In The Supreme Court of Bermuda

APPELLATE JURISDICTION
No. 29 of 2019

BETWEEN:

JEFFERY STIRLING

Appellant

And

MINISTER OF HOME AFFAIRS

Respondent

JUDGMENT

Date of Hearings: 14 and 21 April 2022
Date of Ruling: 29 June 2022

Appellant: Mr. Peter Sanderson (Beesmont Law Limited)
Respondent: Ms. Lauren Sadler-Best (Crown Counsel for the Attorney General)

Appeal against Decision of the Minister of Home Affairs
Refusal of permission to develop residential units
Section 61 of the Development and Planning Act 1974
The Bermuda Plan 2008

JUDGMENT of Shade Subair Williams J

Introduction

1. This is an appeal against the decision of the Minister of Home Affairs, The Hon. Walter H. Roban, JP, MP (the "Minister") to uphold the decision of the Development Applications Board (the "DAB") to refuse the Appellant's application for approval to develop 6 residential units on Lot 8 of Hallett Crescent, Pembroke Parish ("Lot 8").

2. Availing himself of the right of appeal to this Court under section 61 of the Development and Planning Act 1974 (the "1974 Act"), the Appellant, Mr. Jeffrey Stirling, now seeks an Order setting aside the Minister's decision.

3. In hearing and deliberating on this appeal I was very much aided by the careful and ably made submissions of Counsel for both sides to whom I express my gratitude. At the close of the hearing I reserved judgment and informed the parties that I would deliver this written judgment.

Background

4. The original application to the DAB dated 15 May 2018 ("the application") sought planning permission for the construction of 6 dwelling units on a 3-storey lot. It was proposed that each unit would be a 2-bedroom unit. The application also requested the approval of 11 car parking bays and 8 bike bays together with other amenities.

5. However, the DAB refused the application in a letter dated 19 December 2018 (the "DAB's refusal letter"). The refusal was grounded on five separate points which were outlined in both the refusal letter and an accompanying report.

6. By letter dated 15 August 2019, the Minister upheld the DAB's decision, reciting the same five reasons relied on by the DAB in its refusal letter. They are as follows:

   "…

   1. *The proposed development exceeds the maximum density of units and site coverage permitted for the Residential 2 zoned site and as such is contrary to Policy RSD.3(1)(e)(h) Chapter 26 of the Bermuda Plan 2008 Planning Statement.*

   2. *The application does not comply with Policy TPT.17, Chapter 11 of the Bermuda Plan 2008 Planning Statement in that the proposal fails to provide onsite turnaround for the safe movement of vehicles to, from and within the site.*

3. *The proposed development exceeds the maximum permitted hard surfacing for the Residential 2 zoned site and as such is contrary to Policy RSD.16(1) Chapter 26 of the Bermuda Plan 2008 Planning Statement.*

4. *The proposed development exceeds the maximum permitted height for the Residential 2 zoned site and would therefore be contrary to Policy RSD.11(1) and Policy DSN.13(1), Chapters 8 and 26 respectively of the Bermuda Plan 2008 Planning Statement.*

5. *The proposed development does not comply with Policy DSN.11(1), Chapter 8 of the Bermuda Plan 2008 Planning Statement in that the scale and massing of the development is not compatible with the character of the surrounding development*."

The Bermuda Plan 2008

7. The Bermuda Plan 2008 is, in a generic sense, recognized under section 7 of the 1974 Act which empowers the Minister to prepare a local plan for any part of Bermuda. Section 7(2) requires a local plan to formulate proposals for the development and use of land in Bermuda.

8. In this case, both parties agreed that the relevant local plan with which I am concerned is the Bermuda Plan 2008. It is stated under Chapter 2 of the Bermuda Plan 2008 that its general aim is to "*effectively manage Bermuda's natural and built environment, resources and development in a sustainable way which best provides for the environmental, economic and social needs of the community*."

9. Under Chapter 8: Design (DSN) the DAB is entitled to require the submission of a Design Statement

10. DSN.18 applies to the residential design standards in respect of communal open space. DSN.18 provides:

"*Communal open space shall be provided in any residential development proposing 5 or more dwelling units and the minimum area shall be equivalent to 10% of the lot size, and may be provided at or above grade level*."

11. TPT.17 governs the position on parking loading and pedestrian access:

" *All development shall provide to the satisfaction of the Board:- (a) adequate facilities for the parking, loading, unloading and turning of vehicles; and (b) adequate and safe pedestrian*

access; in a manner which provides for the safe movement of vehicles and pedestrians to, from and within the site."

12. RSD.3 (1) :

"*The following forms of residential development may be permitted in those areas designated Residential 1 or Residential 2 in accordance with the following provisions:-*

RESIDENTIAL 2		
(e) Maximum Density	6 dwelling units/acre	
Development Type	**Minimum Lot Size**	**Maximum Site Coverage**
(f) Detached House	18,000 sq. ft.	20%
(g) Attached House	12,000 sq. ft.	20%
(h) Apartment House	18,000 sq. ft.	20%

…"

13. In summary, the rule on "maximum density" allows for no more than 6 dwelling units per acre and for developments of apartment houses on a site, the "minimum lot size" permissible is 18,000 feet. Further, the maximum site coverage for apartment houses on a site is 20%.

14. RSD.9

"*A proposal for a detached house may be permitted on a compact lot within a Residential 1 zone at the discretion of the Board, but only if the Board is satisfied that:-*

(a) the minimum lot size is not less than 3,500 sq. ft…."

15. "Density Maximum" is defined under DEF.30 as "*the greatest number of dwelling units per acre which may be permitted to be developed on a lot of land*".

16. Under DEF.73 a "lot" is said to mean "*a parcel of land which before 27 June 1974 was held by single title or which is within a registered plan of subdivision or which is deemed registered in accordance with the Development and Planning Amendment Act 1997*".

17. "Lot size", pursuant to DEF.75, means "*means the area of a lot which is calculated by excluding any land used as a road and any land which is used as a right of way or easement for vehicular access to three lots or more, notwithstanding that the subject lot may not gain its access from that right-of-way or easement*".

18. "Lot size minimum" is given its meaning under DEF.76 which states it to be "*the smallest area for a lot which may be approved for development purposes in a plan of subdivision*".

19. "Site coverage", according to DEF. 106, means "*the area of a lot which is covered or proposed to be covered by all buildings and other roofed structures which have a solid and permanent roof, such as verandahs, porches and covered patios, notwithstanding that one or more sides of the building or structure is not enclosed; and where site coverage is expressed as a percentage of the total area of the lot or otherwise based on the relevant zoning and policy*".

The Appellant's Case

20. By Notice of Appeal filed on 25 October 2019, the Appellant appealed on the following grounds:

    a) *The Minister erred in law in finding that the development exceeds the maximum density of units and site coverage, having regard to the Bermuda Plan.*

    b) *The Minister erred in law in going on to consider other grounds for refusal other than that at ground 1 in his decision, in that the Inspector had already narrowed the focus of the appeal to that of lot density.*

    c) *Further or alternatively, the Minister erred specifically in considering grounds 3 & 4 in his refusal letter, as those grounds had been conceded by the Director of Planning.*

    d) *Without prejudice to ground b) above, the Minister erred at ground 2 in finding that there was insufficient turnaround, when the evidence did not support such a finding.*

    e) *Without prejudice to grounds b) and c) above, the Minister erred at ground 3 in that it would be unreasonable or absurd to include the roads attached to the lot as counting towards the area of hard surfacing, giving the unusual circumstances of the lot.*

    f) *Without prejudice to grounds b) and c) above, the Minister erred at ground 4 in finding that the development exceeded the maximum permitted heights without properly considering the circumstances of the development.*

    g) *Without prejudice to ground b) above, the Minister erred at ground 5 in failing to properly consider or give reasons for how the development is incompatible with the character of the surrounding development.*

21. By way of relief, the Appellant is asking for this Court to quash the Minister's decision and to grant him an order either mandating the Minister to give planning permission to the Appellant or mandating the Minister to reconsider the application.

22. As an opening to his arguments on the appeal, Mr. Sanderson pointed out that Lot 8 is unusually shaped. He explained that estate roads are ordinarily pieces of land separated from the lot of property to which they afford access. However, for Lot 8, there is no such separation. This peculiarity has provoked the legal arguments as to the "lot size" and the "lot density".

23. On the first ground of appeal, Mr. Sanderson submitted that Lot 8 complies with both the maximum density requirements and the 20% rule on the site coverage permitted for the Residential 2 zoned site. He outlined that the lot spanned 1.17 acres of land, of which a portion comprises various roadways and rights of way.

24. In his written submissions, Mr. Sanderson submitted [3.3]:

    "*If the area were calculated according to the area of the whole lot, this would allow seven dwelling units. If, however, roads and pathways were to be excluded, it would allow a mere two or three dwelling units*."

25. To that end, Mr. Sanderson invited me to find that the definition of maximum density under DEF.30 could only be calculated by applying the total dimensions of a "lot" of land. Mr. Sanderson distinguished this from the term "lot size" which is defined under DEF.75 to exclude any land used as a road or land used as a right of way or easement for vehicular access. Having, highlighted the inclusion of both terms under the Bermuda Plan 2008, together with their differences in meaning, Mr. Sanderson insisted that the definition of maximum density necessarily referred to the whole parcel of land in question and in accordance with the definition of "lot" under DEF.73.

26. Mr. Sanderson further encouraged this Court to take guidance on the general approach to construing the Bermuda Plan 2008 from the remarks made by the UK Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] PTSR 983. He relied on the following passage to buttress his emphasis on the need for a literal and consistent application of the policies stated therein [18]:

    "*The development plan is a carefully drafter and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behavior of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of*

discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle. In this area of public administration as in others (as discussed, for example, in R (Raissi) v Secretary of State for the Home Department [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context."

27. Collectively arguing Grounds (b), (c), (e) and (f), Mr. Sanderson criticized the Minister for his misapplication of the report submitted by Planning Inspector, Mark Hornell, MCIP (the "Inspector"). By way of illustration, he highlighted that grounds e) and f) of the Notice of Appeal were previously conceded by the DAB, notwithstanding the Minister's reliance on those grounds for refusal.

Analysis and Reasons for Decision:

Ground a)

28. No dispute arose before me on the actual dimensions or acreage total of Lot 8. As noted by Inspector, the proposed development site consists of 0.46 acres, in addition to several roadways and pathways. In total, Lot 8 spans a gross of 1.17 acres of land.

29. The proper construction of RSD.3(1) is said to be a pivotal point in this appeal. The contentious portion of the policy is: "*The following forms of residential development may be permitted* [my emphasis] *in those areas designated Residential 1 or Residential 2 in accordance with the following provisions…"*

30. The issue before me was whether RSD.3(1) could be correctly construed as meaning that the specified forms of residential development must be allowed in the designated areas once it is determined that they accord with the qualifications outlined therein. This is what Mr. Sanderson invited this Court to find.

31. So, the crucial question is whether the Minister has a general discretionary power to refuse permission, notwithstanding full compliance with the terms of RSD.3(1). More specifically, as it pertains to this case, does the Minister retain a discretion to refuse permission in circumstances where a significant and majority portion of the lot is encumbered by roadways and easements?

32. On its face, RSD.3(1) does not employ obligatory language. Looking to the plain and literal wording, the policy simply signifies the scope of what the Minister may permit to be

developed. Thus the question as to the existence of a general discretionary power belonging to the Minister must be resolved in the affirmative. Of course, this Court ought to be guided by the general legal principles settled by the UK Supreme Court in *Tesco Stores Limited v Dundee City Council* in considering whether that discretionary power was wrongly or unjustly exercised. In other words, did the Minister have a good reason to depart from the standard and publicly established approach outlined under RSD.3(1)?

33. Mr. Sanderson argued that even if the Minister did have such a power of discretion, he was wrong to allow the term "lot" to effectively be substituted for "lot size". Ms. Sadler-Best, however, suggested that this Court could find that this was a drafting error and that the intended meaning of the policy aligned more so with the term "lot size".

34. In the alternative, Ms. Sadler-Best pointed this Court to the Inspector's report wherein he accepted that Lot 8 qualified under the definition of "lot" under DEF. 73 but remained, for the most part, "functionally undevelopable". This, the Crown argued, qualified as a proper basis for the exercise of the Minister's discretion to refuse permission.

35. In my judgment, it would be presumptuous and far-reaching for this Court, as a matter of construction, to read the words "lot size" into RSD.3(1) in place of "lot". Both terms are defined under the Bermuda Plan and are distinguishable in substance and meaning. It then follows that this Court cannot uphold the Minister's reasoning that Lot 8 exceeded the maximum density of units and site coverage permitted for the Residential 2 zoned site. It did not. To this extent, the appeal must succeed as this finding was not a proper basis for the refusal of planning permission. However, that does not drawn an end to the matter.

36. I ought now to consider whether the Minister could have indeed exercised his power of discretion to refuse planning permission and whether in doing so, it was open to him to do so in accordance with the principles settled in *Tesco Stores Limited v Dundee City Council*.

37. At the risk of stating the obvious, to some degree each case is to be judged on its own peculiar facts, notwithstanding the need and importance of a generally uniform and consistent approach to these applications. However, in this case, as recognized from the outset of Mr. Sanderson's speech to this Court, Lot 8 is most unusually configured. Less than 40% of the lot is in fact developable. Against that factual background, I find that it was open to the Minister to consider the exercise of his discretionary powers to refuse permission on this basis and to further consider whether a refusal of permission would qualify as a good reason to depart from the general qualifications listed under RSD.3(1).

38. So, I would allow the appeal on Ground 1 and quash the Minister's refusal where it was grounded on his finding that Lot 8 exceeded the maximum density of units and site coverage

permitted. However, I remit this application to the Minister for his reconsideration of the application and for him to decide whether he wishes to exercise his discretionary power under RSD.3(1) and in accordance with the legal principles outlined herein.

Grounds b) - g)

39. It seems to me that in light of this decision, it is unnecessary for this Court to explore the merits of the remaining grounds of appeal.

Conclusion:

40. The Appeal is allowed on Ground 1 and the application is remitted to the Minister for his reconsideration.

41. Unless either party files a Form 31TC to be heard on the subject of costs, I make no order as to costs.

Wednesday 29 June 2022

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT