

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 394 OF 1989

IN THE MATTER OF THE TOWN AND COUNTRY
PLANNING ACT

A N D

IN THE MATTER OF THE TOWN AND COUNTRY
PLANNING (KINGSTON) DEVELOPMENT
ORDER 1966

A N D

IN THE MATTER of premises known as No. 26
and 28 Lady Musgrave Road, Saint Andrew,
registered at Volume 1021 Folio 320 and
Volume 1091 Folio 95 respectively, of the
Registrar Book of Titles.

BETWEEN	ROWLAND CURRY	
A N D	SYBIL CURRY	
A N D	SPIC "N" SPAN (DRY CLEANERS) LIMITED	PLAINTIFFS
A N D	THE TOWN AND COUNTRY PLANNING AUTHORITY	FIRST DEFENDANT
A N D	THE ATTORNEY GENERAL FOR JAMAICA	SECOND DEFENDANT

Mrs. Hudson-Phillips Q.C., instructed by Mr. Adolph Edwards for the Plaintiffs.

Messrs. Patrick Foster and L. Pusey instructed by the Director of State
Proceedings for the Defendants.

March 1, 2, 1990 and October 5, 1990.

SMITH, J:

By Originating Summons dated 3th December, 1989, as amended, the
plaintiffs seek:

A. The determination by the Court of the following questions, namely:

1. Did the publication of the Town and Country Planning (Kingston)
Development Order 1965 in the issues of the "Daily Gleaner" of
the 21st May, 1965, 28th May, 1965 and 4th June, 1965, satisfy
the provisions of section 5(3) of the Town and Country Planning
Act and in particular paragraph (b) thereof?

2. (not pursued)
3. (not pursued)
4. Is the Town and Country Planning (Kingston) Development Order, 1966 valid and of effect?

B. The following relief, namely:

1. A Declaration that -
 - (a) the aforementioned notice did not comply with the provisions of section 5 (3) of the Town and Country Planning Act;
 - (b)
 - (c) by reason of the matters set out in paragraph (a) hereof the Town and Country Planning (Kingston) Development Order 1966 is illegal, null and void and of no effect.
2. An Order that the Town and Country Planning (Kingston) Development Order 1966 be rescinded.

The first and second plaintiffs reside at, and are the registered proprietors of premises known as No. 26 Lady Musgrave Road, Kingston 5, in the parish of St. Andrew. These premises were acquired by them on the 13th April, 1983. They are the Directors of Spic "n" Span (Dry Cleaners) Limited, the third plaintiff herein. The third plaintiff is the registered proprietor of premises No. 28 Lady Musgrave Road in the parish of St. Andrew which were acquired on the 13th April, 1973.

Number 26 Lady Musgrave Road is situated at the corner of Lady Musgrave Road and Downer Avenue and has been used as home and business place by the first and second plaintiffs since 1963, first as tenants and since 1983 as owners. The business carried on there is that of dry cleaners as well as shampooing of carpets and upholstered furniture under the trade name of Spic "n" Span Dry Cleaners.

Number 28 is used in conjunction with No. 26 for the purposes of the plaintiffs' business.

In May and June of 1965 the Town and Country Planning (Kingston Provisional Development Order) Notice 1965 was published in the Daily Gleaner and was duly gazetted.

This provisional Order was confirmed with modifications and incorporated in the Town and Country Planning (Kingston) Development Order 1966.

This Order provides for a road reservation of one hundred feet for Lady Musgrave Road which road is presently fifty feet wide. It also provides for a road reservation of 100 ft. for Downer Avenue which was then and is now thirty ft. wide.

The plaintiffs claim that the proposed road and avenue would cut through the centre of their premises No. 26 Lady Musgrave Road and would thus necessitate the destruction of the buildings thereon.

They swore that at the time when No. 22 and No. 26 were acquired in 1973 and 1983 respectively they were not aware of the existence of the aforementioned road reservations. The Certificates of Title registered at Volume 1021 Folio 320 and Volume 1091 Folio 95 respectively do not contain any notice of the said reservations.

The heart of the plaintiffs' contention is that the Notice of the preparation of the Provisional Development Order as published, did not specify the locality to which the said Order related as is required by section 5 (3)(b) of the Town and Country Planning Act. In paragraph 12 of their affidavit dated 8th December, 1989, they swore "we verily believe that proper and adequate notice of the said Provisional Development Order was not given to the persons who were likely to be affected by it."

They aver that they have tried to sell the premises and business but have not been able to obtain a fair market value for them because of the effect of the road reservations.

Point taken in limine:

Mr. Foster for the defendants submitted that the plaintiffs had no locus standi. He argued that remedies provided by a court of law to a litigant must bear a direct relationship to his rights. A declaratory judgment, he submitted, may only be granted if the court is satisfied that the plaintiffs' legal right has been infringed or is likely to be infringed.

He refers to the affidavit of the plaintiffs, to the provisions of sections 5 (3) and 6(1) and (2) of the Town and Country Act and submitted that the plaintiffs have not adduced evidence to show that at the material time they were interested persons within the meaning of section 6(3) of the afore-said Act.

Mrs. Hudson-Phillips on the other hand contended that one must distinguish between the ability of a person to object in 1966 to the terms of the order and the right of a person who has without notice been affected by the failure of the authority to comply with what is a mandatory provision of the Act to seek a declaratory relief to protect his existing rights.

She agreed that the plaintiffs are not "interested persons" within the meaning of section 6(3) of the Act. What they are claiming, she contended, is that because of the failure of the authority to comply with the mandatory provisions of the Act they, unaware of the road reservations, acquired premises which of necessity will have to be destroyed. The plaintiffs, she stressed, have a legal right to the property and it is in the interest of protecting their right to that property that they seek a declaratory relief and consequential order.

When asked to specify the right which the plaintiffs claim is affected Mrs. Hudson-Phillips said "the right which the plaintiffs now seek to protect is the right to maintain the ownership of the property and to be able to dispose of it freely without being affected by the provisions of an order which is void by virtue of the non-compliance with the provisions of the Town and Country Planning Act." To another question she replied "The right would arise when the plaintiffs became aware of the breach."

In his reply Mr. Foster submitted that it is not every citizen who is affected by the provision of the order who has the right to question its validity. A citizen whose house or land has been zoned for commercial or residential use is affected by the order but he must go beyond that to show his legal rights have been affected. To support his contention he cited Gouriet v. Union of Post Office Workers and others (1977) 3 W.L.R. 300.

He submitted that the plaintiffs have not asserted or shown that they have a private right that has been infringed. At the end of these submissions I intimated that I would like to hear the case on its merits as injustice may be caused by treating standing as a preliminary issue.

Have the plaintiffs sufficient locus standi?

It is accepted on both sides that an applicant for a declaration need not show a subsisting cause of action or a right to some other relief but must show that some legal right of his is in issue. If the applicant had no personal legal right in issue he could only succeed if the Attorney General would assist him in instituting a relator action.

The real question therefore is, have the plaintiffs shown that they have a personal legal right which is at stake?

To answer this question we must first look at the relevant statutory provisions. The relevant Act is the Town and Country Planning Act. Section 5(1) reads:

" The Authority may after consultation with any local authority concerned prepare so many or such provisional development orders as the Authority may consider necessary in relation to any land, in any urban or rural area, whether there are or are not building thereon, with the general object of controlling the development of the land comprised in the area to which the respective order applies, and with a view to securing proper sanitary conditions and conveniences and the co-ordination of roads and public services, protecting and extending the amenities, and conserving and developing the resources, of such area".

2.

Section 5(3) provides:

" So soon as may be after the preparation of any provisional development order, the Authority shall cause to be published in the Gazette and at intervals of not less than seven nor more than ten days in three issues of a local daily newspaper, a notice---

- (a) specifying that the Authority has prepared a provisional development order;
- (b) specifying the locality to which the order relates;

- (c) specifying some place within such locality or as near thereto as may be convenient where the provisional development order and the plan or statements relating thereto may be inspected without fee during such period (not being less than fourteen days after the last publication of the notice in a local daily newspaper) as may be specified in such days and at such times as may be so specified;
- (d) specifying the name and address of some person from whom copies of the provisional development order and of the plan or statements relating thereto may be obtained on payment of a reasonable fee specified in such notice; and
- (e) stating that provision is made by section 6 for the making of objections to the provisional development order".

Section 6(1) provides as follows:

" Subject to the provisions of this section every interested person may object to any provisional development order upon the ground that such order is for any reason impractical or unnecessary or that it is against the interests of the economic welfare of the locality to which the provisional development order relates.

2. Every person who desires to object to any provisional development order under this section shall give notice in writing to the Authority within fourteen days after the expiration of the period referred to in paragraph (c) of subsection (3) of section 5 of the ground of his objection and of the facts and reasons upon which he relies in support of such objection.

3. In this section "interested person" means--

- (a) any local authority concerned;
- (b) any person in whom is vested any freehold estate in any land within the locality to which the provisional development order relates;
- (c) any person in whom is vested any term of years in any land in such locality, the unexpired portion of which on the day on which such objection is made is not less than three years, or who holds an option to renew such lease for a period of not less than three years;
- (d)

The Plaintiffs seek to challenge the validity of the Town and Country Planning (Kingston Development Order) Notice 1965 as published in the issues of the "Daily Gleaner". This in fact is a notice of the preparation of the provisional development order. And this provisional order was confirmed by the Minister and became the Town and Country Planning (Kingston) Development Order 1966.

Under section 6(1) "interested person" may object to the provisional order on the ground that it is impractical or unnecessary or that it is against the interests of the economic welfare of the particular locality.

It is clear and indeed is conceded by Mrs. Hudson-Phillips that the plaintiffs' application cannot be founded on this statutory objection.

It means therefore that the plaintiffs must depend upon the inherent powers of the court at common law. The court may declare the notice published by the Authority ultra vires and void if for example the Authority neglected a mandatory requirement or acted in bad faith or in breach of natural justice.

This indeed is the gravamen of Mrs. Hudson-Phillips' submission in this regard. As stated before the plaintiffs are challenging the validity of the Notice. Can they? Now the purpose of the Notice is to afford persons whose land or premises would be affected by the Order an opportunity to object to it. This ordinary right to object to the provisional order must therefore be restricted to persons who at the time of the publication of the notice had a sufficient interest in the land or premises affected. The plaintiffs must be in a position to show that by virtue of the alleged misdescription of the locality in the notice they who would have wished to object were not informed of their opportunity to do so.

As said before the notice under section 5(3) is directed to interested persons within the meaning of the Act. It allows them to be aware of the existence of the provisional order and informs them that provision is made for the making of objection to the said order - section 5(3) (a).

It is interesting to note paragraph 12 of the affidavit of the First and Second plaintiffs. It reads:

" That the said notice as published did not specify the locality to which the aforementioned Order related, as is required by section 5(3) (b) of the Town and Country Planning Act and we verily believe that proper and adequate notice of the said Provisional Development Order was not given to the persons who were likely to be affected by it. (Emphasis supplied)

There is nothing in this or any of the Plaintiffs' affidavits to suggest that they or the Third plaintiff were persons who were likely to be affected. There seems to be in this paragraph an implicit admission by the plaintiffs that at the material time their interests were not affected by what had been done.

Indeed Mrs. Hudson-Phillips for the plaintiffs stated that the legal right which they seek to protect only arose when they knew of the alleged breach. There is no evidence as to when they became aware of the breach but in paragraph 10 of their affidavit they stated that at the time when they purchased the premises they did not know of the existence of the road reservations hereinbefore referred to. It should be remembered that No. 28 was purchased in 1973 and No.26 in 1963.

Mrs. Hudson-Phillips contended that "the plaintiffs have an immediate personal interest in the performance of a public duty because by reason of the failure to perform that duty in the manner specified in the Act they (the plaintiffs) acquired property which is about to become worthless".

There is no evidence to support this contention. The alleged defect in the notice had nothing to do with the plaintiffs' decision to acquire the aforesaid premises. As Mr. Foster for the defendants, submitted, there is a correlation between rights and remedies. Notice under the Act would confer rights only on interested persons or persons who were likely to be affected by the order. Thus if there were any defect in the notice only those persons would have a right to obtain a remedy.

There is no evidence before me that any of the plaintiffs was interested persons at the material time, it would follow therefore that there is no basis for the plaintiffs to allege that a breach of their rights was occasioned by the failure of the Authority to specify the locality in the notice. The plaintiffs cannot therefore challenge the Town and Country Planning (Kingston) Development Order, 1966, on the basis of the invalidity of the aforesaid notice.

The question of its validity must be based on other legal grounds. I therefore hold that the plaintiffs do not have a sufficient standing.

The substantive arguments:

What follows is based on the assumption that the plaintiffs have sufficient standing for obtaining the remedies sought, in other words it is assumed that their legal right - viz. the right to maintain property and to dispose of it freely is at stake.

The plaintiffs' main contention is that paragraphs a - e of subsection 3 of section 5 are mandatory and that they ought consequently to be strictly complied with.

Mrs. Hudson-Phillips for the plaintiffs submitted that the (1965) notice published in the Daily Gleaner did not comply with section 5 (3) (b) of the Act in that it did not specify the locality to which the order relates. The notice is reproduced hereunder.

TOWN AND COUNTRY PLANNING LAW(LAW 42 OF 1957)

The Town and Country Planning (Kingston Development Order) Notice, 1965.

Pursuant to the provisions of section 5 (3) of the Town and Country Planning Law, 1957, the following Notice is hereby given -

This Notice may be cited as the Town and Country Planning (Kingston Development Order) Notice 1965.

The Town and Country Planning Authority has prepared a Provisional Development Order for Kingston as shown on the map accompanying the Order.

The Provisional Development Order and the plans and statements relating thereto may be inspected without fee at the following places during the period commencing on the 20th May, 1965, and ending on the 1st July 1965, between the hours of 9.00 a.m. and 4.00 p.m. on Mondays to Fridays (inclusive) and 9.00 a.m. to 12.30 p.m. on Saturdays:-

(a) The Office of the Kingston & St. Andrew Corporation

(b) The Town Planning Department, 1 Manhattan Road, Kingston 5

(c) The Library at Tom Redcan Avenue.

Copies of the Provisional Development Order with plans and statements relating thereto may be obtained from the Government Town Planner, whose address is, 1 Manhattan Road, Cross Roads, Kingston 5, or the Government Printer, Duke Street, Kingston, on payment of a fee of Five Shillings (5/-) for each copy.

Provision is made by section 6 of the Town and Country Planning Law, 1957, for the making of objections to the Provisional Development Order (to be submitted to the Government Town Planner, by the 15th July, 1965).

Dated at Cross Roads, this 20th day of May, 1965.

G. C. HODGES
GOVERNMENT TOWN PLANNER
TOWN AND COUNTRY PLANNING AUTHORITY

Counsel for the plaintiffs argued that "the necessity for specifying the locality to which the order relates means that the authority must specify each and every street or avenue which is affected by the order so that persons who are resident or who are owners or have a right or interest in property to which the order relates would be properly put on notice as to its effect."

"If on the other hand," she continues "all the paragraph requires the authority to do is to specify the broad area which comprises the streets or avenues to which the order relates, it is submitted that the provision has not been complied with in so far as the order affects streets situated in the parish of St. Andrew and the order merely refers to Kingston.

Persons in St. Andrew, she urged, "would not be put on notice that they were likely to be affected by it."

The first part of this contention, in my view, clearly has no merit. It would be unreasonable to expect that the published notice would contain all the names of streets and avenues affected in light of section 5(3) (c), which requires the notice to specify "some place within such locality or as near thereto (emphasis mine) as may be convenient, where the Provisional Development Order and the plan or statements relating thereto may be inspected without fee....."

"Such locality" in paragraph (c) clearly refers to the "locality" to which the order relates in paragraph (b).

It is crystal clear that paragraph (b) only requires the authority to specify in the notice the broad area which comprises the streets, road and avenues to which the order relates and not to specify in the notice the names of such streets, roads and avenues. It is the Development Order which is required to specify and define the area to which it relates - section 10 (1). To be fair to counsel for the plaintiffs I must state that I apprehend that she was not placing much reliance on this part of her submission.

Let us now turn to the other limb of counsel's submission. As I understand it, the burden of this submission is that the Notice should have specified the locality as "Kingston and St. Andrew" and not "Kingston" alone. In not so doing counsel argued that the Authority failed to comply with section 5(3) (b) of the Act.

Mr. Foster for the defendants contended that based on the common usage of the word "Kingston" in the context of the provision of the Act the order intended to encompass the Kingston urban area which is not necessarily confined to the parish of Kingstor. He argued that it is commonly known that the urban sprawl known as Kingston extends well beyond the parish boundaries of Kingston.

It might be helpful to look at section 2 - the definition section, to see how the parishes of Kingston and St. Andrew are dealt with in terms of "locality". This section provides that:

In this Act -

.....

" 'Local authority' means -

- (a) in relation to the parishes of Kingston and St. Andrew, the Council of the Kingston and St. Andrew Corporation as constituted under the Kingston and St. Andrew Corporation Act;
- (b) in relation to any other parish, the Parish Council of such parish;

'Local planning authority' means as respects any area in the parishes of Kingston and St. Andrew, the Council of the Kingston and St. Andrew Corporation; and as respects any area in any other parish the Parish Council of such parish".

It seems to me that it is reasonable to conclude that for the purpose of the Town and Country Planning Act the parishes of Kingston and St. Andrew are grouped together.

Section 5(3) (b) supra requires the notice to specify the locality to which the order relates. The notice states that the Authority has prepared a Provisional Development Order for Kingston as shown on the map accompanying the Order. The map was not exhibited. The notice, as is required, also states that the Provisional Development Order may be inspected without fee at certain named locations.

The Order, at page 7, states that "the intention of this Order is to make provision for the orderly and progressive development of that portion of the Corporate Area of Kingston and St. Andrew as described in the First Schedule".

The First Schedule of the Order defined the Kingston Development Area so include places in the parishes of Kingston and St. Andrew i.e. in the corporate area. Pages 11 - 14 contain a "Schedule of road width reservation". In this schedule the names of streets, roads and avenues affected are listed. I may observe here that appearing on this list are Downer Avenue (from Lady Musgrave Road to Old Hope Road) and Lady Musgrave Road (from Trafalgar Road to Downer Avenue and from Trafalgar Road to Hope Road).

Thus it is obvious that by the use of the word "Kingston" in the notice the Authority meant the corporate area and was not confining itself to the parochial boundaries of Kingston.

I agree with Mr. Foster that this is consistent with the common usage of the word 'Kingston'. This is too notorious to be the subject of serious dispute. Indeed the evidence before me is that the publication of the Town and Country Planning (Kingston) Provisional Development Order Notice (1965) and the Provisional Development Order relating thereto received extensive publicity and was the subject of considerable public debate in the media. A large number of objections were made to the Provisional Development Order by interested persons many of whom were residing in the parish of St. Andrew (see affidavit of Mrs. Bloussa Samuels the Government Town Planner).

In light of the above I am driven to the conclusion that reasonable persons would know that the reference to 'Kingston' in the notice is a reference to the metropolitan area which encompasses the parish of Kingston and the urban areas of St. Andrew. I am thus inclined to think that section 5 (3) (b) has been complied with.

Finally it should be remembered that the declaratory remedy sought is discretionary in nature. A discretion must of course be exercised in accordance with principle. Even if I had found in favour of the plaintiffs, I would not be inclined to grant any relief in this case for reasons which I will now state.

The Act, section 6, provides that objection should be made within 14 days after the 14 day period given for inspection of the Provisional Order. Thereafter the Provisional Order may be approved by the Minister - section 7 (1). Clearly the main object is to make it safe for public money to be spent on the development of roads etc. without the danger that the Order acquiring the land might be later declared null and void. It is against this background that the court must consider this very late application by the plaintiffs. The plaintiffs evidence is that at the time when they acquired

the premises 26 and 28 Lady Musgrave Road i.e. in 1983 and 1973 respectively, they did not know of the existence of the road reservations. The premises first acquired were acquired some eight years after the notice of the order was published and gazetted.

I find as a fact that the plaintiffs knew that there was a road reservation which affected 28 Lady Musgrave Road from as far back as 1972. This finding is based on a letter dated 6th October, 1972, from the City Engineer to the Third Plaintiff. This letter was received by the Third plaintiff in response to an application for change of use of No. 28 Lady Musgrave Road. The plaintiff was informed that the application was approved on the condition.

" That no future development take place which would conflict with the road alignment which affects the property".

It is interesting to note that the abovementioned application for change of use was made on a form headed "Town and Country Planning Law 1957, Kington Development Order".

I find as a fact that the plaintiffs knew or ought reasonably to have known at the times when they purchased premises 26 and 28 that road reservations contained in the Kington Development Order affected those premises.

The plaintiffs delayed until 1989 to file their Originating Summons and there is no explanation for this inordinate delay.

Another factor to be considered in the exercise of the court's discretion would be the prejudice to the plaintiffs, if any, occasioned by the non-compliance on the one hand and the public inconvenience that would result if the notice and consequently the order were invalidated because of non-compliance with the statutory provision on the other hand.

The plaintiffs could not and did not object to the notice by virtue of section 6 of the Act. The real thrust of their complaint appears at paragraph 6 of the First plaintiff's affidavit dated 26th February 1990.

This paragraph reads:

" That had all or one or other of the plaintiffs been aware of the effect of the Development Order for Kingston on Nos. 26 and 28 Lady Musgrave Road we would not have purchased same in 1983 and 1973 respectively".

As the purpose of the Notice complained of was to afford interested persons the opportunity to object to the Provisional Development Order only on grounds specified in section 6(1) of the Act it is difficult for the plaintiffs' to argue that the alleged defect in the notice is the sine qua non of their complaint at paragraph 6. The plaintiffs have not really been prejudiced by the alleged non-compliance.

I would venture to say that the plaintiffs have themselves to blame for not being aware of the "effect of the Development Order for Kingston" on their premises. Section 7(2) and (3) of the Act provides:

- " (2) Where the Minister is satisfied that the implementation of any provisional development order is likely to be in the public interest he may by notification published in the Gazette confirm it with or without modification and thereupon such order with or without modification shall come into operation as a confirmed development order.
- (3) Every notification under subsection (2) shall also be published in a local daily newspaper at least once in each of two successive weeks".

The Provisional Order in question was confirmed (the confirmed Order was exhibited in Court) and there is no complaint about the validity of the confirmed development order. All the world is fixed with constructive notice of this order. The plaintiffs' contention at paragraph 6 is untenable. The non-compliance with section 5(3)(b) has not really prejudiced them.

On the other hand it cannot be gainsaid that the granting of the relief sought would cause great public inconvenience. In her supplementary affidavit the Government Town Planner states that the Town and Country Planning (Kingston) Development Order governs and controls the physical development of the urban areas of Kingston and St. Andrew and that this has been so for the past twenty-five years.

She listed six main roads in the corporate area which had been widened in accordance with the provisions of the said order. To invalidate

the order would, to say the least, create chaos in the corporate area.

In Montreal Street Railway Corporation v. Mormandin [1917] A.C.

170 at 175, Sir Arthur Channel who delivered the judgment of their Lordships said:

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience and at the same time would not promote the main object of the legislature it has been the practice to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done".

This principle in my view would be applicable in the circumstances of this case.

For the above reasons, even if the plaintiffs' arguments as to non-compliance with section 5(3) were upheld, I would not be inclined to grant the reliefs sought.

In the end therefore the answer to question 1 is in the affirmative. Question 4 is also answered affirmatively. The reliefs sought at B.1 and 2 are denied.

The plaintiffs must pay the costs of the defendants to be taxed if not agreed.