, tourists, special villa operators and residents.*

Please see the attached schedule of concerns.

As we have mentioned to you at the meeting, our concerns have been amplified by Mr. Kumar from Lot 24 insisting that he doesn't have to follow the guidelines, ***and also three staff members from Town and Country who came to discuss the matter with us a few weeks ago, and we were under the impression that the Specific Development Guidelines for Maui Bay Estate was not a legal document and that it was not ratified.***

Once again, we would like to thank you for your time and understanding.

Yours sincerely,
On behalf of the Residents
Evette De La Mare, Craig De La Mare, Ruth Peterson

78. As I had noted in **Petersens'** case, the entire Maui Bay area was originally just a large piece of freehold land which was all comprised in Certificate of Title 2972 and 2872 *Maunivunise, Nadroga Lot 114*.

79. The owner of CTs 2972 and 2872 (**"developer"**) developed the land and subdivided it at some point either in the late 1990s or early 2000s. He wanted to create an up market but low key, residential "A" development in Maui Bay. His concept included a single hotel site which was shown as Lot 114 on his approved plan.

80. The concept attracted a lot of interest from foreign investors including the De La Mares who were lured by the potential in the single hotel site. It appears that the De La Mares were, one way or another, led to the expectation that the developer's concept would bind all lot owners, perhaps, in the same way that a restrictive covenant does. So, the De La Mares went on to purchase three lots through their company, Epic International Limited (**"EIL"**). Two of these lots, namely Lots 55 and 101, were residential lots. Lot 114, which is the third one, was the sole designated hotel site in Maui Bay.

81. Notably, the SDGMB was implemented shortly after the De La Mares invested in the MBDE. Notably also, the SDGMB was implemented some two years and eight months after MBVL had applied on 24 April 2007 to the DTCP to subdivide Lot 7, and one year and eight months after approval was first given on 13 April 2008, and three months after the second approval to Kumar/MBVL on 17 September 2009.

82. As I have said above, the SDGMB was developed in conjunction with the block rezoning of the foreshore lots which the DTCP approved on 29 December 2009 which allowed the owners to apply to the DTCP to have their individual lots rezoned from *Residential* to *Special Use (Tourism -Villa sites)*.

83. The following letter dated 18 August 2010 by the then Acting Director of Town & Country Planning to the Secretary Nadroga Rural Local Authority gives us some further perspective on the intention behind the document.

> *Dear Sir,*
>
> *RE: REZONING OF LOTS 1-6 DP 9240 AND LOTS 1-16,18 & 19 MUAVUNISE, BARAVI, NADROGA – MAUI BAY DEVELOPMENT*
>
> *Reference is made to the block rezoning of the listed coastal properties at Maui Bay and apologies for our late response.*
>
> *To rectify the complaints on the illegal Tourism Operations occurring in the area, the Director has taken the initiative to regularize the Development by rezoning the above-mentioned properties from Residential to Special Use (Tourism- Villa sites) with site specific development guidelines.*
>
> *The Local Authority is required to strictly monitor building development applications within the rezoned area to ensure full compliance and reduce complaints raised by concerned parties.*
>
> *Please find attached two copies of the duly signed Approved rezoning plans and the Specific Development Guidelines for Maui Bay Estate for your necessary action.*
>
> *By a copy of this letter, the Ministry of Lands, Ministry of Trade, Investment Communications and Tourism, the Attorney General, the Prime Minister's Office, Fiji Islands Trade and Investment Board and Fiji Inland Revenue and Customs Authority are informed accordingly.*
>
> *Yours faithfully,*
>
> ………………….
>
> *Maria Duguvesi*
> *For Acting Director of Town & Country Planning*

84. As noted in **Petersens'** case, for some time prior to December 2009, the owners of the foreshore residential lots in the MBDE were using their properties to provide accommodation to tourists. Some even operated a restaurant and a bar service on the side in the same venue. Because these foreshore lots were all zoned *Residential* at the time, the service they were providing to tourists were *prima facie* illegal. This attracted some complaints. At the same time, the "illegal operators" were lodging applications to the DTCP to rezone their lots from *Residential* to *Special Use Tourism Villa*. It appears that the DTCP's decision to implement the block rezoning on 29 December 2009 was borne out of that tension. Once a foreshore lot was rezoned to *Special Use (Tourism -Villa sites)*, it became legal for its owner to provide and operate any villa-type accommodation service thereon to tourists.

85. Having said that, it would appear that, in general, there was an urge to regularize the tourism activities in the foreshore lots.

86. When the De La Mares bought their three lots at the MBDE, they had every expectation that the developer's concept would be the order of the day for investors, so to speak, in terms of planning-compliance. As it turned out, none of the residential lots had any restrictive covenant registered on its title, contrary to what the developer had assured them – as they submitted in Court on one occasion. Also, the De La Mares discovered - as I have said – that most of the beachfront-lots were providing accommodation to guests with a restaurant and bar service on the side and that these operators were taking steps to rezone their lots from *Residential* to *Special Use Tourism Villa*. However, most investors in the MBDE, including the De La Mares, have since come to accept the SDGMB as a document which sets some planning standards applicable in the area.

87. In the **Petersen's** case, I did express the view that while the SDGMB cannot create a legitimate expectation that its provisions will be strictly adhered to, I was prepared to find that the SDGMB, at the most, does create a legitimate expectation that the DTCP will consult the lot owners of Maui Bay whenever he is asked to consider a development application which, if approved, would entail a departure from the standards and specifications in the SDGMB.

88. Again, if the SDGMB were to be held to create a legitimate expectation that its provisions will be strictly adhered to – then the effect of that will be to limit the general discretion available to the DTCPL under section 7(4) of the Town Planning Act.

89. At this point, it is important to state that, generally, there are two kinds of legitimate expectation. The first one is procedural only, that is, that there is a legitimate expectation that a certain procedure will be followed. An example of this is an expectation that people will be heard on a proposed action affecting them before a decision is made.

90. The second kind of legitimate expectation is substantive in nature, that is, that a certain result or benefit will accrue out of a promise made by an executive decision maker.

91. The Fiji Court of Appeal in **Pacific Transport Ltd v Khan** [1997] FJCA 3; Abu0021u.1996s (12 February 1997 said legitimate expectation arises where 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 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.

92. 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.

93. In England, substantive legitimate expectation may arise where a public authority promises a certain substantive benefit to A, or to a group to which A belongs (see **R v. Secretary of State for the Home Department** [1984] 1 W.L.R. 1337); **R v North and East Devon Health Authority, ex p Coughlan** [2001] QB 213 (CA)). A good definition of this is provided by the majority of the Hong Kong Court of Final Appeal in **Tung v Director of Immigration** [2002] 1 HKLRD 561, 600 (Li CJ, Chan and Ribeiro PJJ and Mason NPJ).:

> The doctrine recognizes that, in the absence of any overriding reason of law or policy excluding its operation, situations may arise in which persons may have a legitimate expectation of a substantive outcome or benefit, in which event failing to honor the expectation may, in particular circumstances, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court

94. In Fiji, unless there is a Supreme Court decision to the contrary, the prevailing view would appear to be that which the Fiji Court of Appeal expressed in **Pacific Transport Ltd v Khan**, that a legitimate expectation of a substantive outcome or benefit cannot be entertained:

> The privilege, advantage or benefit may be substantive in nature or only procedural. However, as Mason C.J. stressed in **Quin** (supra) at p.21, when applying the concept of legitimate expectation, a Court must avoid confusion between the content of the expectation and the right to procedural fairness.
>
> A court has no power, in judicial review proceedings, to determine the merits of the decision under review. For that reason, we consider that the few English cases, (such as **R v. Secretary of State for the Home Department** [1984] 1 W.L.R. 1337), in which a legitimate expectation was held to exist that substantive policy would not be changed, are not helpful.
>
> In the **Council of Civil Service Unions** case (supra) Lord Diplock referred to the concept of legitimate expectation as based on the natural justice requirement of procedural propriety. A legitimate expectation, where it exists, is that procedural propriety will be observed for the protection of the privilege, advantage or benefit to which the expectation relates. In the words of McHugh J. (dissenting but not on this point) in **Minister of State for Immigration and Ethnic Affairs v. Teoh** [1995] HCA 20; (1995) 183 CLR 273, 312 the concept of legitimate expectation enlivens the rules of procedural fairness. We are not to be taken, however, to exclude the possibility suggested by Dawson J. in Quin (supra) at 60, that the selective application of an existing policy in an individual case may, depending on the facts, amount to a failure to accord the fairness required by natural justice.

95. In Australia (see **Attorney-General (NSW) v Quin** (1990) 170 CLR 1) there is a view that does not favor substantive legitimate expectation for the following reasons:

(i) Parliament entrusts decision makers with discretionary powers
(ii) Decision makers must retain that discretion
(iii) Administrative discretion cannot be fettered

for Courts to hold administrative bodies bound by substantive legitimate expectation is to fetter their discretion (which goes against the grain of the discretion that Parliament has conferred) and an intrusion into the merits of administrative decision – which is outside the scope of Judicial Review – because that is what Parliament entrusted with the decision maker.

96. This appears to be the approach which the Fiji Court of Appeal endorses in **Pacific Transport Ltd v Khan**. It is for this reason that I cannot elevate the SDGMB to a level requiring strict compliance if the effect of that will fetter the wide discretion which Parliament has conferred on the DTCP (and the local authority) under section 7(4) of the Town Planning Act. However, that does not preclude a procedural legitimate expectation arising out of the SDGMB.

CONCLUSION

97. In the final, I do find that the DTCP has a wide discretion under section 7(4) to make all the decisions which were the subject of the De La Mares' application and that the DTCP find exercise that discretion lawfully. However, having said all that, the issue which the De La Mares raise about the easement granting exclusive possession to MBVL over the foreshore fronting Lot 7 (Lot 1 or 2) deserves some particular mention. The evidence suggests that the then DTCP had conceded to the concerns raised by the De La Mares. Whether any further action or step has been taken to address that concern – is not clear to me. In the final, I direct the DTCP to revisit and reconsider its position on this. Parties to bear their own costs.

....
Anare Tuilevuka
JUDGE

27 February 2023

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[i] See Affidavit of Talei Rokotuibau sworn on 11 April 2017.

[ii] This letter dated 16 July 2012 is annexed and marked TR8 in Talei Rokotuibau's affidavit.

[iii] See paragraph 9 of Talei Rokotuibau's affidavit.

[iv] The preface to the General Provisions reads:

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 Development Control or as Guidelines in the following classes of areas and cases.

[v] Provision 6 provides:

Provision 6: Relaxation from General Provisions

The Council may, subject to the approval of the Director consent to a relaxation of any of the requirements laid down in these General Provisions and so long as the use or development is in accordance with the terms of such consent no offence against these provisions shall be deemed to be committed by such use or development.
Such consent, which shall be in writing, may be granted only when it is considered that the proposed development in respect of which relaxation is sought would not conflict with the overall principles of the Scheme.

Any such consent may be for a limited period named therein and subject to such conditions or restrictions as to use or otherwise as the Director and the Council may think fit to impose.

[vi] Provision 7 provides:

Provision 7: Notification of Relaxations

Where the Council with the consent of the Director proposes to exercise the discretionary power vested in it under Provision 6 of these General provisions.

(a) It shall publicly notify at the applicant's expense, its intention so to do by an advertisement published in the Republic of Fiji Gazette and in two issues of a paper circulating in the district at an interval of not less than seven days.

(b) Every Owner or Occupier of property within the area covered by the Scheme shall have a right of objection to the proposed exemption, and may, by notice in writing addressed to the Council, give notice of such objection and the grounds thereof at any time within 30 days after the first public notification of Council's intention.

(c) Before arriving at a decision, the Council shall take into account any objections submitted to it and may afford objectors the right to be heard at a special meeting of the Council to be called for the purpose.

Provided that where the relaxation of the requirements of these General Provisions is of such a minor nature as to appear to cause no inconvenience or detriment to owners of affected land the Council and the Director may dispense with the requirements of sub-clauses (a), (b) and (c) and further provided that the Council shall seek the comments of owners of properties likely to be affected by the relaxation."