

DEVELOPMENT AT WHAT COST?

PRESENTATION BY HON. JUSTIN L. SIMON QC,

ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS, ANTIGUA AND BARBUDA,

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A CRITICAL ANALYSIS OF THE LAW
RELATING TO LAND USE AND FOREIGN INVESTMENT IN SMALL ISLAND
STATES

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Most humbly, and from my heart of hearts, I crave your indulgence. When, three weeks ago, Ruggles, my friend, in law and in deed, called inviting me to deliver this, the 9th Annual Sir Archibald Nedd Memorial Lecture, and advised me of tonight's topic, I must confess that I was filled with the initial excitement which any new challenge presents. Undoubtedly, the issue of 'land use and foreign investment' in small island states has now, more than ever, assumed a relevance of urgent proportions within the context of "globalisation" - that 'first world' term which is slowly but surely swallowing the economic independence of developing countries as we jockey frantically with each other to become factors of production and marketing opportunities to the pulsating drum beat of the developed metropole. Then, I was, at my request, informed of the eight persons who had had the distinct honour of delivering previous memorial lectures and I suddenly realised that the throbbing in my chest was, far from excitement, expressing in no uncertain terms my trepidation at attempting to walk in footsteps which by any measure are and will always be too big for my small feet. I have nevertheless boldly journeyed to your Island Nation and to be in your esteemed company tonight with the sole purpose of sharing with you my thoughts and my limited youthful experience within a milieu which I assume is familiar to you given our historical walk across the Middle Passage to the Slave Plantations through a Colonial Era on to the status of Associated Statehood and thence into our current fledgling Independence Period.

How do I begin with a topic that reads like the long title to a piece of legislation? "Development at what cost? A critical analysis of the law relating to land use and foreign investment in small island states". You must forgive me for not following on this occasion the advice given by the White Rabbit to Alice in Wonderland, that you begin at the beginning until you come to the end, and stop.

I begin respectfully, with a long quotation from the late Michael Manley, former Prime Minister of Jamaica, who after twenty one years in the public life of Jamaica as a journalist, tradeunionist and politician wrote in his book, *The Politics of Change*: "Land is the basic resource of a people. It should never be out of national ownership and control. In a country like Jamaica we have inherited a situation in which a substantial proportion of our land is owned either by non-nationals or by nationals who have no desire to develop it. Ownership by non-nationals should never be permitted as a matter of principle. In the case of a small island like Jamaica struggling to support two million people, principle is reinforced by common sense since foreign ownership of our land not only mortgages our future but represents a current pressure on a

scarce asset. Where land is already in non-national hands, there should, therefore, be the most careful set of rules concerning the use to which that land is put. Insofar as the future is concerned, land should be leased for specific development purposes, but never sold. By the same token, nationals who hold land for speculative purpose should be required to develop what they own immediately or sell it back to government.

"I now invite you to re-wind the ticking clock of time to meet John William Jeffrey born in 1851 - just 17 years after the abolition of slavery - who has been described by his great grand daughter as one of the thriftiest men of his time; a man who salted his own meat, ploughed his own ground, and saved his money in an "England Jar". He lived in Liberta, one of the free villages established in Antigua following Emancipation, and he was clearly imbued with a desire to own his independence and his land. He wanted to own his estate, not just an acre of land the cost of which varied from eight pounds to one hundred and twenty pounds depending on location, accessibility and fertility. The story is told that when he was finished paying for the estate of Hawksbill, located on the north-west coast of Antigua and consisting of 185 acres with four individual white sand beaches, he had only two shillings left to his name from his life savings. You may or may not believe that story; his intention was however clear and cannot be doubted. His will provides thus: "I devise and bequeath my estate called Hawkes Bill in the said Island of Antigua unto my wife Sarah Jeffrey and my three daughters, their heirs and assigns forever in equal shares ". Today, seventy nine years after his death at the age of 77 years, the whole of the estate remains firmly in family hands with only 39 acres leased for hotel development in 1959 for a term of 50 years.

I am told that negotiations are soon to commence for an extension of the lease to the foreign hotel company which has constructed and established on its leasehold interest a premier hotel resort in Antigua. The descendants are adamant, as they have been throughout the years that they have no intention of selling the lands, particularly to foreign ownership. Such was the vision and foresight of John William Jeffrey! A vision and foresight which his heirs to their credit continue to value. I respectfully submit that it is of that Caribbean vision and foresight that Michael Manley in 1973 speaks to us, though with the expanded or additional notion of the all important national interest.

We now fast forward to 1991 when the Government of Antigua and Barbuda in all good faith sold to a foreign company (which shall remain nameless) 85.91 acres of Crown coastal land at the concessionary price of \$20,000 per acre for the proposed development of a 150 room hotel, a 120 bed condominium resort, a marina with a yacht club and a golf course; the company was issued a Non-citizen Landholding Licence which was made "subject to the condition that construction will commence within 13 months of the date of the licence and completed within 48 months";. In 1995, the sole shareholder of the company sold and transferred his shares to a US company who then changed the company's name, and in 2007 sold the land to a locally incorporated company owned by a foreigner who had obtained Antiguan citizenship for the princely sum of \$9.4M. The value of the land originally held by the Crown in trust for the people had increased in the period of 16 years by \$7.7M; and, surprise upon surprise, the land still remains vacant! No development was ever constructed, not a single investment cent was spent and the loss is ours because no monitoring mechanism had yet been established to police such projects.

Our experience gets worse. In 1997, under a written agreement, unique by any standard, 1542 acres of Crown land was transferred to a foreign company for a total purchase price of \$15.5M of which only \$3M has been paid to date. That company was granted by legislation concessions and exemptions on a massive scale to develop the lands into a modern tourist village complete with hotels, sea-side villas, up-scale private residences, a golf course, a casino, boutiques etc. The company failed to perform, building only one half-finished model villa, due to lack of financial ability or financial backers; by 2004 the company was negotiating to sell the lands for US\$22M with a request for full stamp duty exemption from the transaction, and a waiver of the balance of the purchase price owed to the government — all in consideration of the newly proposed development. And to add insult to injury, the company instituted legal proceedings against the government and claiming some US\$55M in damages. To our eternal shame, there was no performance clause in the Agreement, no stated remedies for any breach by the company, and no provision for the return of the lands even on the company's failure to pay the agreed purchase price which was to have been paid in five annual installments.

Whilst I accept the need for foreign investment in the development of our small island states to allow for steady economic growth and to provide employment for our people, we must recognize the need to obtain a balance between the competing interests of the state on the one hand and that of the investor/developer. We need to be ever conscious of the importance of our land which is fast becoming a scarce commodity and is increasingly being alienated into the hands and

absolute control of non-nationals. We need to take stock of the fact that ‘employment’ cannot continue to mean ‘hewers of wood and carriers of water’ and that real empowerment, with increase in technical skills and higher educational opportunities providing for upward mobility and eventual equity participation by our people, must be the ultimate goal. We need also to pay more attention to our environment and the natural physical beauty of our islands in a world which seems to care little about the effects of global warming in the frenzied search of the almighty dollar and high-end living. The answer lies in our own hands, and consists, I make bold to say, of a structured National Development Policy by our respective governments which addresses land use and development (for the purposes of agricultural, tourism, commercial/industrial, residential, or recreational purposes), financial concessions and tax exemptions, environmental and historical sites protection, and the alienation of land i.e. the issue of sale vs. lease vs. equity participation. I return to Michael Manley’s profound proposition. The principle of our land ownership and control policy must be reinforced by common sense, since foreign ownership of our land while a promise of future and current investment not only mortgages our future but represents a current pressure on a scarce asset.

How do our laws assist in providing the necessary regulatory environment to buttress government’s declared national policy?

The Alien Landholding legislation regulates the holding of land by aliens, and companies under alien control and restricts access to land and other assets or interests in land including shares, mortgages, debentures, and leases. This allows for due diligence and relevant enquiries to be made of aliens who wish to own land as to their bona fides and financial ability to develop such lands as proposed in their applications. In Antigua and Barbuda the power to grant alien landholding licences is vested in the Governor-General acting on the advice of Cabinet and the law provides that a licence shall be operative only as to the land described and shall have no legal force until registered. Further, any land, interest in land or mortgage held by an unlicensed alien or upon any breach of any condition in a licence, the land or interest in the land shall be forfeited to the Crown. The West Indian cases of *Ramsaran v. Attorney General of St. Kitts and Nevis* (1986) and *Attorney General of St. Vincent and the Grenadines v. Chatham Bay Club Ltd.* (June 2007) make it clear that while the principle of forfeiture may be considered harsh, it is the recognised law of the region and even if title is vested in the alien, it is a voidable title and not an absolute indefeasible title. In the recent Vincentian case the company had failed to comply with two conditions in its 1987 licence: to construct a luxury class resort, and to spend a minimum of \$15M within three years of the grant of the licence. The Court ordered that the lands be vested back in the Crown with no compensation payable to the company.

We are, in Antigua and Barbuda, addressing the issue of the transfer of land held under licence. An amendment to the Registered Land Act is currently before Parliament, and provides that transfers of any such land shall not be registered unless a certificate is issued by the Attorney General certifying that the alien proprietor has fulfilled the conditions under which the licence was granted or that the requirement to satisfy those conditions have been waived. I strongly suspect that that change will have a significant impact on aliens who buy our lands for speculative purposes and have no interest in genuine development of these lands. The additional statutory imposition of Land Value Appreciation Tax, and Alien Undeveloped Land Tax can ensure that the national revenue benefits from all subsequent sale of lands by aliens by taxing the net profit realized upon such sales, and, in the latter case, to penalize on an annual basis the alien who fails to diligently develop his land in accordance with the conditions of his licence or having due regard to government’s land use policy.

And what of these sometimes innumerable financial concessions and tax exemptions which are forever being requested of a cash-strapped government in spite of the purely profit motive of the proposed development? Antigua and Barbuda has recently established by law an Investment Authority which will, in keeping with the stated general policy of government, examine these applications in a fair and transparent manner, conduct the necessary due diligence on the applicants, proceed with administrative efficiency and due dispatch to analyse, approve, or disapprove the applications, as the case may be, taking into consideration national developmental priorities, and effectively monitoring the performance of these developers/investors for report to Cabinet through the Minister of Finance and the Economy.

It is a commonly established and accepted principle of law that a company is a separate entity to its shareholders and that except for good and cogent reason the veil of incorporation should not be pierced. This means that once a foreign company has obtained a licence to hold land, its real owners, the shareholders, can sell and transfer their shares a million times without affecting the title to the land or the licence which remain vested in the company. This allows land in a real sense to constantly change hands, in respect of the beneficial ownership, without the knowledge or approval of the

relevant government departments and to the detriment of the tax authorities who collect stamp duty on transfers. It is therefore imperative that new foreign shareholders should obtain alien landholding licenses, that share transfers be made registrable on the payment of the appropriate stamp duties, and that the annual returns made by companies speak to the names of their shareholders, the number of shares held by each shareholder, and particulars of any and all share transfers which took place during that year.

I daresay that it is in full recognition of the use of land as a resource for national use and development, that our respective Caribbean Constitutions, whilst acknowledging the fundamental right and freedom of every person to the enjoyment of property and protection of the privacy of his home and other property and from deprivation of property, makes these rights and freedoms subject always to respect for the public interest which is specifically stated to include the government's right to compulsorily take possession of and compulsorily acquire property of any description for public use, concomitant with the payment of fair compensation within a reasonable time. And the very Constitution gives authority to Parliament to enact the necessary legislation laying down the procedure for such acquisition by the State. So that in Antigua and Barbuda, the Land Acquisition Act provides in section 3 (1):

"If the Cabinet considers that any land should be acquired for a public purpose they may, with the approval of the Legislature, cause a declaration to that effect to be made by the Secretary to Cabinet in the manner provided by this section and the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose".

Interestingly enough subsection (4) of section 3 provides that "Nothing in this section shall be deemed to prevent the acquisition of lands for public purposes by private treaty", which is simply declaratory of Government's right, like any other person, to purchase land on the open market for, again, the use and benefit of the public as a whole.

The compulsory acquisition of land, whether in the hands of an alien or a citizen, though a last resort, can and should be invoked where national interests, objectively assessed so dictate. Take the case of the Half Moon Bay Hotel in Antigua which sits on a white sand crescent-shaped beach which has been described as one of the best beaches in the world. Constructed in the early 1970's by an alien company, the quality of its amenities made the resort particularly attractive to wealthy visitors from Europe and North America. Then came Hurricane Luis in September 1995 which caused great damage to the property so severe that that the hotel closed its doors, sent employees home without any severance payment, and has not re-opened since. In March 2002, Parliament approved the Cabinet's resolution to compulsorily acquire the property, and the company moved for judicial review questioning the government's motivation. In finally resolving the issue in favour of the government, the Privy Council delivered its judgment on June 5 2007, and had this to say:

"There is no doubt that the Cabinet had a responsibility in the best interests of the island to try to resolve the problems which had been created by the continued closure of Half Moon Bay Hotel. Its view that the redevelopment and reopening of the hotel would be in the public interest is not and cannot be disputed. The government had first expressed an interest in promoting its redevelopment in 1997. Years had gone by without any actual progress on the ground. In light of this background their Lordships reject the suggestion that it was irrational for the Cabinet to decide in November 2001 that the time had come for the compulsory acquisition to proceed. . . . As for the future, (the company) has not produced, nor does it offer to produce, any evidence to show that there were sound reasons to doubt that redevelopment could not proceed if the property were to be in other hands. The absence of such evidence must be seen in context. The site is valuable, and there is no doubt that a developer who has access to funds can expect to make money from it. Acquisition for the purpose of transferring it to a private developer who would use it for his own profit is not inconsistent with its being for a public purpose. The absence of an explanation by the Cabinet as to what its plans are does not mean that its decision to acquire the property was irrational."

Notwithstanding the newly established legal principle that the decision of Cabinet is subject to judicial review on the grounds of illegality, fraud, bias and irrationality, or procedural impropriety, the government's right to compulsorily acquire private lands (whether in the hands of aliens or citizens), for the social, cultural, or economic wellbeing of the citizens and residents of the country cannot be denied: see the OECs Court of Appeal judgment in Baldwin Spencer vs. Attorney General of Antigua and Barbuda (1999), and the recent Privy Council cases of HMB Holdings Ltd. vs. Cabinet of Antigua and Barbuda (decided June 2007), and Randolph Toussaint vs. Attorney General of St. Vincent and the

Grenadines (July 2007). And it is this sovereign power which buttresses government's declared legislative intention to create national parks and protected land areas for the preservation of flora, fauna, fish, historic landmarks, and recreational areas for the general good. In Antigua and Barbuda, no Crown land which forms part of a national park can be sold there must first be consultation with the National Parks Authority; and the Authority must first give its written consent to any development approval by the Development Control Authority failing which the approval is null and void ab initio. Clearly therefore, while general policy directions emanate from the Minister of Tourism under whose portfolio national parks fall, the Authority is given an independent mandate to pro-actively oversee and guide the future development of all lands within a national park. I only need to add that the thinking and policies of the government of the day will guide the actions of such statutory authorities. It is ultimately these policies which will determine whether, in the words of Charles Dickens, we enjoy in our own fair land:

“ the worst of times or the best of times, an age of enlightenment or an age of darkness . . . ”

Ladies and Gentlemen, I wish to assure you that I have now come to the realization that I have lectured you enough. The time has come for me to listen to you; and I encourage you to be critical but analytical, open without being hostile, reflective yet thoughtful. Because, we speak to, of, and for the legacy of our children and our children's children: our islands in the sun willed to us by our fathers's hands!

From the bottom of my heart, I thank you for being a patient and attentive audience. I do feel both honoured and humbled by your presence in such large numbers, and by this experience. I wish to applaud the Grenada Bar Association for their vision in both establishing and maintaining the momentum of this annual Memorial Lecture in honour of the Late Sir Archibald Nedd, distinguished son of the soil, and respected Eastern Caribbean jurist. AND FINALLY, I wish to sincerely thank the Association and particularly its President for affording me the opportunity to address you here this evening. I hope and pray, that I have duly followed precedent and, that I have done justice to their cause.