

**IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
OF GUYANA**

REGULAR JURISDICTION

2019-HC-DEM-CIV-FDA-1975

BETWEEN:

**TENI HOUSTY and PAULINE CHASE in their
capacity as representatives of THE BAR
ASSOCIATION OF GUYANA**

Applicants

-and-

THE TOWN CLERK OF GEORGETOWN

Respondent

BEFORE:

The Hon. Mr. Justice Gino Peter Persaud

APPEARANCES:

Mr. Kamal Ramkarran for the Applicants

Mr. Roysdale Ford SC and Ms. D. Sukhdeo for the Respondent

**JUDGMENT DELIVERED: 8th February, 2022 (via electronic
mail)**

PERSAUD J:

1. This is commendable public interest litigation for judicial review filed by the Guyana Bar Association (GBA). At its broadest, judicial review is designed to remedy public law wrongs; that is, any unlawful exercise of public law power by a public law body.¹

¹ *Judicial Remedies in Public Law* by Clive Lewis, 5th ed., para 4-002

2. On 20th June, 2019 the Respondent published the Notice below to advise the general public of a new policy and the cost of applying for a Certificate of Compliance:

PUBLIC NOTICE

The Mayor and Councillors of the City of Georgetown wishes to inform the public that the cost for a Certificate of Compliance will be increased by 0.5% of the current market valuation of the property.

When applying for a certificate of compliance property owners should bring along:

- 1) 2019 General Rates Receipt*
- 2) Current Market Valuation*
- 3) Valid Identification Card*
- 4) Letter of Administration and Death Certificate (if owner(s) are deceased)*
- 5) Agreement of Sale*
- 6) Deed of Gift and the Affidavit of Donor and Donee (if the property is to be transferred as Gift/Trust)*

All documents presented must be certified copies and originals. The Council will not keep the original copies.

The property owners who are in the process of applying for certificate of compliance are required to contact the City Treasurer's Department on Telephone number 226-1228.

The new fee structure takes effect from the 1st July, 2019.

Note: A certificate of compliance is needed by Law for the sale/transfer of a property, land or building from one owner to another. A Compliance Certificate can only be obtained from the Mayor and Councillors of the City of Georgetown.

Sharon Harry Munroe

Town Clerk”

3. The GBA are aggrieved by this decision. They wrote to the Respondent twice requesting reasons for their decision under the Judicial Review Act but section 16 was honoured in the breach since the reasons requested were not supplied. It is not unreasonable to surmise that the GBA were studiously if not superciliously ignored. In 2019 in the case of *Berbice Bridge Company Inc v AG* I had cause to make an order compelling Minister David Patterson to provide reasons under section 16 of the Judicial Review Act for his takeover of the operations of the Berbice Bridge upon an application under section 15 for him to provide same.
4. The GBA believes this decision was an unlawful one and subsequently moved to the courts in filing this public interest litigation to challenge the MCC’s decision since they did not accede to the written request for reasons. It is an action for judicial review of a local government decision – the City Council of Georgetown, named herein as the Town Clerk of Georgetown, the Respondent. Notwithstanding this nomenclature, I will refer to the Respondent as “*the MCC*” (Mayor and City Councillors of Georgetown) and the

Applicants as “*the GBA*” (Guyana Bar Association) for ease of reference.

5. It is not in dispute that the Applicants have locus standi to challenge the decision of the MCC and that the impugned decision is justiciable.
6. Judicial review is used to determine whether decisions taken or measures adopted in the pursuance of statutory or other public law powers are lawful and valid. Secondly, it may be used to restrain public bodies from acting in an unlawful manner.²

Issue

7. The primary issue which falls for consideration and determination in these judicial review proceedings is the legality of the MCC’s decision. Did the MCC have the power to make the decision under review or did it exceed its powers and/or jurisdiction and acted ultra vires?
8. The learned author Clive Lewis of *Judicial Remedies in Public Law*, 5th ed. wrote as follows:

*The basis of judicial control over public authorities has traditionally been the doctrine of ultra vires. Statutory bodies are only able to do those things expressly or impliedly authorised by statute; actions not authorised are regarded as ultra vires and of no legal effect. Judicial review is concerned with ensuring that statutory bodies do not exceed the limits of the statutory powers conferred upon them.*³

² Ibid. para 4-002

³ Ibid. para 2-010

The Applicant's Case

9. The Applicants are seeking the following orders:
- (a) An Order of Certiorari quashing the decision of the respondent that with effect from July 1, 2019 persons applying for a Certificate of Compliance under Section 16A of the Deeds Registry Act, Chapter 5:01 must submit the certified copies and originals of the following documents, to wit:
 - 1) 2019 General Rates Receipt
 - 2) Current Market Valuation
 - 3) Valid Identification Card
 - 4) Letter of Administration and Death Certificate
(if owner(s) are deceased)
 - 5) Agreement of Sale
 - 6) Deed of Gift and the Affidavit of Donor and Donee
(if the property is to be transferred as Gift/Trust)
and pay the fee of 0.5% of the current market valuation of the property.

 - (b) A Declaration that the aforesaid decision is contrary to law and the policy of Section 16A of the Deeds Registry, Act, Chapter 5:01 and/or unauthorized and/or in excess of jurisdiction and/or an unreasonable and/or irregular or improper exercise of discretion and/or takes irrelevant purposes into consideration.

 - (c) An Order of Prohibition prohibiting the respondent from enforcing and/or acting upon the aforesaid decision and/or demanding the aforesaid fee or

documents in order to issue a Certificate of Compliance under Section 16A of the Deeds Registry, Act, Chapter 5:01.

10. The Applicants contend that the said documents demanded by the Respondent are not necessary in order for the Respondent to ascertain and certify from her own records whether rates and taxes have been paid on a particular property up to a specified time. In addition, the demand for the said documents is burdensome, frustrates commerce, superfluous and unnecessarily adds costs and time.
11. The Applicants further contend that the exorbitant fee demanded by the Respondent for the issuance of the Certificate of Compliance is unreasonable and contrary to the policy of and *ultra vires* Section 16A of the Deeds Registry Act, Chapter 5:01 which is to ensure that immovable property is not conveyed by way of gift or voluntary sale without the payment of rates of taxes therefor, and not to act as an additional tax as the respondent purports to do.
12. The effect of the decision has proven financially detrimental. The cost to obtain a Certificate of Compliance from the MCC increased from a flat fee of \$10,000.00 to hundreds of thousands of dollars depending on the valuation of the property.

The Respondent's case

13. The MCC in its Affidavit in Defence provides the reason for the decision as a policing one to prevent fraud in applications for declarations of title by ascertaining that the persons to whom

certificates of compliance are issued have a legal interest in the property.

14. They also contend that the MCC's power/discretion to request the submission of the set of documents is an implied or ancillary power or discretion flowing from sections 16A of the Deeds Registry Act and Courts are not to substitute their views on how such discretion is exercised.
15. They also contend that the decision is a **policy** decision to guide them in the grant of certificates of compliance. It is contended that the MCC has the power to make the decision and that the MCC "*has the power to establish non statutory policies to guide them in the issuance of certificates of compliance.*" This policy decision is needed for good administration of the statutory provision, that is, s. 16A of the *Deeds Registry Act*. It is not unreasonable in the Wednesbury sense.
16. It is further contended that the requested set of documents is not unreasonable, burdensome or adds unnecessary costs since it is expected to already be in the possession and control of an Applicant for compliance anyway.
17. It is further contended that the burden is on the GBA to establish that the MCC's decision was unreasonable or in bad faith or took into account matters which it ought not to and they have failed in this regard.
18. Additionally, the MCC relies on *section 301 (35) (36)* of the Act as the statutory basis which authorises them "*to prescribe fees and charges*"

and in the instant case has allowed them to fix the new percentage basis fee based on a current market valuation of the property.

19. The MCC further contends that there is nothing in the legislation which prohibits them from setting fees and charges on a percentage basis as opposed to a flat fee. They contend that the new fee is not a tax but a levy by a public body. They also contend that the Applicants have not alleged that the percentage fee was adopted by the MCC for the sole purpose of raising revenues.

20. They submit that the separate and conjoint meaning of “*establish*” and “*control*” under *section 301 (35)* means that the MCC is authorised to “*prescribe fees and charges*” in respect of anything which it has to verify, substantiate, prove or control.

ANALYSIS

21. The Applicant seems to have conflated the legal grounds for review. The written submissions filed by the GBA attacks the impugned decision as unreasonable, and or unauthorised, and or irregular, and or in excess of jurisdiction, and or takes into account irrelevant considerations. I prefer to treat the grounds for review separately.

22. I have compartmentalized the legal grounds for review and my analysis in sequential manner as follows:

- (a) Firstly, the “*ultra vires*” argument – Did the MCC have the legal power to make the decision under review? This can also be described as the “*legality issue*” or the “*excess of jurisdiction*” argument. This is a fairly straightforward issue which can be dealt with on an examination of the statutory framework and the powers of the MCC under the Act.

(b) Secondly, the subsidiary question - If the answer to the question above is in the negative, then the matter can be determined on this ground only, that is, the ultra vires ground. However, if the answer is in the affirmative, that the MCC has the power, then a review court sitting in its supervisory jurisdiction can go on to consider whether the power and/or discretion was exercised lawfully, that is, whether it was unreasonable, arbitrary, took irrelevant considerations into account etc.

23. In considering firstly, the ultra vires argument, we must examine the statutory framework and the powers of the MCC under the Act.

The statutory framework and powers of the MCC under the Act

24. The City Council is a creature of statute. It derives its jurisdiction and power from statute. The source of its power is contained in its governing legislation Cap. 28:01 (“the Act”). The MCC cannot act de hors the Act. As a creature of statute, it can only exercise the powers granted to it within the four corners of the Act. Section 8 provides that the City Council shall have such functions as are vested in it by or under this Act or any other law. It is described as an Act to make better provision for local government in the city of Georgetown and the town of New Amsterdam and in other areas of Georgetown.

25. Section 3 establishes the City Council as a body corporate. It is a local authority within the meaning of the Local Authorities (Elections) Act, Cap. 28:03.

26. Section 148 provides that the **revenues** of the City Council consist of all monies received by the Council which shall be credited to its general rate fund. All expenditure of a Council other than that financed by loan shall be discharged from the general fund.
27. Section 155 provides that estimates of revenues and expenditure are prepared once annually for the next financial year.
28. Section 156 provides that the City Council shall submit an annual report to the Minister containing an account of all monies received, expended and applied during the preceding financial year.

RATING

29. Section 203 provides that the Council shall be the rating authority and shall have power to make and levy rates within each rating area in its council area.
30. Section 204, 205 and 206 expressly provides a power to levy a general rate, the power to levy a supplementary rate and for the rates to be a percentage on the value of the property. Section 204 expressly provides for the Council to make and levy for each rating period a general rate which shall be sufficient to meet the expenditure estimated to be incurred by the Council in carrying out its functions under this Act during the rating period.
31. Section 206 fixes the quantum to be levied as a percentage on the value of the property. There is no other corresponding section in the Act which equally fixes the cost of a certificate of compliance to be levied as a percentage on the value of the property. The MCC has conceded that their increased cost is a levy.

32. This is a clear example of an express statutory power given to the Council. It is unambiguous. It is clear that this statutory power to levy rates is the mechanism or means by which Parliament intended and authorised the City Council to raise revenue to meet its expenditure and do its business. The jurisdiction or power of the City Council to levy such general rates – the quantum which is statutorily fixed as a percentage on the value of the property - is without dispute.

33. It is reasonable therefore to conclude that in the absence of a provision as unequivocal as section 206; such a power to levy a charge for a certificate of compliance as a percentage on the value of the property does not exist. Parliament could not have intended a double levy on a ratepayer within the same year which is exactly what became the position in 2019.

34. In 2019, the MCC instituted a double levy on the ratepayer which coincidentally is also a fixed percentage on the value of the property simply to obtain a certificate of compliance which is nothing more than a document verifying that the rates and taxes are paid up in respect of a property to be transferred to a new owner. Such verification by issuing a piece of paper in writing (certificate of compliance) is purely a ministerial function and cannot cost 0.5% of the value of the property to be transferred. This is a pedestrian exercise.

35. The MCC is expressly empowered to raise revenue to carry out its statutory mandate and its fiscal provisions guide its income, expenditure and financial reporting in the interest of accountability. It is expected to manage its financial affairs so as to break even. It is **not** empowered to raise additional revenue by increasing the cost for

the issuance of a certificate of compliance which is exactly what it did.

36. It is also an established principle that a local authority owes a fiduciary duty analogous to that of a trustee to ratepayers to have regard to their interests.⁴ Its duty in this regard is not to overcharge ratepayers. Fees for the provision of administrative services must be reasonable and not exploitative.

37. The MCC have undoubtedly breached their fiduciary duty owed to ratepayers with the double levy in a single year when a property is intended to be transferred.

38. The MCC in its defence stated that the impugned decision was a policy decision. The learned authors of *De Smith's Judicial Review (6th ed.) at para 11-014* describes decisions involving “policy” as “the utilitarian calculation of the public good.” Was the MCC’s policy decision a “utilitarian calculation of the public good” when it raised the fee from a flat rate of ten thousand dollars to a percentage basis of 0.5% of the current market property valuation for the ministerial function of formally certifying that rates and taxes of a property are paid up? The answer must surely be an emphatic and resounding “*no*” worthy of parliamentary disapproval.

39. I find that this policy decision was not a utilitarian calculation of the public good. The object of a policy of any statutory body cannot be whimsically and arbitrarily decided upon for reasons which have nothing to do with its statutory functions contemplated under the Act. In the instance case, the MCC gave a reason as preventing fraud

⁴ *Prescott v Birmingham Corporation* (1955) Ch. 210

but the Act does not contemplate this as a function that falls within their remit. Put frankly, this is none of their business and they had absolutely no business considering fraud in property transfer as a factor which led to their policy decision.

40. The MCC presented no evidence in their Affidavit such as minutes of a meeting or any official record to prove the date when the impugned decision was made, by whom was it made, was it made at a statutory meeting, was it voted upon, or was it made by one person or a group of persons. Was it a democratic decision or was it an instruction given to be carried out? Did the MCC advise itself that it had the power to make such a decision, or did it receive expert legal advice? The Town Clerk who swore to the Affidavit in Defence did not attach any official record to support her contentions. These are all matters that go to the heart of transparency and accountability which the MCC and any public body should hold as sacrosanct.

41. The MCC contends at paragraph 18 of their Affidavit in Defence that they have the power because the City Council is vested with authority to lawfully prescribe fees and other charges pursuant to *section 302 (35)*. Let me say from the outset that this contention is entirely devoid of merit and is rejected. The marginal note of *section 302 (35)* reads “*fees, charges and licenses*. A literal and common-sense interpretation of *section 302 (35)* easily deconstructs the MCC’s contention since the fees and charges mentioned therein relate to licences or permits and for the doing of anything which the MCC is entitled to “*establish, maintain, control or carry on.*” Issuing a certificate of compliance by the MCC does not fall within anything the MCC is required to do to *establish, maintain, control or carry on*” of. Moreover, the power of the MCC under *sub-section (35)* to

“prescribe fees and charges and to issue licences or permits” is confined to the miscellaneous powers of Councils provided for by *section 302* of which *35* is a subsection of. There are thirty-seven subsections. The miscellaneous powers of Councils are contained in thirty-seven subsections enumerated from *section 302 (1) to 302 (37)*. None of these miscellaneous powers contemplate a fee for the issuance of a certificate of compliance on a percentage basis.

42. To reinforce the point and for the sake of argument, I would merely point out that if we were to look at it another way; *section 302(35)* cannot be used by the MCC to charge or levy general rates on properties. General rates on properties are levied on a percentage basis as specifically provided by *sections 203 – 206*. If *sections 203 - 206* did not exist the MCC would still be unable to rely on *section 302 (35)* as imbuing them with the power to levy general rates on properties on a percentage basis. Therefore, in the same way *section 302(35)* cannot be used to levy general rates it cannot be used to levy a charge on a percentage basis for the mere issuance of a certificate of compliance.

43. In the case of *Bromley London Borough Council v Greater London Council* (1983) 1 A.C. 768 the House of Lords agreed with the Court of Appeal and quashed a decision of the Greater London Council (GLC) to issue a precept to all London boroughs to levy a supplementary rate of 6.1p in the pound to enable them to finance an election manifesto promise to reduce London Transport Executive bus and tube fares by 25 per cent. The Courts held that the GLC had acted ultra vires the Transport (London) Act 1969. The House of Lords also confirmed that the local authority owed a fiduciary duty to the ratepayers analogous to that of a trustee to have regard to

their interests and they were in breach of their fiduciary duty in failing to balance fairly the interests of the ratepayers and transport users and casted an inordinate burden on the ratepayers.

44. There is no doubt in my mind that the increased fee is a heavy penalty. It is a penal blow to ratepayers. It is a double burden on the ratepayer who has to pay off all outstanding rates and taxes before transferring his property and then pay an increased fee to obtain a certificate of compliance based on a fixed percentage of the current market value of the property. This is undoubtedly a serious financial injury to the ratepayer.

45. If one looks at the general scheme of the Act it is not possible to conclude that the MCC is empowered to raise revenue or levy such a financially injurious fee for merely providing a piece of paper certifying that rates and taxes are paid up. It is not expressly provided for by statute nor does it arise by necessary implication. This is essentially a clerical exercise which can probably be extracted electronically by a data entry clerk. The overall objects of the Act do not contemplate the MCC raising money in this arbitrary manner. If this were intended, Parliament would surely have made express provision for it in the statute.

46. I find that the impugned decision was without regard to the purpose for which the statutory powers are given and constitutes a breach of the fiduciary duty owed to rate payers. It does not appear from the Affidavit filed by the MCC that any expert legal advice was obtained by them to legally advise themselves before promulgating the new policy. This is significant because it discloses that no serious consideration was given to the Act as a whole to see whether such a power existed. In fact, it was an abuse of power.

CONCLUSION

47. In the circumstances, given that the first question – the ultra vires question – has been answered, it is not necessary to consider the subsidiary question whether a statutory discretion exists and whether it was properly exercised.
48. The MCC has no statutory power to make the decision it did to raise the fee for a certificate of compliance and to request the additional documents. It had no power or business in making the purported policy decision to levy such a charge. It also had no implied power to do it. The decision was beyond their powers and ultra vires and void.
49. The figure of 0.5 percent of the current market valuation of the property to be transferred was not explained in any way at all. How did the MCC arrive at this figure? Were any calculations done? Was there a financial reason in choosing this figure? Did they receive expert advice? No Councillor has provided evidence by Affidavit to explain how they arrived at this figure. In the absence of evidence to justify such a figure it is difficult for the Court not to conclude that it is an entirely arbitrary figure.
50. There is no additional Affidavit evidence from any member of the council indicating how the decision was arrived at or what considerations were taken into account. The Court is left to draw such inferences from the Town Clerk's statements in her Affidavit in Defence about the consideration which the MCC gave to relevant matters without the assistance of any additional evidence from any Councillor who might have known what factors were and were not taken into account in arriving at the policy.

51. It is difficult not to conclude that the purpose of the increased cost was to raise revenue and this is ultra vires the Act since the Act does not imbue the MCC with the power to raise revenue in such an arbitrary and capricious manner. The Act itself provides how revenue is to be raised and if revenue is raised in a manner inconsistent with the MCC's powers under the Act then it is unlawful and ultra vires the Act.

52. In the premises, I have no reservations in holding that the decision of the MCC went beyond their statutory powers and is in excess of jurisdiction and null and void. The decision of the MCC published by way of Notice on 20 June, 2019 was ultra vires the Act and lacked any statutory legitimacy. It cannot be allowed to stand and must be quashed.

53. It is also my considered view that the decision to levy this inordinately high fee is a breach of the fiduciary duty the MCC owes to the ratepayers. It was not a policy decision *uberimma fides*.

54. I conclude with the salutary warning below,

*It cannot be too strongly emphasised that local government councillors are not legislators. Their duty is not to re-structure the law but to exercise honestly and on a proper consideration of all relevant factors the discretions which Parliament has entrusted to them.*⁵

Disposition

⁵ *Bromley London Council v Greater London Council* (1983) 1 A.C 768 at p. 790

55. In the circumstances, judgment is hereby granted to the Applicants with the following orders:

1. It is hereby **ORDERED** and **DECLARED** that the decision of the Respondent published to the general public by way of Notice on 20 June, 2019 was unlawful and ultra vires the Municipal and District Councils Act, Cap. 28:01 and Section 16A of the Deeds Registry, Act, Chapter 5:01 and is consequently null and void;

2. An Order of Certiorari be and is hereby granted quashing the decision of the Respondent that with effect from July 1, 2019 persons applying for a Certificate of Compliance under Section 16A of the Deeds Registry Act, Chapter 5:01 must submit the certified copies and originals of the following documents, to wit:
 1. 2019 General Rates Receipt
 2. Current Market Valuation
 3. Valid Identification Card
 4. Letter of Administration and Death Certificate (if owner(s) are deceased)
 5. Agreement of Sale
 6. Deed of Gift and the Affidavit of Donor and Donee (if the property is to be transferred as Gift/Trust)and pay the fee of 0.5% of the current market valuation of the property.

3. An Order of Prohibition be and is hereby granted prohibiting the Respondent from enforcing and/or acting upon the aforesaid decision and/or demanding the

aforesaid fee or documents in order to issue a Certificate of Compliance under Section 16A of the Deeds Registry, Act, Chapter 5:01

4. Costs in the sum of one hundred and fifty thousand dollars to the Applicants.