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Ex Parte: CITY COUNCIL OF JOHANNESBURG

In re: PAGEVIEW TOWNSHIP

O P I N I O N

Portion of the Township of Pageview was promulgated in 1956 as a group area for white ownership and occupation in terms of Section 3(1)(a) and (b) of the then Group Areas Act 1950, as amended. The remainder of the Township was similarly promulgated as a white group area in 1963 in terms of Section 20 (1)(a) and (b) of the current Group Areas Act 1957, as amended. I shall refer to the current Act as the Group Areas Act. The proclamations of the group areas were made in the face of opposition not only on the part of the residents - exclusively or overwhelmingly Asiatic - but of the City Council of Johannesburg itself, which Council is the Consultant herein.

The Council now faces a fait accompli as to the future character of the area concerned. Whatever be its own views on the subject, there is no longer any practical alternative open to the Council to giving effect to the Government decision implicit in the Ministerial

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Proclamation. Accordingly, it is necessary to redesign Pageview so as to fit it for the only purpose for which it can in the future be legitimately used, namely for the benefit of the white group only. Such redesign has become an urgent necessity, particularly because of the need for immediate housing, and perhaps in particular of sub-economic housing, for whites. Accordingly, in April, 1964, the Council took a decision to proceed with the overall planning of the entire area of Pageview as one for white ownership and occupation.

Arising out of this decision of the Council, and as a preliminary to its implementation, we have been asked to advise on the proprietary rights (if any) of the standholders in the Township, as to whether or not it is legally necessary to expropriate any such rights as they may have before the area can be taken over for the contemplated purpose, and as to the most appropriate machinery to be adopted by the Council to give effect to its proposed scheme, more particularly in regard to expropriation and compensation under the Group Areas Development Act 1955, as amended (here referred to as "the Development Act") and otherwise.

It is convenient in the first place to consider whether the Council should itself undertake the development of Pageview as a white area or whether this should be left to the Group Areas Development Board. Primarily, the responsibility for such development would fall on the

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Development Board in terms of Sections 12 bis and 12 ter of the Development Act. However, Section 13 contemplates delegation of the powers of the Development Board to a local authority; and the question arises as to whether the Council should seek delegated powers in terms of that Section. Doubtless the Development Board would place no obstacles in the way of such a delegation and would probably welcome an approach by the Council for the necessary powers.

As to whether the Council should seek delegated powers under Section 13, the most important considerations of the problem appear to be as follows. The fact that Pageview lies within the geographical boundaries and, therefore, under the jurisdiction of the Council is an important aspect of the matter; and the Council may well prefer to be in effective and exclusive control of an area which is properly its own domain. The fact that there is an urgent need for housing is another important factor, because, if the development is left to the Development Board, it may be more difficult for the Council to exercise the requisite pressure to ensure speedy development. Again, although the Council would no doubt be consulted as to the form and details of development, the ultimate say would be with the Development Board unless the Council took delegated powers. Furthermore, the Council may wish to have an effective voice on the standard of compensation to be paid to standholders whose rights will have to be expropriated. This is a matter, however, for Council

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policy upon which we are unable to express any view. Finally, it is obvious that even if the development is left in the first instance to the Development Board, it will be necessary sooner or later for the Council to take over the area from the Board. The method of development and the cost thereof to the Board will then have to be taken into account when the Council takes over the area. If it is not out of place for us to express our own view as to the attitude the Council should adopt, we consider that it will be better for the Council to control the area from the beginning and not to acquire it as an already redeveloped area. If the Council adopts this view, then the exact terms of the delegation is a matter for negotiation between it and the Development Board in terms of Section 13.

The next question to be considered is as to whether and, if so, to what extent the existing rights of the standholders and occupants of Pageview are obstacles to the contemplated redevelopment of Pageview and as to what steps are required to terminate any such rights and as to what, if any, compensation must and should be paid for any such rights.

The rights of the standholders and the non-white residents of Pageview have been vitally affected by the proclamation of the entire Township as a white group area in two respects. First, there is a requirement derived from the fact that the area has been proclaimed as a group

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area for white occupation, that all non-whites cease to occupy or reside on any of the stands in the Township. This is a matter with which the Council need not concern itself save, perhaps, insofar as prolonged occupation or residence of any portion of the Township may itself impede a rapid redevelopment of the area for white occupation. Subject to this qualification, the implementation of this portion of the Ministerial decision, including the grant of permits under the Group Areas Act to remain in the area after the date when non-white occupation becomes otherwise illegal, is a matter for the Minister and for the Group Areas Board - see Sections 18 and 20 (1) bis of the Group Areas Act, as also the penal provisions of Section 42 thereof. The Minister will no doubt regulate his notices to vacate to synchronise with the availability of alternative accommodation elsewhere for the displaced residents of Pageview. The Council's function must be limited to tendering advice to the Minister and to the Group Areas Board on the phasing of the notices and making recommendations to minimise the inevitable hardships which the residents of Pageview must undergo because of their enforced evacuation of the Township.

The physical evacuation of Pageview by the non-white occupants will not, however, of itself solve the preliminary problem facing the Council, namely of having the area available for eventual white occupation and for immediate redevelopment for that purpose. If the standholders in the Township have other property rights (as

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distinct from their right of physical occupation for themselves), they are entitled to exercise such rights save insofar as these have been taken away, modified or affected by the relevant provisions of the Group Areas Act read with the Proclamations of the Group Areas referred to above, and the related Development Act, or by any other law, including the law relating to expropriation for municipal purposes - particularly housing. In this connection, it is right to point out at once that neither of the Acts mentioned above contemplates confiscation, that is the termination of rights of property without compensation. The expropriation provisions of those Acts as also in the other appropriate laws - in particular, the Municipalities Powers of Expropriation Ordinance of the Transvaal, 1903 and the Housing Act, 1957 - are designed to have the same effect.

For a proper consideration of the property rights of the standholders of Pageview, it is necessary briefly to consider the history of that Township and of the forms of land tenure involved.

The freehold ownership of the land constituting the Township of Pageview, formerly known as the Malay Location, was vested in the Council by virtue of Crown Grant No. 338 of 1921. With the exception of some 26 stands, the freehold title to all the land has remained vested in the Council. The excepted stands are those of which the freehold ownership was transferred to Asiatics

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in terms of the Conditions of Establishment relating to the Township, which Township was promulgated in 1947. In terms of such Conditions of Establishment, the transfer, leasing and residence of and on the stands was restricted so as to exclude "Europeans, Natives and prohibited immigrants", and transfer was made subject to the consent of the Council, such consent not to be unreasonably withheld.

Save for the excepted stands referred to above, all the stands in Pageview are held - as they have always been held - on a form of tenure, which is evidenced by a document known as a "Site Permit", which tenure was created many years before the promulgation of the Township - namely, in or about 1895. It was then that the Malay Location was established under the enabling provisions of Law 3 of 1885 of the Transvaal. That Law permitted the Government of the Republic to assign areas to (among others) Asiatics to live in, and at the same time prohibited ownership by such Asiatics of fixed property elsewhere in the Republic - Hatch v. Koopoomall, 1936 A.D. 190. Ownership was not, however, in fact so granted in respect of any of the stands in the Location prior to the promulgation of the Township of Pageview. The only form of tenure in fact previously permitted - and still permitted - was that of the site permit. This form of tenure, which we shall discuss later in this Opinion, was governed by the provisions of the "Regulations for Native Locations" (sic) promulgated in 1895 (here referred to as "the Regulations"). The

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Regulations, subject to certain subsequent amendments which are not material to this Opinion, remain unrepealed.

Freehold owners

The property rights of the standholders depend, in the first place, on whether they have freehold title or site permit/tenure. The freehold owners of the 26 stands referred to above need not detain us. Their rights are no different from those of other freehold owners of land. In the case of an individual, the freehold title remains undisturbed for the lifetime of the owner. In the case of a company or of a deceased estate, the owner may retain his ownership for a maximum period of ten years after promulgation of the group area - Section 24 (1)(b) of the Group Areas Act. These freehold rights can only be taken away if the properties are voluntarily disposed of, or if such properties are expropriated. In view of the promulgation of the area as a white group area, any voluntary dispositions must, of course, be to persons not disqualified from ownership or occupation, namely persons who are whites. The owners may also lease their properties to, and otherwise confer rights of occupation upon, white persons. Finally, unless and until their properties are expropriated, the freehold owners may exclude anyone from possession thereof, including white persons.

Site Permits

The rights of a standholder under a site permit create greater difficulties. Insofar as the site permit gives him a right to sub-let (as to which see Clause 8 of the Regulations), he may continue to do so but, of course,

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Site permit rights

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may not do so to persons who are not white. Although occupation of all the stands in Pageview is restricted in terms of Clause 4 of the Conditions of Title applicable to the Township so as to exclude white persons, that restriction has lapsed with the proclamation of the area as a group area for white occupation - see Section 23 (4) of the Group Areas Act.

It does not seem to us that either the lapse of this Condition of Title, or the proclamation of the group area as one for white occupation only, has the effect of nullifying either the tenure constituted by the site permit or the Regulations. We believe that, to the extent that it is still possible to give effect to the rights otherwise conferred by such site permit and the Regulations, the Courts will do so - and this despite the fact that the whole basis for the establishment of the Malay Location has fallen away, namely to provide an area for non-white occupation. In this respect it is to be observed that there is nothing in the enabling Law 3 of 1885 which legally precluded white persons from occupying stands in an area set aside for the Asiatics and others there referred to; nor do the Regulations themselves specifically provide for any restriction against non-white occupation.

It is now necessary to consider the other rights conferred by the site permit tenure. Such permit has always been regarded as freely transferable with the formal permission of the Council (and of its predecessors, initially

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Site permit rights

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the Sanitary Board of Johannesburg) under what is known as a "Transfer Permit". The exact nature and legal implications of the tenure of the standholders have never been fully defined in any authoritative decision of our Courts. Several aspects thereof have, however, been the subject of important judicial pronouncements, notably in the cases of Hatch v. Koopoomall (supra); Essop v. Rex, 1909 T.S. 480 (per Innes C.J.) at pp. 484-5, and Petersen v. Jajbhay, reported in both Courts at 1940 T.P.D. 182. See, particularly, the judgment of Schreiner J. in Petersen's case in the Court a quo at pp. 184-5, which was adopted by the Full Court at pp. 187-8. ~~The~~ Reference may also be made, for a discussion on this type of tenure, to the Feetham Report paras. 38 - 47. It is clear that the tenure involves the right of exclusive occupation and the normal right to transfer such occupation to others. The right cannot be taken away and was intended to be permanent. The tenure has been equated to that of quitrent; and we consider that quitrent title very nearly describes the right conferred by the site permit. The standholders' rights are rights exercisable against the whole world and are, therefore, rights in rem. Although the matter is not free from doubt, we have come to the conclusion that the interest of the site permit holder in his stand is an "interest in land" within the contemplation of the definition of "immovable property" read with the definition of "land" in the Development Act (Section 1(1)(viii) and (x)). The mere fact that the standholder's tenure is not registrable does not appear to us to be an obstacle to its

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being regarded as immovable property. K.B.I. v. Anglo American (Q.F.S.) Housing Co. Ltd., 1960 (3) S.A. 642 A.D. at 649 F.

The next question is whether the permanent improvements, effected upon the stands by way of buildings, themselves constitute a form of immovable property. That buildings can be treated as immovable property, seems clear from the definition of the latter term in Section 1 (1)(viii) of the Development Act above referred to. Although perhaps not all buildings on land constitute portion of the immovable property, we have no appreciable doubt that the buildings erected by the standholders on their stands were intended to be of a permanent nature, that they adhered to the land, and that, accordingly, they are portion of the immovable property to which the standholder has legal title. It follows, in our view, that neither the Development Board nor the Council will be able to develop the area concerned for white occupation unless and until ^{all} the standholders' interest in their stands and the buildings thereon are (expropriated). The mechanics for expropriation under the Development Act are contained in Sections 24 to 29 thereof. There are parallel provisions for expropriation under the various other statutes under which expropriation may take place, and it is unnecessary for us to consider this aspect further in this Opinion.

We do not consider it appropriate to express a view as to the probable value which will be placed upon

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Basis of Compensation

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the expropriated rights of the standholders, if proceedings for expropriation are pursued. It may, however, be relevant for us to say that, in our opinion, the value to be attached to the improvements is likely to be the same value as would be placed upon improvements made by a bona fide possessor. As to this, see Lachoana v. Cloeta, 1925 A.D. 536. The expropriated rights will have to be valued at the date of expropriation. In this connection, however, attention must be drawn to the relevant adjustments which may have to be made in compensating the standholders, depending upon the basic values to be placed upon the immovable property under the Development Act by reason of the proclamation of the group areas. It is the function of the Development Board to prepare the necessary list of affected properties and to have the basic values determined and settled in terms of the Act. If the Council obtains delegated powers, as is suggested earlier in this Opinion, it may be liable for depreciation contributions or may receive appreciation contributions under the Development Act as there provided. It is obviously in the interest of the Council that the list of affected properties be prepared as soon as possible, and that the basic values be determined immediately thereafter. The Development Board should be called upon to expedite the framing of the necessary list and the determination of the values. If the Council does not take delegated powers but leaves the development of the area to the Development Board, the latter will have to acquire from the Council its own interest in the land affected.

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Finally, we should advise that it may well be that the Development Board will not accept our view that the standholders have rights which constitute immovable property in terms of the Development Act. If so, steps should be taken to have this issue decided by a competent Court. Doubtless one or more of the standholders affected will be only too ready to test this question in Court by proceedings against the Board. The Council need not be an active participant in such proceedings.

D. J. D. D. D.
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Chambers,
JOHANNESBURG.

30th October, 1964.

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