

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FULL COURT

SUIT NO. 32 OF 1986

CORAM: The Hon. Mr. Justice Malcolm, J.
The Hon. Mr. Justice Bingham, J.
The Hon. Mr. Justice Gordon, J.

Regina vs. The Town and Country
Planning Authority Exparte Auburn
Court Limited and Delbert Perrier.

Gordon Robinson instructed by Nunes, Scholefield, DeLeon and Company
for the Applicant.

Neville Fraser and David Henry of the Attorney General's Department
for the Town and Country Planning Authority instructed by the
Director of State Proceedings.

June 27, 28 and 29, 1988

MALCOLM, J:

This is a judgment of the Court. The judgment will be
read by Bingham J.

This Applicant seeks in this case to move this Court for
an Order of Mandamus to compel the Town and Country Plainning Authority
(hereinafter referred to as the Authority) to approve certain
amended plans submitted to it by the Applicant on or about October,
1984, and/or again on or about July 1985, regarding a development on
Lots 165 and 166 Trinidad Terrace, New Kingston, where a six storey
building with basement parking facilities has been erected.

The history leading up to the presentation of the amended
plans disclose the following undisputable facts:-

1. That on 19th October, 1983, the Applicant submitted
an application for a four storey building on the
said site;
2. The Authority recommended approval limiting the
proposed development to three floors (above ground);
3. On or about 16th January, 1984, the Applicant submitted
detailed plans for the erection of an office building
with basement parking in conformity with the outlined
approval previously given. The said plans were duly
approved by the Authority;

- 4. That in the meantime the Applicant commenced construction and in the terms of paragraph 6 of his Affidavit sworn to on 1st April, 1986 he realised "that the projected income to be generated from only three (3) floors of office space suddenly became insufficient to cover" escalating costs;
- 5. On or about 24th July, 1984 the Applicant submitted amended plans for a four storey office building with basement parking;
- 6. These plans were considered by the Authority on 25th July, 1984 at which meeting the Applicant was present and the application was refused. One of the reasons given by the Authority was that the additional floor would be incongruously related to the adjoining existing three storey building. Another reason was that the traffic generated could not be accommodated by the existing parking facilities.

While this application was pending, the Government Town Planner had one discussion with the Applicant and he was advised that he had already been granted the maximum development permissible.

The Applicant, however, persisted and on 12th November 1984 he submitted amended plans for the erection of a six storey building with basement parking.

While this application was pending the applicant was served with an enforcement notice by the Kingston and Saint Andrew Corporation, the body which previously was vested with the power that the Authority now exercises.

A Writ was also filed by the Kingston and Saint Andrew Corporation on 28th January, 1985, seeking an injunction against the Applicant in respect of the continued upward extension of the building.

Despite the fact that the Court has since determined that the Kingston and Saint Andrew Corporation had no locus standi in relation to both the enforcement notice and the Writ seeking injunctive

relief by these two acts, abortive though they may have been, the Applicant was clearly put on his enquiry that he was acting in contravention of the permission he had obtained.

His argument for so acting is that not having heard from the Authority in six weeks of the submission of the amended plans, it was the custom in the building trade to assume that approval was contemplated and so he decided to continue with the planned extension to the building. This argument in our view is clearly untenable as:-

- 1. He had been previously refused permission to proceed to four floors;
- 2. He had been served with an enforcement notice and a Writ seeking injunctive relief albeit by an Authority which it has now been declared had no locus standi.

Notwithstanding the history already given, the Applicant on or about 24th July, 1985, again submitted plans for the erection of an office building with six floors and basement parking.

This application was considered by the Authority on 6th August, 1985, and refused, and notice of such refusal was communicated to him.

The Authority avers that the criteria that applied at that time for the granting of planning permission was that adequate parking facilities should be provided within the curtilage of the building and further that the building should not be incongruously related to other buildings in that locality.

The Applicant has made reference to several other buildings in the New Kingston area some of which did not have parking facilities within the curtilage and also to other buildings for which planning permission had been given for further upward extension as well as to a development which is sited in the same vicinity as that of the Applicant, for which planning permission was approved for a development consisting of six floors.

This Court is not in a position to question the criteria that obtained when those buildings were erected or for that matter to question the basis on which approval was given for the proposed development.

Parliament has vested the Authority with the absolute power to determine applications for the erection of buildings. Prior to that it was the Kingston and Saint Andrew Corporation which had the power which lended itself to this state of confusion which resulted in the service of the enforcement notice and the filing of the Writ by that body.

An aggrieved Applicant has under Section 13 of the relevant Act, The Town and Country Planning Act, the right to appeal to the Minister against a refusal by the Authority to grant him permission to erect a particular structure. Among the powers which the Minister has on appeal is that he may on reviewing the matter reverse the decision made by the Authority. An appeal was lodged in this cause and subsequently withdrawn in circumstances in which the Applicant and the Town Planner are at variance by what is deposed to in their respective affidavits. Be that as it may what is, however, of crucial importance in this matter is that subsequent to the withdrawal of the appeal the Applicant on or about 24th July, 1985, submitted his application for the erection of an office building with six floors and a basement parking. As already stated this application was refused by the Authority. No further appeal was lodged against this refusal.

This Court does not act in the capacity of a reviewing body as it is not clothed with appellate powers. It is not for us to decide whether on the facts before us we would have come to a conclusion contrary to that of the Authority as to do so would be tantamount to a usurpation of the functions of the Authority. Neither can we say that based upon the facts before us and the reasons given by the Authority for its refusal that such a responsible body acted illegally, irrationally, or with procedural impropriety.

The records submitted by the Applicant further disclose that in 1982 enquiry was made of the Government Town Planner to ascertain if approval would be considered for the erection of two seven storey office buildings on four lots. One of these lots No. 166 was one of the two lots to which this present development relates.

This enquiry was made by one Mr. Headly Feanny, apparently the previous owner of these lots.

The letter of the Deputy Town Planner in reply which is exhibited in the record submitted by the Applicant clearly stated "You will not be able to obtain the seven storeys as proposed. The Town Planning Department will support a development consisting of a ground or basement storey for parking, plus three floors of offices above which you may provide two penthouses."

Prior to 1984, when the amended plans were first submitted it was clear that the Applicant was seized with information as to what would have been the maximum permitted development in that locality.

Before parting with this matter we must refer also to a letter written by McMorris Sibley and Robinson, Architects, to the Planning Officer, K.S.A.C. on 11th February, 1985. This letter was copied to the Government Town Planner. The letter raised points concerning the erection of this structure and stated at paragraph 4 that:-

" In examining the entire issue certain matters arise -

1. Had the approval been based on a three storey structure then the foundation columns, beams, etc. would be so designed as to support such a structure. However, had the plans that were approved indicated over-designed foundations columns, beams etc., then it is reasonable to assume that the intention was always to build a building in proportion to the size of the foundation, columns, beams, etc.
2. Should the foundation, columns, beams, etc., be designed and approved for a three storey building and a six storey building is erected on such a structure then the building is unsafe and should be demolished."

In the light of the above, we, therefore, are unanimously of the view that this application must be refused.

Costs ordered to the Respondent, the Town Planner, such costs to be taxed, if not agreed.