Re FAIRWAY AVENUE, NO. 4 in St. ANDREW

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN JUDICIAL REVIEW COURT

SUIT E 460 of 1999

IN THE MATTER ***of an application for an application for permission to develop land and an application for approval of detailed building plans.***

AND

IN THE MATTER OF ***the Town and Country Planning Act and the Kingston and St. Andrew Building Act.***

Dr. Lloyd Barnett Q.C and Norman Wright Q. C. instructed by Norman E. Wright and Co. for Applicant.

Miss Cheryl Lewis and Mrs. Susan Reid-Jones instructed by Director of State Proceedings for Town Planning Department and Ministry of Environment.

Miss Carol Davis and Miss Rose Bennett for the K.S.A.C. and the City Engineer.

Heard: **June 12, 13, 14, 15 and October 17, 2000**

Before Harris, J.

This is an application by way of Judicial Review in which the applicant seeks the following reliefs: -

"(1) An order of certiorari to remove into this Honourable Court and quash an order or decision of the Town and Country Planning Authority dated March 1, 1999 and refusing permission for the construction by the Applicant of a multi-purpose building at 4-6 Fairway Avenue, St. Andrew.

(2) An order of certiorari to remove into this Honourable Court and quash an order or decision dated August 3, 1999 of the Hon. Easton Douglas, M.P., Minister of Environment and Housing dismissing the Applicant's appeal against the aforesaid decision of the Town and Country Planning Authority:

(3) An order of certiorari to remove into this Honourable Court and quash a decision of the Kingston and St. Andrew Corporation Building and Town Planning Committee refusing the application of the Applicant to erect the proposed building;

(4) An order of mandamus compelling and/or directing the Building Authority of the Kingston and St. Andrew Corporation to consider and grant approval to the

detailed building plans submitted by the Applicant in May 1998.

(5) A declaration that the approval of the said development granted by the Local Planning Authority on September 14, 1978 is valid and in effect;

(6) A declaration that the approval of the building application in respect of the said development which was granted on October 17, 1978 by the Building Authority of the Kingston and St. Andrew Corporation is valid and in effect;

(7) A declaration that the outline approval of the building application granted by the Kingston and St. Andrew Building Authority and the Local Planning Authority on March 9, 1993 is valid and in effect.

(8) A declaration that the detailed building plans submitted to the Kingston and St. Andrew Corporation are in conformity with the Kingston and St. Andrew Building Regulations and ought to be approved:

(9) A declaration that the City Engineer acted unlawfully and in breach of his statutory duty in failing to consider and

approve the detailed plans submitted by the Applicant; and

(10) Damages against the City Engineer and/or the K.S.A.C., his employer.

PARTICULAR OF DAMAGES

(i)	Costs of Preparation of detailed drawings:		
	(a)	Land Surveyor's Fee	$ 35,000.00
	(b)	K.S.A.C.'s Fee (Application for approval)	42,504.50
	(c)	Professional Fees	1,695,900.00
	(d)	G.C.T. and expenses	219,958.00
(ii)	Escalation in building costs over period of delay		1,507,683.00
			$3,501,045.50"

Background

On June 27, 1978 an application was submitted by a R. L. Villiers on behalf of Metaphysical Study Group for the change of use of property known as 4 – 6 Fairway Avenue, St Andrew from residential to a centre for religious group meeting. The Town and Country Planning Authority granted permission for the change of user subject to certain conditions and the Applicant was so informed by letter dated September, 14 1978.

By a letter dated October 17, 1978 the City Engineer advised the then applicant that approval for the change of use of the property had been granted by the Building and Town Planning Committee of the Kingston and

Saint Andrew Corporation on October 4, 1978. Approval was granted subject to certain conditions.

Mr. Lascelles Dixon, acting on behalf of the Temple of Light Church of Religious Science, made an application on February 23, 1989 to the Town and Country Planning Department for planning and building permission for the construction of a multi-purpose building with stage for performances and presentations. The Town and Country Planning Authority refused this application on August 8, 1989.

The K.S.A.C became the local Planning Authority in 1992. In October of that year the applicant applied to the K.S.A.C for outline building permission. The Kingston and St. Andrew Corporation approved the applicant's outline building application for development of the property, subject to certain conditions and they were so informed by letter dated March 9, 1993.

By Order of the Supreme Court dated July 31, 1997 the relevant restrictive covenants were modified pursuant to an application by the Applicant.

In April 1998 the applicant submitted to the K.S.A.C., an application together with detailed building plans for the construction of a multi-purpose building. Sometime during 1998, the K.S.A.C referred the application to the

Town and Country Planning Authority for planning permission. A circular letter dated June 2, 1998 was sent informing it of its right of appeal to the Minister, subsequent an inquiry by the Applicant to the Tribunal regarding the result of the application. On December 16, 1998 the Town and Country Planning Authority considered and refused the application and informed the Applicant of this by letter of March 1, 1999, which was received by it on March 16, 1999.

On March 31, 1999 the Applicant appealed to the Minister with respect to the decision of the Town and Country Planning Authority. The appeal was heard on April 7, 1999, the decision of the Town and Country Planning Authority was upheld and the Applicant was so advised by letter dated August 3, 1999 .

The K.S.A.C., by letter of the April 23, 1999 informed the Applicant that permission had been refused by the K.S.A.C's Building and Town Planning Committee. On June 4, 1999 the Applicant appealed to the Minister with respect to the decision of the K.S.A.C. This Appeal has not yet been heard.

Affidavits were submitted by Miss Elma Lumsden and Mr. Lascelles Dixon on behalf of the Applicant. Affidavits were also filed by Mrs.

Blossom Samuels, the Town Planner on behalf of the Planning Authority and by Mr. Patrick Aitcheson the City Engineer for the K.S.A.C.

In seeking to quash the award, the Applicant has placed reliance on ten grounds. Consideration will be given to grounds 1,2,3 and 4 simultaneously, as it will be convenient so to do

Grounds 1, 2,3,4

> **"(1) The Local Planning Authority validly exercised its powers under section 11 of the Town and Country Planning Act in granting the application for change of use of the subject property in that the premises could be used as a religious centre for group meetings;**
>
> **(2) Neither the Town and Country Planning Authority nor the minister has the power or jurisdiction to cancel or revoke or set aside the said approval and accordingly the purported refusal dated March 1, 1999 by the Town and Country Planning Authority of planning application for the construction of a multi-purpose building for the said purpose is ultra vires and void and the purported confirmation made on**

August 3, 1999 by the Minister of the said decision is also ultra vires, null and void;

(3) the Building Authority of the Kingston and St. Andrew Corporation validly exercised its power under the Kingston and St. Andrew Building Act of the building Application for the construction and/or alteration of the building on the said property so that it may be used as a centre for religious group meetings and did not thereafter have the power to refuse the application on the grounds stated in the letter of April 23, 1999.

(4) Neither the Town and Country Planning Authority nor the Minister has the power or jurisdiction to cancel or revoke or set aside the said approvals previously given and accordingly the decision of the said Authority to refuse permission for the said development is ultra vires, null and void and the purported confirmation by the Minister on August 3, 1999 of the said decision is also ultra vires, null and void."

It is indisputable that on the 14th September, 1978 permission for the change of use of premises at 4 and 6 Fairway Avenue, St. Andrew from a residence to a centre for religious group meeting had been granted. Such permission had been granted by the Town and Country Planning Authority, which was empowered so to do. There is no question that this permission had been validly given.

In paragraph 4 of her affidavit dated November 11, 1999, Miss Elma Lumsden stated that in 1978 the local Planning Authority granted permission for change of use and that the City Engineer advised that the Building and Town Planning Committee of the K.S.A.C. had granted an application for building approval.

The approval granted by the local planning authority for change of user was subject to the following conditions:

1. "The level of noise resulting from the proposed use shall not be such as to cause justifiable ground for complaint by the residents in the immediate area.
2. No alteration be undertaken that will in anyway impair the residential character of the premises.
3. Parking facilities being confined to the rear of the premises.

4. There be no breach of existing covenants or supportable objections from adjoining owners.

5. This approval applies only to the applicant/and or owner and is not transferable."

It was disclosed by the Authority that the imposition of the foregoing conditions was to ensure safe and satisfactory standards of development and safeguard existing rights.

A notation appearing on the letter of approval indicates that the "permission does not imply or include permission under the Local Building Regulations."

The application made to the K.S.A.C in 1978 would have been the same, which had been submitted to the Town and Country Planning Authority that year. That application was approved by the K.S.A.C subject to conditions similar to those mentioned in items 1-4 of the approval granted by the Local Planning Authority.

It is necessary to determine at this juncture whether the permission granted in 1978 enures to the benefit of the applicant. In 1978, permission was granted to the Metaphysical Study Group. In 1983, the Metaphysical Study Group changed its name to the Temple of Light Religious Science Jamaica Ltd.

Dr. Barnett submitted that under section 15(4) of the Town and Country Planning Act, the permission enures for the benefit of the land and the Authority had no power to grant permission in persona.

Miss Davis, on the other hand, urged that the Metaphysical Study Group had not been incorporated until 1979 and at the date of the application and approval the present Applicant was not in existence. The Metaphysical Study Group no longer owns the property, as a consequence, the present Applicant is not entitled to the benefit of the 1978 approval which was expressed to be nontransferable

S. 15 (4) of the Act provides:

> "Sec. 15(4)
>
> "Where permission to develop land is granted under this Part, then, except as may be otherwise provided by the permission, the grant of permission shall be enure for the benefit of the land and of all persons for the time being interested therein but without prejudice to the provisions of Part V with respect to the revocation and modification of permission so granted"

Where permission is granted to develop land under this statutory provision, the grant of the permission accrues to the land only in circumstances where the relevant Authority makes no specific provisions in its order granting approval. The words "except as may be otherwise provided by the permission," clearly demonstrate that the relevant Authority is empowered to impose restrictions with respect to any approval, which it may grant.

On the grant of the approval in 1978, certain conditions were imposed. The imposition of the fifth condition which reads, "this approval applies only to the applicant and or owner and is not transferable" irrefutably restricts the approval to the applicant or owner of the land at the date of the approval on September 14, 1978. On that date, the Metaphysical Study Group was the applicant and owner. The Metaphysical Study Group, at that time, was unincorporated and was therefore not a legal entity. It was expressly stipulated that the approval was not transferable. The change of name from Metaphysical Group to Temple of Light Religious Science Jamaica Ltd. does not avail the Applicant, as the Metaphysical Study Group had been incorporated subsequent to the grant of the permission.

Although the change of user approval had been properly given, such approval inured exclusively for the benefit of Metaphysical Study Group and

not for the benefit of the land. It was not transferable, as it extended only to Metaphysical Study Group, the owner of the property and applicant at the date of approval.

The letter from the K.S.A.C is headed "Building application (recommended) 4 and 6 Fairway Avenue (change of use)." The final paragraph stated that the then applicant should arrange to take delivery of a set of approved plans from the K.S.A.C. The heading suggests that a building application was recommended as distinct from being approved. However, it cannot be recognised that a building approval was in existence by virtue of the change of user approval, as, under the Building Act plans would have had to be submitted by the Applicant at the time of the application for change of user. There is no evidence that any plans had been submitted at that time.

The change of user approval granted in 1978 could not be considered general permission. It is limited in scope and tenor. It does not confer on the applicant any benefit. Although the Applicant has assumed that it had, it could not be said that it bestowed any right to carry out construction on 4 – 6 Fairway Avenue, by virtue of which the Applicant could have been a benefactor of a building approval.

I will now address the matter as it relates to the position of the relevant authorities. The Kingston and Saint Andrew Corporation is endowed with certain regulatory powers as a Local Planning Authority under the Town and Country Planning Act, as well as a Building Authority under the Kingston and St. Andrew Building Act. The construction or erection of a building requires that two separate processes be undertaken. Planning permission must be obtained from the Local Planning Authority for a development pursuant to the Town and Country Planning Act. Building approval is also necessary in accordance with the K.S.A.C Building Act.

Under section 2 of the Town and Country Planning Act "planning permission" is defined as "permission for a development which is required by virtue of section 10".

Section 10 (1) of the Act provides as follows: -

> "1. Every confirmed development order (hereafter in this Act called a "development order") shall –
>
> (a) specify and define clearly the area to which it relates;
>
> (b) contain such provisions as are necessary or expedient for prohibiting or regulating the development of land in the area to which the

development order applies and generally for carrying out any of the objects for which the order is made;

(c) without prejudice to the generality of the provisions of paragraph (b) in particular, make provision for any of the matters mentioned in the Second Schedule;

(d) provide for the grant of permission for the development of land in the area to which the development order applies, and such permission may be granted ----

(i) in the case of any development specified in such order, or in the case of development of any class so specified, by the development order itself;

(ii) in any other case by the local planning authority (or, in the cases hereinafter provided by the Authority) on an application in that behalf made to the local planning authority, in accordance with the provisions of the development order."

Section 10 (1) (a-d) makes provision for the contents and effect of every confirmed development Order. Under section 10(2) ,on the grant of permission for development of land within the area to which the Order is applicable, it is specified that permission may be granted unconditionally or subject to certain conditions or limitations.

Section 5(2) of the Act defines "development" as follows: --

> "(2) In this Act, unless the context otherwise requires, the expression "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land:"

The Kingston Development Order 1966 was formulated for the parishes of Kingston and St. Andrew. The property 4 – 6 Fairway Avenue falls within the area governed by the Development Order.

S. 6 (1), (2) and (2) (a) (b) of the Kingston Development Order provide: -

> "1. An application to the local planning authority for planning permission shall be made in a form issued by the local planning authority and obtainable from that authority or from the Authority, and shall include the particulars

required by such form to be supplied, and be accompanied by a plan sufficient to identify the land to which it relates and such other plans and drawings as are necessary to describe the development which is the subject of the application, together with such additional number of copies (not exceeding five) of the form and plans and drawings as may be required by the directions of the local planning authority printed on the form; and the local planning authority may by a direction in writing addressed to the applicant require such further information to be given to them in respect of an application for permission made to them under this paragraph as is requisite to enable them to determine that application.

(2) Where an applicant so desires, an application expressed to be an outline application may be made under sub-paragraph (1) of this paragraph for permission for the erection of any building, subject to the making of a subsequent application to the local planning authority with respect to any matters relating to the siting, design or

external appearance of the buildings, or the means of access thereto; in which case particulars and plans in regard to those matters shall not be required and permission may be granted subject as aforesaid (with or without other conditions) or refused: Provided that ----

(a) where such permission is granted it shall be expressed to be granted under this paragraph on an outline application and the approval of the planning authority shall be required with respect to the matters reserved in the planning permission before any development is commenced.

(b) where the planning authority are of the opinion that in the circumstances of the case the application for permission ought not to be considered separately from the siting, design or external appearance of the building, or the means of access thereto, they shall within the period of one month from the receipt, of the outline application, notify the applicant that they are

> unable to entertain such application, specifying the matters as to which they required further information for the purpose of arriving at decision in respect of the proposed development, and the applicant may either furnish the information so required (in which event the application shall be treated as if it had been received on the date when such information was furnished and had included such information) or appeal to the Minister under section 13 of the Law within one month of receiving such notice, or such longer period as the Minister may at anytime allow, as if his outline Application had been refused by the planning authority."

This section outlines the procedure to be adopted following the submission of an application for planning permission.

Under S. 11 (1) of the Town and Country Planning Act on receipt of an application to develop land, the local planning authority may grant permission conditionally or unconditionally, or refuse permission and in the

dealing with the application must take into account such provisions of the development order which are relevant, as well as any other material considerations.

Section 11(1) provides as under:

> (1) Subject to the provisions of this section and section 12, where application is made to a local planning authority for permission to develop land, that authority, may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development order so far as material thereto, and to any other material considerations,"

Section 12 to which reference is made in section 11, makes the following provisions in subsections (1), (1A) and (2):

> "(1) The Authority may give directions to any local planning authority or, to local planning authorities generally requiring that any application for permission to develop land, or all such applications of any class specified in the directions, shall be referred to the Authority instead of being dealt with by the local planning authority, and

any such application shall be so referred accordingly.

(1A) Where an application to a local planning authority seeks permission for a development which is not in conformity with the development order, that application shall be deemed to be one required to be referred by the local planning authority to the Authority under this section."

(2) Where an application for permission to develop land is referred to the Authority under this section, the provisions of section 11 and of subsection (4) of section 13 shall apply, subject to any necessary modifications, in relation to the determination of such an application by the Authority as they apply in relation to the determination by the local planning authority:

Provided that before determining such application the authority shall, if either the application or the local planning authority so desire, afford each of them an opportunity of appearing before and being heard by a person appointed by the Authority for the purpose."

Section 10 (1) of the Kingston and St. Andrew Building Act outlines the necessary procedure to be adopted by persons who desire to erect or extend any building or part thereof. S. 10 (1) provides as follows:

> "Every person who proposes to erect or re-erect any building or any part thereof, or to extend any building or any part thereof, shall give notice thereof to the Building Authority, and such notice shall be accompanied by –
>
> (a) An accurate ground plan showing the land or site, The frontage line for length of 20 feet, of any building, Whether standing or in ruins adjacent to each side Thereof, and full width of the street or streets immediatley in front and at the side or back thereof, If any.
>
> (b) An accurate plan showing the several floors of such Building and the front elevation thereof and at least one Cross section and such other cross or longitudinal Sections and further particulars, as the Building Authority may from time to time by regulation or in any particular case require.
>
> (c) An accurate plan showing the frontage of such building on any street or lane."

In 1989 the applicant submitted an application for planning permission and building permission for the construction of a multi-purpose building with stage for performances and presentations. This application would have been the first which had been submitted in compliance with the requirements of the Town and Country Planning Act as well as the Kingston and St. Andrew Building Act. Application for outline planning permission was refused by the Town and Country planning Authority. The applicant was so informed.

In 1992 the powers assigned to the Local Planning Authority were transferred to the K.S.A.C. In 1993 outline building permission, as evidenced by letter dated March 3, 1992 from Town Clerk to Lascelles Dixon and Associates was granted to the applicant pursuant to application made by it in 1992.

The letter states as follows:

"I am directed to inform you that the Council's Building and Town Planning Committee of the Kingston and Saint Andrew Corporation at it meeting held on the 20th January, 1993 approved your outline Building application to erect a Religious Group Centre at the above address on the following condition:

(1) That detailed building plans are submitted for consideration and approval prior to the commencement of any construction work"

Such approval would have been granted under the Town and Country Planning Act. The Applicant was clearly aware that it was an outline building approval, which was given. In paragraph 5 of the affidavit of Mr. Lascelles Dixon, sworn on the 6th November, 1999, he stated that the application was for building approval and in paragraph 6 he stated that the "Building and Town Planning committee of K.S.A.C. approved the application for building permission." Miss Elma Lumsden in paragraph 6 of her affidavit of the 6th November, 1999 also made reference to the approved outline building application. The Applicant was also fully cognizant of the fact that this approval was conditional and was subject further approval. Additionally, it has not been shown that the planning permission as required by the Town and Country Planning Act had ever been obtained.

By operation of law, an outline approval is granted under the Town and Country Planning Act and the Kingston Development Order. Approval under the Town and Country Planning Act is not inclusive of, nor does it encompass an approval under the K.S.A.C Building Act. Although building approval was obtained from the local planning Authority in the form of an

outline application under the Town and Country Planning Act, no approval was secured from the Building Authority under Kingston and St. Andrew Building Act.

Any drawings submitted, to which reference was made by the K.S.A.C. in its letter of March 9, 1993 ,could only have been preliminary design plans. These being preliminary drawings, they could not be recognised as the accurate drawing which are required by virtue of the provisions of section 10 of the Kingston and St. Andrew Building Act, for the reason that detailed building plans were required to be submitted for consideration and approval prior to the commencement of any construction work. The items for consideration by the Building Authority would include matters relating to siting, design or external appearance of the building or means of access thereto. Mr. Dixon, in paragraph 8 of his affidavit of 6th June, 2000 averred that preparation of the site for construction had started. This would surely have been in contravention of the outline approval.

The Outline Building permission granted in 1993 cannot be interpreted as building and planning approvals. It must be regarded an outline building approval only, as, a condition had been imposed for the Applicant to submit detailed building plans for consideration and approval

prior to the commencement of any construction work. The relevant authorities would have reserved the right to give consideration to the building application on one hand and the planning application on the other hand in obedience to the Town and Country Planning Act, The Kingston Development Order, the Kingston and St. Andrew Building Act.

In April 1998 Mr. Dixon, on behalf of the Applicant, made an application for permission to construct a multipurpose Building at 4 – 6 Fairway Avenue. This application was accompanied by detailed plans. The K.S.A.C. referred the matter to the Town and Country Planning Authority sometime in 1998. This, the K.S.A.C was constrained to do in light of section 12 (1A) of the Town and Country Planning Act. The matter was considered by the Town and Country Planning Authority in December, 1998 and permission was refused. By letter of March 1, 1999 the applicant was notified of the refusal.

It is the Applicant's contention that the 1998 application was in pursuance of the outline approval obtained in 1993 and confirmation thereof ought to have been automatic. Mrs. Blossom Samuels averred in paragraph 10 of her affidavit of the 6th June 2000 that when Town and Country Planning Authority considered the matter at its meeting in 1998, it took into

account, "The siting, design, external appearance, means of access, the suitability for the locality and the extent of the intensification of user including the increased noise and traffic were considered against the fact that the area is zoned as a residential area". Continuing in paragraph 11 of her affidavit, she stated "that since it was planning permission that was being considered the result of a community survey was also taken into consideration."

The application in 1998 must be construed as two separate applications, one with respect to planning permission and one for building permission pursuant to the Town and Country Planning Act and the Kingston and St. Andrew Building Act, respectively. April 1998 was the first and only time that detail plans were submitted. This was the first and only application which could have been considered by the K.S.A.C. in its capacity as Building Authority. As the Planning Authority,it also considered the application, taking into account all matters which it was bound by law to consider and thereafter arrived at a decision. The Applicant was notified of the decision, albeit late, and the reasons therefor were transmitted to it.

I will now turn to the position of the Minister.

S. 13 (1) and (2) of the Town and Country Planning Act provides: -

"Where application is made under this Part to a local planning authority for permission to develop land or where such application is referred to the authority under the provisions of section 12, and that permission is refused by the local planning or the authority, as the case may be, or is granted subject to conditions, then if the applicant is aggrieved by the decision so taken he may by notice served within the time, not being less than twenty – eight days from the receipt of the notification of the decision, and in the manner prescribed by the development order, appeal to the Minister:

Provided that the Minister shall not be required to entertain an appeal under this subsection in respect of the determination land if it appears to him that permission for that development could not have been granted by the local planning authority, or could not have so granted otherwise than subject to the conditions imposed by them, having regard to the provisions of section 11 of the development order, and to any directions given under that order.

(1) Where an appeal is brought under this section from A decision of a local planning authority or the authority, the minister may allow or dismiss the appeal or may reverse or vary any part of the decision of the local planning authority, or the authority, as the case may be, whether or not the appeal relates to that part, and deal with the application as if it had been made to him in the first instance."

In paragraph 10 of the Dixon's affidavit of the 6th November, 1999 he stated that he appealed to the Minister due to the failure of the Planning Authority to give a decision. Under S 13(4) of the Town and Country Planning Act, it would have been obligatory on the part of the Planning Authority to have given notice of its determination of the matter to the applicant within a specified time.

S. 13(4) provides as follows: -

"4 – Unless within such period as may be prescribed by by the development order, or within such extended period as any at any time be agreed upon in writing between the applicant and the local planning authority, the local planning authority either---

(a) give notice to the applicant of their decision on any application for permission to develop land, made to them under this Part; or

(b) give notice to him that the application has been referred to the Authority in accordance with directions given under section 12."

The Kingston Development Order, section 6 (7), requires that such notice be given within three months of the Planning Authority's decision or within such period as extended by agreement between the parties in writing.

The Planning Authority had failed to observe the requirements of S13 (4) of the Act as well as Section 6 (7) of the Development Order. It ought to have furnished the applicant with notice with respect to its determination of the matter within 3 months of its decision, it being supplied with the detailed plans. In light of the omission by the Planning Authority in giving the applicant the appropriate notice, the Minister would have been under a duty to hear the appeal.

Under S13 (2) of the Town Planning Act the minister may allow or dismiss an appeal, or reverse, or vary any part of the Local Planning Authority's decision irrespective of whether the appeal relates to all or part of a complaint. He may deal with the application as if it had been a new

matter being made to him. He is empowered by the Act to consider the entire decision or any part of the decision of the relevant authority. In hearing the appeal, he would have been obliged to have considered it, even in this circumstance where the decision of the planning Authority had not yet been communicated to the Applicant.

In the case under review, the Minister had been correctly seized of the matter at the time he heard the appeal. The receipt, by the Applicant, of a letter on April 23, 1999 from the Planning Authority denying the application for planning permission would not operate to render the appeal invalid.

The Minister took into account the reasons given by the planning authority for their refusal of the application. This is demonstrated by his letter dated 3rd August, 1999 addressed to Mr. Dixon. The Minister was also under a duty, in compliance with the provisions of the Kingston Development Order, the Kingston and St. Andrew Building Act, to take into account all relevant considerations

The Minister acted within the scope of his authority. Further, the Applicant, through Mr. Dixon, had fully participated in the process. Having submitted itself to the appellate jurisdiction, and having offered no

objections at the hearing of the matter, it is estopped from asserting that there was want of jurisdiction on the part of the Minister.

The Applicant does not rank as a beneficiary of the change of use approval granted in 1978.It has not been shown that either the Town and Country Planning Authority or the Minister had cancelled, revoked or set aside any approval given. There is no evidence that the Building Authority had exercised its power under the Kingston and St. Andrew Building Act for the construction on, and or alteration of 4 – 6 Fairway Avenue for it to be used as a centre for religious group meetings. It has not been demonstrated that the Town and Country Planning Authority or the Minister acted ultra vires with respect to the decisions in 1999 or that the Building Authority had refused a building application in 1999.It follows therefore that the applicant cannot succeed on any of these grounds.

GROUND 5

> **"Planning permission having been obtained from the Local Planning Authority and building permission having been obtained from the Building Authority, the Applicant only required the detailed building plans to be approved by the Surveyor or Chief Engineer and neither the Local Authority nor the Building Authority**

had any power or jurisdiction to revoke, cancel or set aside the permission or approval already granted;"

The only approval obtained by the applicant was with respect to an outline application. There is no evidence that planning permission had been received from the Local Planning Authority; nor is there any evidence that the applicant had secured building approval from the Building Authority. Outline building approval was obtained in 1993 from the Local Planning Authority.

Having obtained an outline approval in 1993, by virtue of S 6 of the Kingston Development Order, the applicant was under a duty to submit a further application for consideration by the planning authority. By operation of law, all matters relative to the siting, design or external appearance of the building or means of access thereto and consideration of detailed plans which had been reserved in the outline permission had to be examined by the Planning Authority.

Section 2 of the Kingston and Saint Andrew Building Act defines the "Surveyor" as the Chief Engineer appointed under the K.S.AC Act or such officer as appointed by the Building Authority. It cannot be acknowledged that approval by the surveyor or the chief engineer would have been automatic, once plans were submitted. The Applicant was obliged to submit

a further application accompanying the detailed drawings for the consideration of the Planning Authority as well as an application for consideration by the Building Authority and not merely to present plans for the approval of the Surveyor or Chief Engineer.

There is no approval which the Surveyor or the local authority or the Building Authority had revoked, cancelled or set aside.

This ground is devoid of merit.

GROUND 6

> **"The Surveyor or Chief Engineer of the Kingston and St. Andrew Corporation and/or the Building Authority acted *ultra vires* and in excess of jurisdiction in considering objections to the applicant's development after planning permission and building approval had been granted as aforesaid."**

At the time of the submission of the application in 1998, Mr. Dixon was informed by the acting Deputy Building Supervisor of the K.S.A.C. that objections were received from neighbours and their objections would have had to be taken into account in considering the applications. . These objections were made on the ground that noise was emanating from the

property. Mr. Dixon asserted that the noise which formed the subject of the complaint resulted from demolition of an old out house on the property.

On 23rd April, 1999 the K.S.A.C. informed the applicant that building permission was refused. The reasons given for the refusal are as follows: -

> "(1) The proposal is inconsistent with the character of the area and would result in the establishment of a multi-purpose use alien to this predominantly residential community.
>
> (2) The proposed development would generate more traffic which would be detrimental to the already burdened infrastructure.
>
> (3) The proposed development would result in undesirable noise intrusion in the Community.
>
> (4) The proposed access at this busy intersection would be an impediment to road safety and the free flow and movement of traffic"

The applicant's application was not in conformity with the Kingston Development Order. The decision of the KSAC, in the capacity of the local planning authority, as well as the Building Authority, was in accordance

with the advice of the Town and Country Planning Authority. Such advice the local planning authority is mandated by law to obtain. Further, in its role as Building Authority, it was obliged to give consideration to the suitability of the development to the locality or the neighbourhood. It accords with good reason that they had taken into account the opinion of the Town and Country Planning Authority.

Assessing the reasons advanced for the refusal, it is evident that the objections by the neighbours were not considered. The findings of the tribunal with respect to noise was obviously with regard to the proposed development and not with respect to undesirable noise intrusion from the demolition of an old out building. The Building Authority acted intra vires in arriving at its decision. The decision was not taken by the Surveyor or Chief Engineer It was communicated to the Applicant under the hand of the Town Clerk . It follows that this ground must also fail.

GROUND 7

> **"The Surveyor, Chief Engineer and/or the Building Authority acted unfairly and in breach of the rules of Natural justice in considering objections to the applicant's Development without advising the Applicant of contents Of the said objections or the identity of the objectors."**

A Tribunal in the exercise of its function must have regard to the dictates of natural justice. In the observance of the rules of natural justice the Tribunal is required to act fairly, impartially and with openness. A Court, however, will not interfere with the Tribunal's decision unless the rules of natural justice are broken.

Deliberations on the application were done by the K.S.A.C.'s Building Committee. The Building Authority considered the application with advice from the Town and Country Planning Authority. One of the reasons proffered for the refusal of permission is that the proposed development would result in undesirable noise intrusion in the community. It is plain that the issue as it relates to noise from the demolition of an old outbuilding, had not been taken into account.

The Applicant was afforded an opportunity to peruse the objections and make notes thereof. Having had the opportunity to see the objections it follows that it would have also been aware of the identities of the objectors. It cannot now declare that the objections were considered without its knowledge of the objections and the identities of the objectors.

The Building Authority did not pursue any purpose other than that for which power had been conferred on it by statute. In considering the

application, the Tribunal had done so, objectively and impartially, taking into account only relevant factors. It cannot be said that the Surveyor, Chief Engineer and or Building Authority acted unfairly and in breach of the rules of natural justice.

The Applicant cannot succeed on this ground.

GROUND 8

> **"Outline approval having been granted by the building authority, the surveyor or chief engineer had a statutory duty under section 10 of the Kingston and St. Andrew Building Act to approve the detailed plans submitted by the Applicant once they conformed with and satisfied the requirments of the Kingston and St. Andrew Building Regulations."**

An outline approval was granted in 1993 by the local planning authority. An outline approval can only be made by the Local planning Authority. The Building Authority is not empowered by law to grant outline approval. Consequently, an outline approval had not been and could not have been granted by the building authority.

Under section 10 of the Kingston and St. Andrew Building Act, persons proposing to erect, re-erect or extend buildings have an obligation to

notify the Building Authority and with such notification submit accurate ground and floor plans. The plans are then approved by the Surveyor who is obliged to notify the builder in writing, or he may request amended drawings ,or make any other request. However, the provisio demands that no plans can be approved unless, inter alia, the class of building, the frontage, elevation and design are in the opinion of the Building Authority suitable to the locality or neighbourhood.

The Surveyor, in the case under review, was under a duty to consider the plans. He would have been obliged to have ensured that the requirements of the proviso are satisfied before the approval of the plans. It had been imperative that the plans were in accordance with the provisions of Section 10 of the Kingston and St. Andrew Building Act. There is no requirement that the plans satisfy the requirements of the Kingston and St. Andrew Building Regulations.

It is clear, from the reasons given for refusal of permission, that the Building Authority was of the opinion that the proposed building was not suitable to the locality or neighbourhood and accordingly refused the application. The Surveyor or Chief Engineer was under restraint by law to

take into account the requirements of the proviso in considering whether the plans ought to have been approved.

The Applicant cannot succeed on this ground.

GROUND 9

> **"The Minister acted unfairly and in breach of the rules of natural justice in failing to advise the Applicant of the contents or purport of the advice which he obtained from the office of the Attorney General or to give the Applicant or its legal representatives an opportunity to respond to the said advice, submissions or opinion."**

Dr. Barnett submitted that the manner in which the Minister conducted himself at the hearing of the appeal was in breach of the principles of fairness, in that he terminated the hearing on the basis that he would seek legal advice which was never shared with the Applicant.

The nature of the legal advice sought by the Minister had been clearly indicated during the conduct of the proceedings. On examination of the Notes of evidence the following extract discloses the tenor of the advice the Minister required:-

> ***"Chairman: Having had that refusal in 1989 the same application was then sent to KSAC in 1993 when the authority was then transferred from Town Planning to KSAC and it is that application in Outline that was approved by the KSAC not for Planning but for Outline Building Permission and this is where I need to have advice legally to find out what is the status of that response from the K.S.A.C."***

The notes of evidence also illustrated that Minister stated that he had a need to ascertain the precise dates when Town and Country planning authority was transferred to KSAC.

Mr. Dixon was fully cognizant of the substance of the legal advice which the Minister sought to obtain. The Minister was entitled to obtain legal opinion in the matter if he so desired. In the circumstances of this case, he was under no duty to reveal the nature or extent of the advice he received. Mr. Dixon did not indicate that he would have experienced any difficulty or prejudice in the Minister seeking the information. If the Minister's obtaining the advice had posed a problem, Mr. Dixon ought then to have stated his objections and to have informed the Minister of any necessity on his part to

make further submissions, or for him to obtain legal advice or secure legal representation.

Further, there is nothing to suggest that Mr. Dixon did not have the opportunity to present the applicant's case fully. The Notes of Evidence reveal that he made submissions to the Minister with due skill and care.

There is no evidence which portrays that the minister had considered any matters other than those relating to the issues before him. His letter of the 3rd August, 1998 relaying his decision does not in anyway intimate that he had placed reliance on any legal advice in arriving at that decision.

The case ***of Fairmont Ltd. v Environmental Secretary 1976*** WLR 1255 was cited by Dr. Barnett. It must be distinguished from the present case. In that case, at the end of an Inquiry, Inspectors who had gone to inspect premises discovered the foundation to be defective. On appeal, the Minister took into account the Inspector's Report which had not been proposed at the Inquiry. In this case there is no evidence that any new matter which had not been raised before the Local Planning Authority, had been taken into consideration by the Minister.

Dr. Barnett also alluded to the case ***of T. A. Miller Ltd. v. Minister of Housing 1968 1 WLR 993.*** In that case, the Minister took into

consideration a letter with respect to a finding of fact which was contrary to the position of certain objectors. In the present case the essence of the legal advice required by the Minister was evident. In T. A. Miller Ltd. v. Minister of Housing (supra) objections were taken. No objections were taken by Mr. Dixon when the Minister announced that it would have been necessary for him to obtain legal advice. Additionally, Mr. Dixon did not assert that it would have been essential for him or his legal representative to make submissions with respect to the advice which was to be obtained by the Minister.

Reference was also made to the case of ***Board of Education v Rice All E R reprint 1911-1913 36*** by Dr. Barnett. This case revolves around the question of law. It was necessary that certain issues of law be determined in order to decide whether the Education Board's decision was in keeping with the relevant law. In the case under consideration, there is no issue that the Minister's decision was based on wrong principles of law. It is contended that the applicant was not accorded the right to be privy to legal advice he obtained. Surely, the applicant through its agent Mr. Dixon had full knowledge of the nature of the advice which the Minister had proposed to seek. Further, in the pursuit of his duties, and in observation of the process of the making of fair and just decisions, it would have been prudent for the

Minister to resort to legal consultation with respect to those matters which he deemed necessary.

It has not been shown that the Minister acted unfairly. There is no evidence that Mr. Dixon was not given a hearing. The Minister gave proper reasons for his decision. There being nothing to demonstrate that he has offended the rules of Natural Justice, this ground also fails.

GROUND 10

> **"In view of the nature and terms of the said permission and approval granted to the Applicant in 1978 and 1993 and the failure of the Local Planning Authority and the Town and Country Planning Authority to raise any objection to the Applicant's application for modification to the relevant restrictive covenant affecting the property, the Applicant had a legitimate expectation that the detailed building plans which conform with and satisfy the Building Regulations would be approved."**

Dr. Barnett urged that the applicant was led to believe that no additional town planning considerations would be raised other than specific matters listed in the conditions, they having obtained change of user outline approvals. He further submitted that for several years the applicant

established and managed programmes of activities based on the change of user approval. The applicant has incurred expenses and expended time in the preparation of detailed drawings in preparation for the proposed development. He continued by stating that the applicant had a legitimate expectation that no additional objection would be used in preventing the final approval and that the applicant could proceed in reliance on the implied representations in the prior approvals.

The principles upon which a party can successfully rely on the doctrine of legitimate expectation, is clearly propounded in the well known case of Council of Civil Service Unions et al v Minister for Civil Service 1984 3All E R 936, which case had been cited by Dr Barnett and Miss Davis. This case demonstrates that, in order for an aggrieved person to successfully pray in aid the doctrine of legitimate expectation, he must show that the decision of a public authority affects him, by the deprivation of some benefit or advantage which he had previously enjoyed and which he could legitimately expect or permitted to continue to enjoy.

The approval granted in 1978 was exclusively for a change of user. On no interpretation of that permission could it be perceived that such approval extended to the construction of a multi-purpose building as was

proposed by the applicant. Further, the Applicant was neither the Applicant nor owner of the property in 1978 and the permission specified that it was not transferrable. Consequently, the 1978 approval cannot be recognised as a foundation on which the applicant could have legitimately expected that the 1998 application would have been given favourable consideration by the local Planning Authority and the Building Authority.

In 1989 an outline permission for the proposed development was refused by the Town and Country Planning Authority. Even if the applicant had anticipated that the 1978 change of user approval would have formed the basis for the expectation that it could have proceeded on the implied representation of the 1978 approval, the refusal in 1989 would have clearly negated that expectation.

In 1993 an approval was granted. This was an outline building approval. As a matter of law, a subsequent application together with accurate plans were required for consideration and approval expressly reserved. A subsequent application with detailed drawings were submitted in 1998. The 1998 application would by law be required to be considered in keeping with the provisions of the relevant statutes. It follows therefore that there could have been no legitimate expectation by the applicant that the

application submitted in 1998 would have been considered outside the scope of the statutes.

Dr. Barnett also submitted that restrictive covenants having been modified, the outline approval having been granted , the Authority could not act inconsistent with that which had been represented by them.

Although an Order for modification of covenants is in existence, this does not in any way preclude the Local Planning Authority refusing, modifying, changing or revoking an outline approval. The Tribunal was under an obligation to observe the requirements of section 6(2) of the Kingston Development Order. The Planning Authority, in making a decision with respect to the grant or refusal of an application, would have been obliged to consider a number of factors, as dictated by section 6(2) even in circumstances where there had been modification of a covenant. The fact that the Local Planning Authority or the Town Planning Authority did not raise objections to the modification of the restrictive covenants is of no import.

It is significant to note that the applicant places great emphasis on the approval granted in March 1993. In fact, great reliance was placed on that approval. The detailed or accurate building drawings were not submitted

until April 1998, a little over 5 years after the 1993 approval. Interestingly, the Applicant did not exhibit a copy of the 1992 application. It is therefore not known whether the application in 1992 which was approved in 1993 was same application in 1998. If the 1992 approved application was the same as that which was presented in 1998, then in the submission of the further application and accurate plans over 5 years after the approval, the Applicant could not reasonably believed that the doctrine of legitimate expectation could avail it.

This ground is unsustainable.

In my Judgment, the Town and Country Planning Authority, the Kingston and St. Andrew Corporation, the Building and Local Planning Authorities and the Minister acted intra vires. The relevant authorities as well as the Surveyor, Chief Engineer and the Minister had done nothing, which could be considered a breach of natural justice.

The application is refused with costs to the respondents.