

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CLAIM NO. MNIHCV2021/0034

BETWEEN:

DAVID MCKEAND

Claimant/Applicant

and

H.E. THE GOVERNOR OF MONTSERRAT

THE ATTORNEY GENERAL OF MONTSERRAT

THE CHAIR, PLANNING AND DEVELOPMENT AUTHORITY

Defendants

APPEARANCES

Mr. David McKeand in person.

The Attorney General, Mrs. Sheree Jemmotte-Rodney for the Defendants.

2022 MAY 27

RULING

On whether to grant leave for judicial review of a Planning Authority decision

- 1 **Morley J:** Application by David McKeand in person has been made on 25.11.21 for leave for judicial review of a decision on 21.10.21 by the Montserrat Governor in Cabinet (GIC) on the recommendation of the 'Planning & Development Authority' (PDA) to redesignate plot 12/01/207, being 12.5 acres, from recreational to residential use.

- 2 McKeand has been monitoring what might happen to plot 12/01/207 for some time. His property abuts it, reporting it a conservation area and bird sanctuary. He describes frustration from he believes a lack of PDA transparency and appears to wish to maintain conservation status. A history seems as follows:
- a. The plot was originally designated for residential use in the Montserrat Physical Development Plan (PDP) of 2000-09.
 - b. The plot was redesignated for recreational use in the PDP¹ of 2012-22, published in December 2012.
 - c. On 08.08.16, Paradise Development Company acquired ownership of the plot, and in February 2019 applied to the PDA for redesignation back to residential.
 - d. Various public notices arose, and in June 2019 the PDA was moving toward recommending redesignation but covid interrupted, so it was not until 06.08.20 redesignation was approved by the GIC.
 - e. However McKeand began court action, and it was then agreed by the PDA there may have been a procedural flaw, so further consultation was agreed during court hearing on 19.10.20, meaning the redesignation was rescinded by the GIC on 22.10.20.
 - f. Further consultation occurred during 60 days between 30.10.20 and 29.12.20, with four further comments lodged, leading to redesignation being again recommended by the PDA, approved by the GIC on 21.10.21.
- 3 McKeand raises two complaints.
- a. First, he is suspicious Paradise is a front for a company called 'Shanghai Co.', run by a 'Mr Lu', who is said to have paid US\$1.358m for plot 12/01/207, he wonders where the money has gone, what might be built, perhaps whether homes or a hotel, and at what scale. Further, he has informed the court, broadly, there is a police investigation being conducted into what has occurred, though the precise details are understandably not available. However, this opaque information and his suspicions can have no bearing on the instant application which is instead limited to considering the statutory process leading to the decision of 21.10.21, while any police investigation must take its own separate course.

¹ For ease of reading, the parties, various institutions, and other entities, may be abbreviated to surnames and acronyms, rather than requiring writing out whole names and words, and no disrespect is intended by such shortening.

- b. Second, his application for judicial review of the redesignation of 21.10.21 seeks further, distilled:
 - i. a declaration how the Physical Planning Act should work as regards redesignation within the PDP;
 - ii. a declaration an environmental impact assessment (EIA) is required here before redesignation;
 - iii. and mandamus that the Planning Register should record submissions Paradise made for redesignation and what are the PDA reasons for it.
- 4 Submissions were filed in opposition to leave by the Attorney General Counsel Rodney on 15.12.21 and 03.05.22, and in response by McKeand on 17.12.21, 10.03.22 and 19.05.22, with discussion on the subject in court on 10.03.22 and 13.04.22, leading to adjournment for decision today 27.05.22.
- 5 At this stage, it needs to be pointed out a decision to redesignate plot 12/01/207 to residential use is not a decision to build. The redesignation merely means an application to build for residential use may now be made, and will take its natural course as regards notice, opposition, adjudication, and recording on the Planning Register.

The statutory framework and evidence offered

- 6 The question in this application is whether it is persuasively arguable on what has been presented there has been an actionable error in how the decision has been reached to redesignate. The issue is whether the process has been flawed; it is not whether the right decision was made.
- 7 Analysis requires an extensive review of the **Physical Planning Act** cap 8:03 (PPA), particularly **ss 2, 5, 6, 7, 8, 9, 11, 12, 13, 15, 18, 19, 20, 63**, and **Schedule 3**, which where relevant say:

Interpretation

2. In this Act, unless the context otherwise requires—...
 “development” has the meaning assigned to it by section 15;...

PART 3 - DEVELOPMENT PLANS

Preparation of Development Plan

5. (1) The Authority shall prepare a National Physical Development Plan (hereinafter referred to as the "Development Plan") setting out the scheme of land use and development it proposes for Montserrat...

Representations

6. In preparing the Development Plan the Authority shall make known to the public and interested persons or organisations the matters it intends to take into consideration and shall provide adequate opportunities for individuals and organisations to make representations.

Draft Development Plan

7. (1) When the Development Plan has been completed the Authority shall publish the plan as a Draft Development Plan together with a statement of the representations it has received and the responses of the Authority to those representations.

(2) The Authority shall invite further representations on the Draft Development Plan to be submitted within a period of sixty days from the date of its publication.

(3) The Authority shall consider all representations, and after making such revisions to the Draft Development Plan as it considers appropriate, submit the Draft Development Plan for the approval of the Governor acting on the advice of Cabinet through the Minister.

(4) For the purposes of this section "publish" means to display in a prominent place to which the public has access.

Approved Development Plan

8. (1) A Draft Development Plan approved by the Governor acting on the advice of Cabinet shall be referred to as the Approved Development Plan and shall be available for inspection at the offices of the Authority or such other place as the Governor acting on the advice of Cabinet may prescribe.

(2) Notification of the Approved Development Plan and any revision or modification thereof shall be published in the *Gazette* and in two successive issues of a newspaper circulating in Montserrat.

Revision and modification of Development Plan

9. (1) The Authority shall keep under review the Approved Development Plan and shall prepare such proposals for its revision and modification as it deems fit.

(2) A proposal for the revision or modification of the Approved Development Plan shall be subject to the procedures outlined in section 7.

Status of Development Plan

11. The Authority shall, in considering an application for development permission have regard to the provisions of the Approved Development Plan or, where the Draft Development Plan has not yet been approved, to the Draft Development Plan, and shall, except where the Authority considers it inexpedient so to do, give effect to the Approved Development Plan or to the Draft Development Plan as the case may be.

PART 4 - DEVELOPMENT CONTROL

No development without permission

12. Subject to the provisions of this Act no development shall be commenced on land except with a permission issued in accordance with the provisions of this Act.

Application for development permission

13. (1) Any person, being the owner of land, or a person having a sufficient interest in land may apply to the Authority for permission to develop that land.

(2) For the purposes of subsection (1) a person has a sufficient interest in land where, being a prospective owner, developer, part-owner or lessee of the land he obtains the consent of the owner, other part-owner or lessor as the case may be to develop the land.

(3) An application for the development of land shall be made to the Authority in such form, and shall be accompanied by such plans, drawings and other information as may be prescribed by Regulations made under this Act.

Meaning of development

15. (1) For the purposes of this section “development” means, subject to subsection (2), the carrying out of building, engineering, mining or other operations in, on, over or under land, the making of a material change in the use of any building or land, the sub-division of land and the display of advertisements.

(2) The following operations or uses of land shall not constitute development—

(a) the carrying out of works for the maintenance, improvement or other alteration of a building, if the works affect only the interior of the building, do not involve structural alterations or do not materially affect the external appearance of the building; or

(b) the use of an existing building or land within the curtilage of a dwelling for a purpose incidental to the enjoyment of that dwelling as a dwelling house; or

(c) subject to subsection (3)(a) the use of land for the purposes of agriculture or forestry; or

(d) a development specified in the Second Schedule subject to any conditions set out in that Schedule.

(3) For the avoidance of doubt the following shall be deemed to constitute development—

(a) the use of land for the purposes of intensive agriculture and the subdivision of agricultural land;

(b) the use as two or more separate dwellings of a building previously used as a single dwelling;

(c) the deposit of waste on land notwithstanding that the land is comprised in a site already used for that purpose; if—

(i) the superficial area of the deposit is extended; or

(ii) the height of the deposit is extended and exceeds the level of the land adjoining the site;

(d) the use for the display of advertisements of an external part of a building not normally used for that purpose.

Environmental impact assessment

18. (1) Unless otherwise directed by the Authority, an application for development permission in respect of a development specified in the Third Schedule shall be accompanied by an environmental impact assessment of the proposed development.

(2) An environmental impact assessment shall include the matters specified in the Fourth Schedule.

Grant of permission

19. (1) The Authority shall, in respect of an application submitted to it under this Act have regard to—

- (a) the provisions of the Approved Development Plan or the Draft Development Plan in accordance with section 11;
- (b) the proposed development as it affects the interest of a person or body of persons interested, or the interests of residents of a locality;
- (c) the requirements of the Montserrat Building Code or any planning standards, guidelines or regulations that are currently in force;
- (d) the sustainability of the proposed development;
- (e) the content of any environmental impact assessment; and
- (f) any other material planning consideration,

and may grant development permission conditionally or unconditionally or may refuse development permission.

Appeal

20. The applicant or any person aggrieved by a decision of the Authority respecting the grant or refusal of development permission may within sixty days of the making of that decision appeal to the Tribunal setting out the grounds upon which the appeal is based.

Planning Register

63. (1) The Authority shall maintain a register of all—

- (a) applications for development permission;
- (b) decisions on such applications;
- (c) compliance notices;
- (d) amenity notices;
- (e) modification or revocation orders;
- (f) appeal decisions;
- (g) approved Development Plans;
- (h) Act Survey maps.

(2) The register shall be open for inspection at all reasonable times during normal working hours at a place to be designated by the Authority.

THIRD SCHEDULE

(Section 18(1))

DEVELOPMENT PROPOSALS FOR WHICH AN ENVIRONMENTAL IMPACT ASSESSMENT IS REQUIRED

1. Hotels of more than fifty bedrooms.
2. Residential developments (including sub-divisions) where the number of plots or dwellings exceeds fifty....
16. Any development proposed within an environmentally sensitive area defined within an adopted Development Plan or within a designated National Park, Marine Park, Forest Reserve or Protected Forest.

- 8 A first observation from reviewing the Act is there appears a distinction between a 'development plan' in **ss5-11** in **part 3 PPA**, which is reviewable per **s9**, and a 'development permission' in **ss12** and **13** in **part 4**. Part 4 sets out the procedure for an individual seeking planning permission to build; whereas part 3 sets out the procedure for the authority to designate potential land use, requiring later any planning permission sought under part 4 by an individual to have recourse to the PDP per **s11**. It does not follow where land is designated residential, permission will automatically be given to build, which instead requires a separate process, and then adjudication by the PDA under **s19**, which may then separately be appealed under **s20**.
- 9 A second observation is an EIA arises under **s18 PPA** during a **part 4** application for 'development permission' to build, not a **part 3** application to redesignate through a revision of the PDP under **s9**. If there is an application under part 4 by Paradise to build, a hotel or more than 50 homes per **schedule 3**, or if plot 12/01/207 is deemed 'environmentally sensitive', for example owing to birds or as a conservation area, then an EIA appears necessary, but not for redesignation under part 3 within the PDP by the GIC.
- 10 A third observation concerns the Planning Register, under **s63 PPA**. This requires a record of all applications for, and decisions on, 'development permission'.
 - a. Development permission is defined at **s13 PPA** as sought by an individual, being expressed as, *'any person, being the owner of land, or a person having a sufficient interest in land'*, so that such a person *'may apply to the Authority for permission to develop that land'*. From this, it seems clear 'development' is not considered redesignation by the Authority, which is the PDA, whose function merely ascribes a potential to land, but instead development is what occurs if an individual then builds with permission from the Authority.

- b. Reviewing **s15 PPA**, interpreted by **s2** which requires attention to 'context', it says development includes *'the making of a material change in the use of any...land'*. McKeand argues redesignation is a material change in use. However, in my judgement not so; instead, redesignation establishes only a potential change in use, meaning it does not amount to 'development', which instead in the context of the structure of the PPA, divided between **parts 3 and 4**, requires permission and then building activity. An actual change in use is not the same as a potential change in use, so that no material change yet occurs; potential change in use by redesignation merely means the land remains as it is, undeveloped, though might develop in time and on application by an individual under part 4, meaning development has not yet happened.
- c. In my judgment, it follows if redesignation is not development, then redesignation under **s9 PPA** does not require a development permission under **s13**, and as such the process is not caught by the Planning Register under **s63**, according to a strict reading of the Act, meaning the redesignation does not require the submissions of Paradise nor the reasons for the redesignation to be entered into the Register. Conversely, if following redesignation there is a development permission sought by Paradise, then the application, and responses as part of it, and the PDA decision, will all be so caught, so that the Register will require a full record and to be available for public scrutiny.

11 While the PDA may not strictly be required to declare through the Planning Register reasons for redesignation, in this case the Deputy Governor Lyndell Simpson has made voluntary offer of some measure of explanation, saying by affidavit of 12.04.22 at paras 5 and 6:

Cabinet was provided with the information and responses obtained from the March to May 2019 and the October to December 2020 public consultation exercises...and cabinet noted the majority of the public responses in support of the proposed modification of the development plan were submitted anonymously on the deadline date for responses....In light of the information submitted cabinet took into consideration a number of factors to include the current and future development patterns, the amenity and character of the area, the heritage and environmental features of the area, the housing market demand, the taxation value, the need for recreational space, as well as the public opinion and comments received on the proposed changes. Cabinet having considered all of these matters, on 21.10.21 took the decision it would approve the modification of the PDP to rezone plot 12/01/207 from recreational to residential.

- 12 Giving some measure of reasons, even if not strictly required under the statute, is in keeping with dicta in **Dover DC v CPRE Kent 2017** UKSC 79 where Lord Carnwath took the view, following **R v Home Secretary, ex parte Doody 1994** 1 AC 531, that reasons will be required where they are necessary to permit the courts to scrutinise the underlying decision effectively, saying at para 54:
- Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. *Doody* itself involved such an application of the common law principle of “fairness” in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts. Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision.
- 13 In my judgment, for present purposes, what has been said by the Deputy Governor is adequate as reasons, not strictly sought under the **PPA**, if ever they were required under the *Dover DC* case *supra*.
- 14 Moreover, by affidavit of 13.12.21 by Clement Meade, the Chief Planning Officer, as regards the process followed for redesignation, reported at paras 7-20:
- a. Following receipt from Paradise in February 2019 of the request to redesignate under **ss 9** and therefore **7(1) PPA**, the PDA published notice on the Physical Planning Unit website, notice boards, on the radio, and via town hall meetings, during 60 days, leading to 98 comments, including from McKeand in opposition.
 - b. At his para 12, in explaining the then thinking of the PDA up to the redesignation decision on 06.08.20, Meade uses much of the exact same language later offered by the Deputy Governor on 12.04.22 to explain her later thinking in October 2021, his saying factors in favour of redesignation included:

‘...the current and future development patterns, the amenity and character of the area, the heritage and environmental features of the area as well as the public opinions and comments received on the proposed changes’.

- c. A further consultation period was agreed in court on 19.10.20, of 60 days under **s7(2) PPA**, leading to four further comments, and redesignation on 21.10.21, leading to publication of the redesignation in the Alliaouagana Express as a modification of the PDP, on 22 and 28.11.21, as required under **s8(2) PPA**. During these strange covid times, the November edition of the Legislative Gazette was not published, and while redesignation notice ought to have been published in it, the absence of this formality would not to my mind create a persuasive argument to review and set aside the whole process, given publication in the Express.
- d. In sum, the mechanism of **ss7-9 PPA** for redesignation appears on the materials offered to have been followed satisfactorily.

Leave for judicial review

- 15 I turn now to whether leave should be granted for judicial review of the GIC decision to redesignate.
- 16 Of assistance have been paras 5 and 6 in the submission on 04.05.22 by Counsel Rodney, who wrote, with which the court agrees:

‘Judicial review is concerned not with the decision, but the decision-making process’, per Lord Brightman in **Chief Constable of North Wales Police v Evans 1982** 3 All ER 141. It is not an appeal from a decision, but a review of the manner in which the decision was made. The Court’s concern is with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers...The Court in Judicial Review proceedings is restricted to determining whether or not the decision being challenged was legal, and not whether the decision maker made the correct decision, nor whether the Applicant or the Court agrees with the decision made.’
- 17 Judicial review is governed by **rule 56 Civil Procedure Rules 2000 (CPR)**. Remedies include under **r56.1(3)** certiorari, prohibition, and mandamus, meaning if appropriate an administrative decision can be by the court quashed, forbidden, and with some other order made in its place. Leave to apply is required.

- 18 In the Privy Council case of **Sharma v Brown-Antoine 2006** 69 WIR 379, the test to be applied at the leave stage was outlined as follows:
- The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.... It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen.
- 19 From the *Sharma* case, it follows mere arguability is not enough; the argument must be a good one with a realistic prospect of success.
- 20 As above at para 15, reasons to give such a remedy include where 'a decision-making authority
- a. exceeded its powers,
 - b. committed an error of law,
 - c. committed a breach of the rules of natural justice,
 - d. reached a decision which no reasonable tribunal could have reached,
 - e. or abused its powers'.
- 21 On what has been presented, when the GIC made the decision to redesignate: there was no exceeding powers, as **s9 PPA** allows it; there has been no error of law as to the procedure for review of the PDP as the letter of the statute appears has been followed, including the 60 day consultation agreed on 19.10.20, per **s7(2) PPA**; there having been some measure of reasons given, these are not irrational; and in all, there has been no evidence offered of abuse of power.
- 22 Concerning breach of natural justice, the two fundamental principles are *audi alteram partem*, meaning 'let all sides be heard', and *nemo iudex in causa sua*, meaning 'no one should be a judge in their own cause'.
- a. Dealing with the latter, the PDA is not a judge in its own cause by redesignating land, as land designation is not its cause in which it has a private interest, but is its very function as a public body under the **PPA**, in creating and reviewing a PDP as **ss5** and **9** expect.

- b. Dealing with the principle, 'let all sides be heard', McKeand is not yet a 'side', and so far has had opportunity to be heard. The process expects representations on consultation and then a designation decision, and on what is before the court the consultation took place in keeping with the **PPA**, where McKeand was heard insofar as he responded to the consultation. Further, McKeand cannot yet be a side, because the redesignation decision cannot yet affect him, as no building has been permitted, nor development permission granted under **ss12 13**, and **19**, so that he has not yet locus to complain, nothing yet happening on the land as a material change in its use; when such application is made, to be fully recorded in the Planning Register, then McKeand can raise objection, and inspection of the Planning Register of a decision by the PDA to grant permission to build might then raise judicial review depending on how the decision was reached, also then raising issues as to an EIA, though noting besides there is separately an appeal available under **s20** if aggrieved by a decision to grant development permission under **s19 PPA**.

23 While refusal of leave closes the door on McKeand's current action, it must be remembered this is not the end. Instead, his application is merely premature, challenging the wrong decision, namely the one under **s9**, not **s19 PPA**, (if it ever arises and is challengeable).

24 Specifically, in answer to what McKeand seeks, as above:

- i. *a declaration how the PPA should work as regards redesignation within the PDP* – answer: the decision appears within the working of the **PPA** so that no declaration to correct its working is needed;
- ii. *a declaration an EIA is required here before redesignation* – answer: the decision to redesignate under **s9 PPA** did not require an EIA, which arises under **s18** if at all on application to build under **s13 PPA**, so no declaration is needed;
- iii. *and mandamus that the Planning Register should record submissions Paradise made for redesignation and what are the PDA reasons for it* – answer: under the **PPA**, the Planning Register does not strictly require record of the redesignation submissions and reasons (though brief adequate reasons have been offered on 12.04.22 by the Deputy Governor).

- 25 In all the circumstances, for the reasons explored above, there being no arguable ground with a realistic prospect of success for judicial review of the redesignation, with attendant declarations, leave for judicial review of the decision of 21.10.21 recommended by the PDA, then made by the GIC, is refused.
- 26 I thank the parties for their learning and assistance, and in particular Applicant McKeand, not being a lawyer, but who has raised interesting argument intelligently.
- 27 As McKeand has raised an important examination of the workings of the **PPA**, as a worthy point of public interest, there shall be no order as to costs.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

27 May 2022