

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

FEDERATION OF SAINT CHRISTOPHER AND NEVIS (NEVIS CIRCUIT)

SKBHCVAP2017/0002

BETWEEN:

DIRECTOR OF PHYSICAL PLANNING

Appellant

and

ANNE HENDRICKS BASS

Respondent

BEFORE:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances

Mrs. Rhonda Nisbett-Browne for the Appellant
Mr. Garth Wilkin for the Respondent

2017: June 13;
15.

Civil appeal – Interpretation of section 47 of Nevis Physical Planning and Development Ordinance CAP. 6.09 – Information to be kept in register under section 47 – Extent of public access to said information

The appellant is the Director of Physical Planning in the Nevis Island Administration (“the Director”) and was appointed under the Nevis Physical Planning and Development Ordinance (“the Ordinance”). The respondent is a citizen of Saint Kitts and Nevis and resides in Nevis. A representative of the respondent visited the office of the Department of Physical Planning to inspect the Department’s files in relation to an application by Caribbean Development Consultant Ltd to develop Candy Resort Villa Development (“the Development”) and to extract copies of all documents and plans relating to the Development. The representative was allowed to inspect some of the documents and plans on the Department’s file but her request to take copies of the documents and plans was denied by the Director. Consequently, the respondent applied for judicial review of the Director’s decision refusing her request to take copies of the documents and plans on the Director’s file.

The application was heard by the learned judge who applied a purposive construction to the interpretation of section 47 of the Ordinance. The learned judge made several orders including an order quashing the decision of the Director to refuse the respondent's request. The Director appealed against the judge's orders.

Held: dismissing the appeal; affirming the order of the learned trial judge with the exception of subparagraph 6 of paragraph 68 of the learned trial judge's judgment and awarding costs of the appeal to the respondent to be assessed by a master unless agreed by the parties within 21 days, that:

1. The combined effect of the preamble and section 3 of the Ordinance makes it abundantly clear that the development of land in Nevis is not entirely a private matter even when it is taking place on land that is privately owned. The public has an interest in how land is developed on the island and the draftsman has made provision in the Ordinance for a fair, open and accessible system of approving projects for the development of land and has gone as far as to direct in section 3(2) that the Ordinance must receive '...such purposive and liberal construction and interpretation as best ensures the attainment of its objects.' This is very powerful language and this Court would be remiss if it did not honour the draftsman's intention of not just looking at the words used in the Ordinance and interpreting them literally, but reading and interpreting them in the context of land development in Nevis as is clearly set out in the preamble and section 3. There is nothing in the remainder of the Ordinance that contradicts the clear intention in the preamble and section 3. The Court, therefore, applies a liberal and purposive construction to the interpretation of section 47.
2. The register must be in a form that allows the public to have access to sufficient information to allow them to be able to make a proper assessment of the development that is contemplated. To achieve this objective, the information in the register cannot be limited to what the Director sees fit to note therein. The use of the word "information" in section 47(5) and the requirement for an index are clear indications, in the context of the general intention of the Ordinance, that the register means the information actually recorded on the register itself and the supporting documents which must be listed in the index and which form a part of the register. Further, from a proper reading of section 47(5), the right to take copies of those documents upon paying the prescribed fee follows. Accordingly, the respondent and other members of the public have a right to inspect and take copies of the register of the Development kept by the Director under section 47 of the Ordinance which register includes the supporting documents. The attempt to restrict that right to information entered in the register by the Director is in breach of the Ordinance and is unlawful. The learned judge was therefore correct in her categorisation of the information that should be included in and form part of the register kept by the Director and was correct in granting the respondent's application in the terms set out.

ORAL JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the decision of the learned judge's order setting aside a decision by the appellant refusing the respondent's request to inspect and take copies of documents forming a part of the appellant's records. Full details of the judge's orders are set out in paragraph 4 below.

Background

- [2] The appellant is the Director of Physical Planning in the Nevis Island Administration ("**the Director**"). He was appointed under the **Nevis Physical Planning and Development Ordinance**¹ ("**the Ordinance**") and is charged with responsibility for physical planning and development control in Nevis. The respondent is a citizen of Saint Kitts and Nevis and resides in Nevis.
- [3] In January 2016, a representative of the respondent attended the office of the Department of Physical Planning to inspect the Department's files in relation to an application by Caribbean Development Consultant Ltd to develop Candy Resort Villa Development ("**the Development**") and to extract copies of all documents and plans relating to the Development. The representative was allowed to inspect some of the documents and plans on the Department's file but her request to take copies of the documents and plans was denied by the Director. As a result, the respondent applied for judicial review of the Director's decision refusing her request to take copies of the documents and plans on the Director's file.
- [4] The application was heard by the learned judge who applied a purposive construction to the interpretation of section 47 of the Ordinance and made the following orders:

- (a) An order of certiorari quashing the decision of the Director denying the respondent access to information recorded in the Department's register related to the Development

¹ Cap. 6.09 (N), Revised Laws of Saint Christopher and Nevis 2009.

- (b) A declaration that the respondent is entitled to be granted access during ordinary business hours to all information in the registers required to be kept by the appellant related to the Development
- (c) An order of mandamus compelling the Director to provide access to the respondent or her agents to all information recorded in the registers required to be kept by the Director related to the Development and to take copies of such information on payment of the prescribed fee
- (d) A declaration that the register contemplated by section 47(1) of the Ordinance are documents including but not limited to:
 - (i) The actual application made for planning permission
 - (ii) The plans of the project
 - (iii) Any amendments or revisions to the application
 - (iv) Related applications
 - (v) Environmental impact assessments amended thereto or supplemental environmental impact assessments.
 - (vi) Any notices issued and all related documents in relation to that particular application for development
- (e) A declaration that the actions by the appellant exercising his discretion not to allow members of the public to view and take copies of documents forming part of an application to develop land are unlawful
- (f) An order that the appellant take all lawful measures to be in compliance with section 47 of the Ordinance.

The judge also ordered that there be no order as to costs because the case related to public law.

- [5] The Director appealed against the judge's orders. The crux of the appeal is the interpretation of section 47 of the Ordinance which we will set out in full because of its importance in determining this appeal.

"Registers to be kept.

- (1) The Director of Physical Planning must maintain such registers as may be necessary or convenient for recording particulars of
 - (a) any application for permission to develop land, including
 - (i) the name and address of the applicant;
 - (ii) the date of the application;
 - (iii) the proposed development forming the subject of the application;
 - (iv) the date and effect of any decision made in respect of the application;
 - (v) any appeal in respect of the original decision and the decision made on the appeal;
 - (vi) any modification or revocation of any permission granted in respect of such application;
 - (b) any enforcement notice or stop notice issued in respect of any development of land;
 - (c) any commencement notice received and any completion certificate issued; and
 - (d) any other matter which may be prescribed by regulation under this Ordinance.
- (2) Any register kept by the Director of Physical Planning pursuant to subsection (1)(a) and (b) must have an index in the form of a map.
- (3) The Director of Physical Planning may maintain any register or index map required to be kept pursuant to subsection (1) in an electronic data storage and retrieval system.
- (4) Every entry in the register must be made within seven days of the date on which the decision, notice or event to which it relates was made, filed, issued or done.
- (5) The register must be kept at the office of the department of the Nevis Island Administration charged with responsibility for physical planning and development control, and any person is entitled, during ordinary business hours, to have access to the information recorded therein free of charge and take copies of such information on payment of the prescribed fee."

- [6] We will now set out in summary form the parties' submissions on the interpretation of section 47 and then apply the Court's analysis to the interpretation of the section.

Appellant's Submissions

[7] Mrs. Nisbett-Brown, who appeared for the Director, submitted that the Court should interpret section 47 literally because there is no ambiguity in the section and find that the plain meaning of the section is that the public should have access to the registers kept under section 47 and not to the documents filed by an applicant in support of the application. In other words, the Director is required by the section to extract from the supporting documents the information that is required to compile the register for an application and enter the extracted information on the register. The public has full access to this information and can take copies of the information on the register on payment of the prescribed fee. The section does not give the public the right to inspect or to take copies of the supporting documents, even though in practice the Director allows persons to inspect those documents but not to take copies. Put shortly, she said that the section on its proper construction allows a member of the public access and the taking of a copy or copies of the register only.

[8] Mrs. Nisbett-Brown submitted further that the purposive rule of construction does not apply in this case because there is no ambiguity in section 47. But even if this construction was applied to the section the result would be the same as the only reasonable interpretation of the section is the one suggested by her in the preceding paragraph.

Respondent's Submissions

[9] Mr. Wilkin, who appeared for the respondent, submitted that the Court is bound to apply a purposive construction to section 47 of the Ordinance as a whole because this is what is required by section 3 of the Ordinance.² He emphasised that section 3 provides that the physical planning and development control processes must be fair, open, accessible, timely and efficient and that the Ordinance must receive such purposive and liberal construction and interpretation as will best ensure the attainment of its objects. Further, it is not surprising that subsection 5

² Section 3 outlines the objects of the Ordinance and is set out in paragraph 12 below.

of section 47 gives the public the right to have access to the “information” in the registers kept under the section and to take copies of such information. If the draftsman intended that the public’s access should be limited to the register it would have been the simplest thing to use the word “register” when dealing with the issue of public access in subsection 5 instead of the more general word “information”.

[9] Mr. Wilkin further submitted that if all that was required for keeping a register in accordance with section 47 was the making of entries on a form, the requirement in subsection (2) of section 47 for having an index for each register would not make sense because the index must be referring to the documents filed in support of the application. In short, it would be illogical to have an index for a form only. He referred the Court to the Department’s register for the Development comprising one page with very scanty information and submitted that it would be absurd for the Court to find that the intention of the draftsman was that the public’s access would be limited to this one page document containing what the Director saw fit to insert into that document. He said that the only reasonable interpretation of section 47 is that the public has access to the register, the application for development and the supporting documents, and the public has the further right to take copies of these documents. It is only in this way that the public has an effective right to scrutinise and, if necessary, challenge developments in their own interest or in the interest of the people of Nevis.

[10] As an example of the deficiency in a system where the public’s access is limited to the information in the register itself Mr. Wilkin reminded the Court that the application by Caribbean Development Consultants Ltd is subject to a challenge in ongoing proceedings in the High Court and that this information is not recorded in the register for the application as required by subparagraph (a)(v) of section 47(1). This, he submitted, is just one example of the potential inaccuracy of the information in the register and how misleading, by omission or commission, the register by itself can be for a member of the public who has genuine concerns as

to the potential impact of the proposed development. There must be public accountability in the process and it could not be that the intention is that the public should be restricted to the bare information that appears on the register itself.

- [11] In summary, he submitted that the draftsman intended that the register should comprise a bundle of documents, with an index, which includes the actual documents and plans submitted to the Department for planning permission, any environmental impact assessments submitted, notices issued and all other relevant documents. The learned judge was correct in her interpretation of section 47 and the appeal should be dismissed with costs to the respondent.

Analysis

- [12] A good place to start in the interpretation of the Ordinance is the preamble which provides that the Ordinance is:

“AN ORDINANCE to make provision for the preparation of physical plans for Nevis, for the control of the development of land, including building operations and the subdivision of land, for the assessment of the environmental impacts of development, for the preservation of the natural and cultural heritage, and for related matters.”

This is followed by section 3 which sets out the objects of the Ordinance as follows:

“(1) The objects of this Ordinance are to

- (a) ensure that appropriate and sustainable use is made of all publicly owned and privately owned land in Nevis in the public interest;
- (b) maintain and improve the quality of the physical environment in Nevis, including its amenities;
- (c) provide for the orderly subdivision of land and the provision of infrastructure and services in relation thereto;
- (d) maintain and improve the standard of building construction so as to enhance human health and safety;
- (e) provide for physical planning and development control processes that are fair, open, accessible, timely and efficient; and
- (f) protect and conserve the natural and built heritage of Nevis.

(2) This Ordinance must receive such purposive and liberal construction and interpretation as will best ensure the attainment of its objects.”

[13] The combined effect of the preamble and section 3 makes it abundantly clear that the development of land in Nevis is not entirely a private matter even when it is taking place on land that is privately owned. The public has an interest in how land is developed on the island and the draftsman has made provision in the Ordinance for a fair, open and accessible system of approving projects for the development of land and has gone as far as to direct in subsection 2 of section 3 that the Ordinance must receive ‘...such purposive and liberal construction and interpretation as best ensures the attainment of its objects.’ This is very powerful language and this Court would be remiss if it did not honour the draftsman’s intention of not just looking at the words used in the Ordinance and interpreting them literally, but reading and interpreting them in the context of land development in Nevis as is clearly set out in the preamble and section 3. There is nothing in the remainder of the Ordinance that contradicts the clear intention in the preamble and section 3.

[14] In the circumstances, this Court will apply a liberal and purposive construction to the interpretation of section 47. This makes it unnecessary to set out in this decision the very helpful cases cited and submissions made by both parties in their written submissions on which rule of interpretation this Court should follow in construing section 47.

[15] The two main issues that call for interpretation in section 47 are (a) what is the information or particulars that should be in the registers kept under the section, and (b) what is the extent of the public’s access to that information.

[16] In relation to the content of the registers, we accept Mr. Wilkin’s submission that the register must be in a form that allows the public to have access to sufficient information to allow them to be able to make a proper assessment of the development that is contemplated. How else would the public be able to determine

what impact, if any, the development will have on neighbouring properties, the environment, and on ‘...the preservation of the natural and cultural heritage’ of the island of Nevis? To achieve this objective, the information in the register cannot be limited to what the Director sees fit to note in the register. A brief perusal of the register for the Development shows how unhelpful the notations in the register can be. The only real information that can be gleaned from this document is that the proposed development is for 17 condominium style buildings, six of the buildings are under construction and there is an outstanding application for fencing. There is no mention of the ongoing dispute which is before the High Court regarding environmental issues and no real details of the scope of the development.

- [17] We do not think that this was the intention of the legislation. The use of the word “information” in subsection 5 and the requirement for an index are clear indications, in the context of the general intention of the Ordinance, that the register means the information actually recorded on the register itself and the supporting documents which must be listed in the index and which form a part of the register. The learned judge was therefore correct when she found and declared at paragraph 68(d) of the judgment that the register contemplated by section 47(1) should contain the various matters set out in paragraph 68(d) of her judgment which is set out in paragraph 4 above.
- [18] We agree with and adopt the judge’s categorisation of the information that should be included in and form part of the register kept by the Director. As an aside, there was mention in this matter of correspondence on the Director’s file. For completeness, we do not think that such correspondence forms a part of the register kept by the Director.
- [19] The other issue regarding the interpretation of section 47 is the extent of the public’s access to the information on the register and their right to take copies of all the documents that comprise the register. It was suggested by Mrs. Nisbett-Brown that even if the public has the right or has been given the right to inspect

the documents on the Director's file, this right does not extend to taking copies of those documents. We can find no justification for making this distinction. From a proper reading of section 47(5), once it is established, as the lower court and this Court have found, that the register includes the documents mentioned in paragraphs 4 and 17 above, the right to take copies of those documents, upon paying the prescribed fee, follows.

[20] In all circumstances, we find that the respondent and other members of the public have a right to inspect and take copies of the register of the Development kept by the Director under section 47 of the Ordinance which register includes the supporting documents. The attempt to restrict that right to information entered in the register by the Director is in breach of the Ordinance and accordingly unlawful. The learned judge was therefore correct to grant the respondent's application in the terms set out above and there is no reason to interfere with those findings.

[21] For these reasons, the appeal is unmeritorious and we make the following order:

- (1) The appeal is dismissed. The order of the learned trial judge is affirmed with the exception of subparagraph 6 of paragraph 68 of the learned trial judge's judgment.
- (2) The appellant shall bear the respondent's costs of the appeal to be assessed by a master unless agreed by the parties within 21 days.

[22] The Court is grateful to counsel on both sides for their very helpful written and oral submissions.

I concur.

Janice M. Pereira

Chief Justice

I concur.

Davidson Kelvin Baptiste

Justice of Appeal

By the Court

Chief Registrar