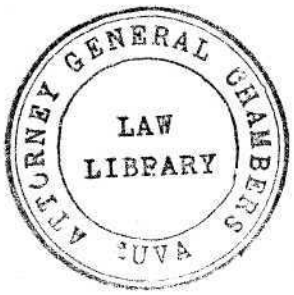
IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

JUDICIAL REVIEW NO. 14 OF 1996



Between:

STATE

v.

1. TAUZ KHAN
2. DIRECTOR OF TOWN & COUNTRY PLANNING
3. SUVA RURAL LOCAL AUTHORITY &
4. ATTORNEY GENERAL OF FIJI

Respondents

Ex-parte: JOYCE HEERAMAN, HENRY HOWARD & KALOLAINI HOWARD

Applicants

Mr. S. Chandra for the Applicants
Mr. M. Raza for the 1st Respondent
Mr. Y. Singh & Ms. M. Rakuita for the 2nd, 3rd and 4th Respondents

Date of Judgment: 7.9.05

JUDGMENT

The three Applicants have applied for judicial review under the provisions of **Order 53** of **The High Court Rules, 1988**, from the **decision** of the **Director of Town and Country Planning** (the '**DTCP**') to re-zone residential lots into industrial zones contrary to **section 22** of the **Town Planning Act, Cap. 139** (the '**Act**').

By consent the judicial review was converted into a writ action so that evidence on oath could be adduced through the parties and their witnesses particularly because there is a claim by the applicants for damages.

The Reliefs sought

The applicants seek relief as follows (as in the application):

(a) **Certiorari**

An order to remove the decision of 30th May 1996 of the second Respondent to rezone Lots 1 & 2 of the First Respondent from Residential B to Industrial and the same be quashed.

(b) **Declaration**

That the second Respondent has acted in breach of natural justice and/or abused his discretion and/or exceeded his jurisdiction.

(c) **Mandamus**

That the Minister of Housing and Urban Development be ordered to make a final decision on the appeal filed by the Applicants under section 5 of the Town Planning Act.

(d) **Injunction**

That the 1st Respondent immediately cease to construct any building or any development in the Lots 1 and 2 unless and until the Minister makes a final decision under Section 5 of the Town Planning Act and or upon further order of the Court.

(e) Damages

(f) Further Declaration or other relief as to this Honourable Court may seem just

(g) Costs

Grounds for Judicial Review

Very briefly the grounds for judicial review are as follows:

(a) The second respondent breached the rules of natural justice in that he did not give the applicants a fair hearing and was biased against the applicants.

(b) That the second respondent failed and or neglected to give any or any proper reasons for his decisions.

(c) The Minister failed to give any or any proper reasons for not exercising that right under section 5 of the Town and Country Planning Act.

(d) The Minister abused his powers under section 5 of the Town and Country Planning Act.

i) That it took into consideration irrelevant matters and;

ii) He did not take into consideration relevant matters and;

iii) He acted unreasonably, arbitrarily or in bad faith;

iv) He acted and or omitted to act in the breach of the Doctrine of Legitimate Expectation.

Chronological order of events

(1) Motion dated 5th August 1996 filed with this Judicial Review Action No. HBJ 14 of 1996.

(2) Interim injunction granted against Respondents on 9th August 1996 (see page 44).

(3) Interim injunction discharged on application by First Respondent on 29th of August 1996 (see page 136).

(4) Motion for Judicial Review filed on 6th day of September 1996 (see page 138).

(5) Submissions by applicants for leave for Judicial Review (see page 139).

(6) Summons filed by applicants for specific discovery on 22nd September 1998 (see page 145).

(7) Order obtained for specific discovery on 23rd October 1998 (see page 146).

(8) Affidavit Verifying List of Documents filed on 4th May 2001 (see page 147).

(9) Minutes of the Pre-Trial Conference filed on 23rd May 2001 (*later amended one filed on hearing date*) (see page 178).

This action first came before me in November 2000 and counsel were not ready to proceed to hearing until May 2001. After hearing, the last of the written submissions was filed in April 2002. This was a judicial review proceedings of some complexity.

Consideration of the application

Background facts

The applicants, **Joyce Heeraman, Henry Howard & Kalolaini Howard** initially sought judicial review of the decision of the Suva Rural Local Authority to allow Mr. Tauz Khan the 1st Respondent to rezone his property Title Nos. 22193 and 22194 to Industrial from Residential 'B'. The applicants sought and obtained an Interim Order by the High Court restraining the First Respondent from developing and constructing a building.

That the said Interim Order was discharged on the 29th of August 1996 and leave for Judicial Review was granted on the same day by the High Court. The matter started as a Judicial Review application but was converted into a Writ action.

The applicants rely upon sections 18, 19, 20, 21, 22, 23, 24 and 26 and the appeal provisions of section 5 of the **Town Planning Act Cap. 139** (the '**Act**').

The Applicants are the registered proprietors of Lots 3 and 4 and the first Respondent is the registered owner of Lot(s) 1 and 2 on DP 5482, along Ratu Dovi Road, Laucala Beach Estate. On 13 of July 1990, the Director of Town &

Country Planning (**DTCP**) received an application from **Tauz Khan** (1st Respondent (the '**TK**') for development permission under section 7 of the Act. Tauz Khan had applied to the DTCP on 13 of July 1990 to use Lot 2 DP 4244 on CT 8316 as a taxi base. The view of the adjoining owners were sought and on 22 of July 1990 a petition and an objection letter was received by the 3rd Respondent (the '**SRLA**') from concerned residents who objected to this application. Approval was granted on 30 August 1990 but was subject to certain conditions set by DTCP.

On the **16 of May 1991**, SRLA received a complaint from a **Mr. Alick Robinson** the previous proprietor of Lot 3 **now owned by the first applicant** that TK had constructed a new building next to his boundary. An inspection carried out on the site noted that the TK had contravened the conditions of the approval given on the use of the site. Hence his next application to renew planning permission to use his property as a taxi base was rejected; TK then applied to have Lots 1 and 2 re-zoned from Residential B to Commercial B but the application was refused on the basis of a Public Participation Exercise, which received strong objections from adjoining landowners. TK then applied to DTCP to re-zone lots 1 and 2 from Residential "B" to Special Use – Electronic Workshop under Schedule A provision 9 of the Act.

The Act stipulates that approval would only be given for such re-zoning subject to a public participation exercise. The public participation exercise was carried out and a report was prepared which recommended disapproving the application to re-zone. The DTCP approved the application subject to some conditions imposed on the type of activities allowed by TK on this re-zoning scheme. The SRLA had the responsibilities of enforcing any conditions set by DTCP.

The Act states further in **section 5** that in the event that people wish to **appeal** the decision of the Director of Town and Country Planning and/or local

town council, they can appeal the decision to the **Minister of Urban Development and Housing**. The applicants **appealed against the decision** of the DTCP Respondent to the **Minister who did not respond to the appeal**. They are now amongst other relief seeking an order of **mandamus to compel the Minister to respond to the appeal**.

The **issues** (four in number) for Court's determination are as follows which I will now consider:

Issue 1

Whether the decision of the DTCP and SRLA were in accordance with the Town Planning Act?

The DTCP is authorized by the Act to make decisions in relation to any building or re-zoning scheme. To make any decision, the said Respondent Authority may by virtue of **section 19** of the Act give provisional approval to the re-zoning subject to its own alteration and the provisional approval shall be publicly prescribed by regulations and the details shall be deposited with SRLA for inspection by interested persons. A public participation exercise was carried out by the SRLA and met with objections from concerned residents particularly the Applicants for this intended re-zoning and a letter written as follows to the Acting Director Town & Country Planning by a **Mr. K.N. Krishan** of the SRLA and dated 2 August 1995 made strong disapproval of this intended re-zoning; it was his recommendation that the application for re-zoning be disapproved:

> *"It is quite imperative that the neighbours specifically owner of Lots 3, 4, and 5 want to have a peaceful life without having to confront health hazards; however Lot 22 owner has a dairy shop and lives on top. Therefore the support for the proposal cannot be overemphasized since most of the supporters are businessmen. One of the areas which most of the neighbourhood will be affected would be traffic hazard. There could be no control of this and the serenity of the residential areas could have adverse effects, should this proposal is given approval."*

A **public participation exercise report** was also compiled by the DTCP and dated 24 May 1995 of which a **Mr. D.P. Singh** recommended the re-zoning. Mr. Singh wrote as follows that ... "*The Suva Rural Authority was requested to carry out a public participation exercise. During the exercise 10 residents were interviewed of which 6 were in favour of the proposed developments; 3 were against the proposal and one agreed only to taxi operation*".

The policy argument by TK was the creation of new jobs. Moreover Mr. Singh observed that the noise nuisance would be substantially minimized with the air-conditioned building but the Applicants gave evidence that the noise level is unbearable. Mr. Singh further states that the building would be in accordance with other building structures in the area but the applicants have also given evidence to the contrary in that the building has now blocked sunshine and the flow of air to the neighbourhood.

Findings

I find that the requirements of the Act were carried out in the sense that a public exercise was done in which objections from residents most likely to be affected by this intended re-zoning were recorded. However, it is not the intention of the Act to rest the decision of whether to re-zone or not entirely with the public participation exercise. In fact sections 20 and 21 of the Act gives occupiers of land to be affected by the scheme the right to object to the scheme and the local authority shall forward this to the SRLA together with a statement of opinion as to the merits of the objection. The SRLA must then make a decision that is fair and reasonable taking into consideration the procedures laid down in the regulations made for that purpose.

Section 22, 23 and **24** direct the DTCP to consider all objections and upon doing so may dismiss them or give final approval only after all the objections have been disposed off. The DTCP upon approving the scheme must make public

this approval for inspection. The SRLA mentions that the normal procedure for consideration of an application for re-zoning is set up by the Act.

Basically **section 7** requires the DTCP to work together with the local authority or SRLA who gives recommendation for rezoning. In terms of public objection, the DTCP must consider the interest of all parties concerned and it is clear from the evidence before me that **they took this into consideration** by placing specific conditions for this re-zoning scheme.

I find and hold that, after taking into account the testimonies of the DTCP and documentary evidence provided to this court that the DTCP had taken into consideration the public participation exercise to reach his decision. I find that he has **acted reasonably** upon the recommendation of the SRLA to approve the re-zoning of this area with reasonable conditions also attached. It is clear from the Act that the Director must consider all objections raised but it does not necessarily direct him to use the objections as a basis of determining the outcome of any re-zoning scheme.

However, while I feel that the requirements of the Act in terms of granting such re-zoning scheme was legitimate, someone failed to carry out their duties to oversee that the conditions imposed on TK was thoroughly followed. As such while the residents of Ratu Dovi Road may be benefiting from the special use purposes granted to TK, have had their lifestyles greatly affected by this re-zoning scheme. The SRLA was to have ensured the conditions set by the DTCP was met by TK. This court is aware that the SRLA has initiated prosecution action against TK, which has been suspended. But I also feel that the DTCP did not adequately act on numerous letters of complaints that the Applicants have made since 1990. This court has heard as to how the Applicants brought their grievances to the relevant authorities including the Town and Country Planning Office, the Suva Rural Local Authority, the Ombudsman's Office, the Fiji Police Office, the Minister of Urban Development and even the Prime Minister's office but nothing

much was done. Most of the protests raised by the Applicants had been about the illegal activities of TK on his land. It is rather unfortunate that such activities have been going on for sometime without any legal recourse, but the purpose of this case is not to determine the legality of activities carried out by TK but whether the processes and the decisions undertaken by the DTCP and SRLA are in accordance with the Act.

In 1995 the DTCP granted an approval for the re-zoning of lots 1 and 2. But the authority granted the re-zoning for special electronics alone and "*no other uses to be permitted from the site but more than just electronic*". Moreover "*that in the event that the operation of the electronic shop would adversely affect peace and quite enjoyment of nearby residents it shall be the duty of the owner to immediately abate the nuisance*". The DTCP is authorized to approve the re-zoning scheme and he did so with conditions of which it was the SRLA's duty to ensure that the conditions are observed by TK. The DTCP has informed this court that the "public participation exercise obtaining the views of adjoining land owners was carried out and a report prepared on whether or not to approve the application". He said that after consideration '**of all information available to us**', we approved TK's application to re-zone his lots from Residential B to Special Use.

The facts of this case are that the 1st initial application for re-zoning was rejected because it was to be for commercial purpose, which is forbidden by the Act. However the second application was for 'special use' defined as "in the particular use only". This was the erection of a security system building under the name Safeway Electronics. Evidence was given in this court that the building complied with building regulations. Approval for the building and re-zoning was given by the DTCP and valuer Mr. Babu Lal confirmed that the building met the requirements of the Town and Country Planning Procedures. In fact the sub-committee headed by the Director and made up of the Head of Sections gives the final approval and has the final say on such matters. As far as this court is

concerned, the **decisions of the DTCP were in accordance with the provisions of the Act**.

Appeal provision – section 5

While the Applicants may have been aggrieved by the decision of DTCP to re-zone the land, **section 5** of the Act directs them to exhaust the procedures set out therein and that is basically **to appeal** that decision to the Minister of Urban Development within 28 days of notification of the decision to the appellants.

The Applicants had **filed the relevant appeal to the Minister who has not responded**. The whole issue may have been settled had the Minister responded to the appeal as required by the Act if he felt that the decision of DTCP or SRLA is wrong. The court acknowledges that some years have lapsed since this case was first initiated and the building has been completed. Traffic has increased in this area regardless of the said building and the commercial activities in the area have also increased. While these factors do not have any bearing on this decision, they indicate that changing times have also brought about an increase in activities, which includes traffic, noise and pollution even in residential areas. However, it is still the duty of relevant authorities to ensure that procedures set out by statute are implemented and as far as the appeal is concerned it should have been heard by the Minister.

The Applicants argue that the **DTCP had been biased** against them but they have not produced any evidence to prove this allegation. They argue that they have the right to a **fair hearing**, but the Act states that the final decision still vests in the Director who had given ample reasons as to the approved re-zoning scheme. While the Applicants submit that the Public Participation exercise was not considered together with the recommendation of the SRLA, the court feels that DTCP took such considerations into account as evident in his granting the re-zoning scheme subject to specific conditions imposed. The reason for imposing

such conditions is to minimize the potential problem anticipated by the Applicants that might arise through this intended re-zoning. **Whether the decision of DTCP was right or wrong it is a matter for the Minister** to consider on appeal as required of him under the Act and not for the Courts. The DTCP argues that he stands by his decision as one who is authorized by statute to make and if it was a wrong decision, then it was one, which the Minister had to decide upon under section 5 of the Act.

The Minister's decision on appeal in the matter at issue '**shall be final**', (s5). Here he has not dealt with the appeal.

It is a well-established principle of law that the courts do not interfere with decisions of statutory bodies unless a decision made has been either in excess or lack of jurisdiction. In **Associated Provincial Picture Houses Limited v Wednesbury Corporation (1948) 1 KB (C.A) 233 at 234 Lord Greene M.R.** said:

> ***"The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which parliament has confided in them."***

I find that the DTCP has not acted ultra vires in carrying out the powers vested on him by statute. The **order for certiorari is rejected** as DCTP did not re-zone the said land from Residential to Commercial rather for special use which is accepted by the Act and that he **did not breach the principles of natural justice**.

Issue 2

Whether damages can be awarded against the State in the event it is held that the DTCP's decision was wrong?

The DTCP is a servant of the State and his authority is derived through the Act. This power allows the Director in his capacity to make decisions that he feels are necessary for the purposes of building, rezoning and other types of schemes associated with development. The DTCP himself testified that the final decision on any scheme is determined by a board which he chairs. And therefore if the DCTP commits an act, which is beyond or falls short of the powers prescribed by the Act, he may be liable in negligence if damage is caused as a result. However, as stated in issue 1 above, the decision of DTCP was one in accordance with the Act, which simply states that he must conduct a public participation exercise, and a final decision was made taking into consideration that public exercise together with recommendations by the SRLA.

On the evidence before me, I find that in law DCTP's decision was arrived at by following the proper procedure; and if it was otherwise then it is for the Minister to decide on appeal. As required by the Act an appeal has been lodged with the Minister but he has not dealt with it as no response has been sent to the applicants.

In any case in a judicial review application, it is not the province of this Court to delve into the merits of a case. The Court is merely concerned with the procedure by which the decision has been reached. **I do not find any procedural impropriety** in this case and the decision is **not Wednesbury unreasonable**.

Grant of Mandamus

This leads me to consider the question of **mandamus**. This is a relief sought by the applicants and they are quite justified in doing so in all the circumstances of this case.

It was the bounden duty of the Minister to deal with the appeal as this is a statutory requirement. There is nothing in evidence to show why he had fallen down on his statutory duty.

Section 5 provides that his decision 'shall be final' on appeal. Had he considered the appeal, it would have disposed off the matter altogether.

In these circumstances I cannot help but remark that although the decision has been made by DTCP, it does not finally dispose off the matter. The decision on appeal is still awaited. But because the Minister has been sitting on the appeal and has not considered it the Court has the **power to issue mandamus** to make him hear the appeal in appropriate cases.

The applicants had the **alternative remedy** of appealing to the Minister which they have done. In fact this should be exhausted by the applicants before anything further is done.

It would appear on the facts of this case that the application to grant certiorari is premature for the decision of DTCP in so far as it goes has been arrived at by following the procedure laid down in the Act but the alternative remedy of appeal should be exhausted before the Court will interfere by way of judicial review, but then we should not ignore the fact that the Minister's decision 'shall be final'. However, in this case 'mandamus' can still be granted although certiorari is refused. This does not mean that the DTCP's decision is defective.

What is the requirement when applying for mandamus, that is, is there a requirement of '**demand and refusal**'?

It would appear in this case that there has not been a demand and refusal but the refusal or silence to perform the duty can be implied **from conduct**. The

following is what is stated on this aspect in the Book **Administrative Law by H.W.R. Wade** 5th Ed. at 640 and it is pertinent to the issue before me:

> *"It has been said to be an 'imperative rule' that an applicant for mandamus must have first made an express demand to the defaulting authority, calling upon it to perform its duty, and that the authority must have refused. But these formalities are usually fulfilled by the conduct of the parties prior to the application, and refusal to perform the duty is readily implied from conduct. The substantial requirement is that the public authority should have been clearly informed as to what the applicant expected it to do, so that it might decide as its own option whether to act or not.*
>
> *The court does not insist upon this condition where it is unsuitable. As Channell J. said in R. v. Hanley Revising Barrister [1912] 3 K.B. 518 at 531:*
>
> > *"The requirement that before the court will issue a mandamus there must be demand to perform the act sought to be enforced and a refusal to perform it is a very useful one, but it cannot be applicable to all possible cases. Obviously it cannot apply where a person has by inadvertence omitted to do some act which he was under a duty to do and where the time which he can do it has passed."*

Issue 3

Whether the properties of the Applicants have been affected adversely by the decision of the 2nd Respondent?

The commercial and industrial activities which are carried on by TK are of burglar alarms. The Applicants submit that the building constructed by TK is causing a lot of noise, pollution, and a lot of rubbish is left beside the 1st Applicant's fence. Dust, fumes from paints, and welding also continue to create problems for them. The 1st Applicant says that she could buy property anywhere she wanted. She bought her house along Rt Dovi Road knowing that beside her was a commercial and industrial area with businesses such as Lees, 7 to 7, Shah's

fruit and vegetables. RB Patel and Vinod Patel and there was likelihood of attracting further developments.

It is in evidence that the 1st applicant purchased the property from the said Alick Robinson and by that time the latter had already complained about this development. So it is clear that she went about purchasing the property with her eyes open. If the property value has been affected because of the development alone it cannot be placed on the door steps of the respondents. She can have no claim on anyone from any alleged damage.

Evidence has been given that the Applicants had their property valued by Mr. Vidya Narayan who concluded that the value of Lots 1 and 2 on DP 5482 owned by TK has been increased by 25% but the properties adjoining these Lots have devalued. He details the alleged effects on the Applicants' land as a result of the 1st Respondent's building and lists amongst the depreciations affecting the said property thus:

a) properties of applicants damaged by the building

b) morning sunshine and air is disturbed – 30% remains under shade.

c) Damp and moistness affects because of the shade

d) 75% sealed concrete on 1st Respondent's property giving out more heat and storm water runs on the applicant's properties.

The **Respondents'** counsel submitted that in this case, compensation providing for payment in respect of 'injurious affection', usually specifies a number of circumstances under which the right to receive payment is excluded for example '*where the injurious affection results from a provision in the scheme, if that provision or one substantially to the same effect was already in force, or could have been made and enforced without the liability of any authority to pay compensation*'. (From **Land Valuation and Compensation in Australia**, Chapter 27 by Rost and Collins).

Counsel further submits that in the '**zoning of land**', compensation need not be paid for one of the following reasons:

1. *a specific provision in the law of a State excluding compensation for the effect of zoning, or*

2. *the fact that provisions having the same or substantially the same effect as those under the zoning were already in force, or could have been made and enforced without the liability of any authority to pay compensation. (**Land Valuation and Compensation in Australia, Chapter 27 by Rost and Collins**).*

On the evidence before me I hold that the 2nd Respondent's decision is not the cause of the alleged depreciation to the Applicants' property as the decision made by him was one authorized by sections 19 to 24 of the Act. Although the Act gives the power to the third Respondent to make recommendations to the 2nd Respondent, but in the end the decision rests with the 2nd Respondent.

Compensation or damages will not be ordered against the 2nd Respondent for reasons already mentioned.

Under these circumstances TK cannot be blamed for any alleged damage to applicants' property as he has been successful in his application for rezoning.

Therefore, the Respondents are not liable to pay damages which may have been caused to the applicants' properties as a consequence of the rezoning in favour of Tauz Khan.

Issue 4

If the said 3rd issue is answered in the affirmative, then what is the quantum of the applicants' loss?

The applicants have not suffered damage, if any, through the actions of the respondents. As far as the second respondent is concerned, he has performed his functions in accordance with the provisions of the Act. If the applicants are unhappy with R2's decision they can appeal to the Minister which they have done but no response has been received by the applicants.

This application for judicial review is actually against the decision of R2 who is the Director of Town and Country Planning.

In these circumstances and in view of my findings on Issues 1 to 3, the applicants are not entitled to any damages, hence no question of quantum arises on this issue (No. 4).

Conclusion

To sum up, for the reasons given hereabove the relief sought for an order for **certiorari** is refused but an order for **mandamus** is granted as the Minister concerned has not dealt with the appeal herein which is a statutory duty that he must perform.

Furthermore it has not been established that the then Director of Country Planning (DTCP) acted ultra vires in the performance of his duties.

I find that there was neither any bias against the applicants on the part of the DTCP nor was there a breach of natural justice or abuse of discretion.

On all other grounds raised by the applicants the application fails.

On the question of damages the applicants are not entitled to any in these proceedings for any alleged damage suffered by them as a result of the decision on the part of the DTCP.

The building that has been constructed by **Tauz Khan** had the approval of all relevant authorities. Hence the bringing of this action should not in any way affect its construction.

However, if the first respondent has not complied with the terms and conditions of its use for a specific purpose then it is for the Suva Rural Local Authority to look into it and decide on an appropriate action against Tauz Khan.

Order

It is ordered that **mandamus** issue against the Minister for Housing and Urban Development to hear the appeal herein lodged by the applicants and arrive at a decision without any further delay and communicate same to the applicants.

It is further ordered that the **action** against the Respondents be **dismissed**. However, I award costs against the fourth respondent the sum of $500.00 to be paid to applicants' solicitors within 21 days for the Minister for Town and Country Planning's inaction in performing his statutory duty which gave rise to present proceedings.

D. Pathik

Judge

At Suva

7 September 2005