



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 $\frac{1,507,683.00}{\$3,501,045.50}$ "

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 subparagraph (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 its 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

