

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1878/19

In the matter of :-

Liladhur Gossagne Sewtohul

Appellant

v/s

District Council of Pamplemousses

Respondent

DETERMINATION

1. This is an appeal against the decision of the District Council of Pamplemousses ['the Council'] for having refused the granting of a Building and Land Use Permit ['BLUP'] to the Appellant for the addition of a second floor to an existing building for residential purposes at Royal Road, Arsenal. The grounds of refusal communicated by the Respondent through the National E-Licensing System are:

“Proper consent and ID cards from neighbours not submitted for the proposed second floor is at less than 2.0m from the plot boundaries (consent submitted dates back to 2010, the attached ID cards are not valid and neighbours are complaining about the construction)..”

2. The Appellant had initially put into cause 2 individuals as co-respondents who had allegedly objected to the development, however, following a ruling of the Tribunal on a point in law raised, they were put out of cause. The Appellant otherwise conducted his own case and called no witnesses. The Respondent was legally represented as well as represented by Mr. Banjhu, Planning and Development Officer. We have duly considered all evidence before us as well as the submissions of Counsel. We shall refer to those of relevance where we deem it fit to do so for the purposes of the Determination of this case.

I. CONTEXT ANALYSIS

3. The Appellant's case is that he bought a plot of land from one Mr. Namnarian Jekarahjee and others in 2010, as per the title deed at Annex 1 of the Statement of Case ['SOC'], on which he constructed a one storeyed residential building. The Jekarahjees held a valid BLUP since 2009 for excision of the portion of land for residential purposes, which they sold to the Appellant. At the time that the ownership passed hands, the latter got a written authorization from Mr. Bardwaj Jekarahjee and Mr. Namnarain Jekarahjee for him to "*construct a reinforced concrete building on the edge of*" their land, situated at Royal Road, Arsenal, Pamplemousses, as evidenced by Annex3 of the SOC. On the 4th August 2010, the Appellant obtained a BLUP from the Council for the construction of a reinforced concrete building to be used as general retailer's shop on ground floor and for residential use on the first floor which he subsequently started occupying, as per the notice of occupation at Annex 5. In 2019, he started construction of a second floor under CIS roof which was brought to a halt following the intervention of the Council. The Council's contention is that following a complaint from Mr. Jekarahjee that waste water was being drained from the Appellant's property into theirs, the Council looked into the matter and found that the Appellant did not have the required BLUP to put up a second floor for which he was requested to apply for one. The Council rejected the application for the reasons set out in its refusal mail.

II. GROUNDS OF APPEAL

4. The grounds of appeal as per the Notice of Appeal lodged by the Appellant are as follows: "
- a) *The Statements of consent provided by the neighbours are clear and unequivocal, have been provided in writing and are under private signature. The Respondent cannot now change a term in the statements of consent or redo the statements of consent under the cover of interpretation by stating that proper consents have been submitted because:*
- (i) *On 04 August 2010, Appellant was issued with a BLUP and the same statements of consent were submitted as part of the process.*

- (ii) The Respondent has to see whether the contents of the statements of consent are valid by looking at the intention of both the Appellant and the neighbours at the very outset of any development work on the property.*
- b) The Statements of consent provided by the neighbours validate not only what are expressed in them, but also all the consequences which equity, use or law gives to the agreements according to their nature because:*
- (i) The statements of consent provided can only be revoked by mutual contents or by operation of law and none of these apply in this case.*
- (ii) The parties to the statements of consent must fulfill their obligations as were initially intended and the Respondent cannot now say that these obligations are not valid with the passage of time.*
- c) The ID cards submitted are fully valid for the purpose of the BLUP application because:*
- (i) The previous ID card remained valid until 30 April 2017 and the statements of consent from the neighbours were provided on 26 June 2010.*
- (ii) The new NIC legislation does not have retrospective operation on agreements signed before its entry into operation.*
- d) Respondent has failed to disclose the nature of the alleged complaint(s) by the alleged neighbours to the Appellant, nor has the alleged complaint(s) received by the Respondent been disclosed to the Appellant before and during the evaluation of the submitted application for the BLUP.*
- e) Appellant denies any alleged complaints referred to by the Respondent and avers that the alleged complaints are false and malicious and suspects that these are from no other than the Co-Respondent No.1 Mr Bardwaj Jekarahjee because:*
- (i) The latter is not on speaking terms with his contiguous neighbours and has initiated civil proceedings against most of them.*
- (ii) The District Court of Pamplemousses stated in case No:2018 RDR 17 that Co-Respondent No.1 had lodged a frivolous claim against his contiguous neighbor, Mr Beerbul Mankumar. The Co-Respondent No.1 is now resuming such behavior but this time with the intention to harm the Appellant.*
- f) Respondent has shown a propensity to act against the interest of Appellant's property, which at most may amount to harassment and persecution because:*

- (i) The Appellant had to obtain a supreme court order dated 26 July 2012 for the Respondent to waive a stop Notice issued against the construction of Appellant's building.*
- (ii) In or about February 2017 Respondent refused to deliver a Trade License to two Italian investors to operate their business on Appellant's premises by telling them to look for another building.*
- g) Appellant does not agree with the decision of the Respondent and is surprised by the same as the latter is a public authority and is delegated by the legislator to carry out its functions, in the overall public interest and not to its personal preferences and discretion given that:
 - (i) By approving the complaints by the alleged neighbours, Respondent did not do any proper balancing act, whatsoever, that should have been taken by any reasonable planning authority, after having listened to all the issues raised by the Appellant and come to a proper appraisal of Appellant's property and the character of the neighbourhood.*
 - (ii) Respondent, which appeared very attentive to Appellant's grievances during previous meetings, seems merely to have capitulated to pressure to reject the application, leaving the decision to be addressed by the Tribunal.**
- (h) Appellant submits that had Co-Respondent No.1 not complained against the construction of the structure on the second floor, the Respondent would have approved the BLUP application as there are no flaws in the submitted structural drawings and Appellant would have already fixed u-shape gutters on the CIS structure to allow for proper rain water drainage and completed the other required works.*
- (i) Because of the acts and doings of the Respondent and the Co-Respondent No.1, Appellant is severely prejudiced by being deprived of his right to a peaceful enjoyment and occupation of his land."*

In view of the lengthy grounds of appeal, we shall deal with those bearing similarity together.

(i) Under Grounds (a) and (b)

5. The contention of the Appellant under these 2 grounds in essence is that there was a valid consent of the 2 neighbours, Mr. B. Jekarahjee and Mr. N. Jekarahjee as per a 'statement of consent' that the Appellant provided at Annex 3 of the SOC which the Council cannot now challenge since the latter had issued the Appellant with a BLUP in 2010 having taken on the same statement of consent and that the Respondent needs to consider the validity of the statement of consent by having regard to the intention of the Appellant and his neighbours when the development works were first initiated, that is in 2010. It is also his contention that the statement of consent can only be revoked by mutual consent or by operation of the law, none of which is applicable in the present instance and that the parties to the statement of consent must fulfill their obligations, it is not for the Respondent to say that these obligations are not valid with the passage of time. The Appellant also testified that the consent given by both Mr. B. Jekarahjee and Mr. N. Jekarahjee are valid for a lifetime and will bind not only them but all the successors in title.

6. The stand of the Council is that in view of the fact that the prescribed distance of 2 metres which is applicable for all construction of second floor from the plot boundary is not being respected, a derogation can only be accepted by the Council if the relevant contiguous neighbour has no objections to it and since in the present case no consent with respect to this proposed development has been submitted and infact the same neighbours have raised the grievance to the Council, it has to consider the objection as such. The Council's representative, Mr. Banjhu, also testified that the consent letter obtained from the neighbours, both Mr. Jekarahjee, was for the construction of a concrete building which the Council already acted upon in 2010 but that the proposed development differs in that it is under CIS roof. It is not denied by the Appellant that the second floor under CIS roof which he has already partly put up does not observe the prescribed distance of 2 metres from the boundary line of Mr. Jekarahjee. His contention is that he has a valid consent from Mr. Jekarahjee since 2010 to build on the boundary line.

7. The Outline Planning Scheme of a particular planning area and the Planning Policy Guidance [‘PPG’] are used as a basis for the standards which are applicable to residential development within zones where residential development may be allowed. The **Design Guidance on Residential Development** and the **Design Sheet on Individual Household Development of the PPG 1** provide the type of standard that the Residential Design should include, for instance, setbacks, heights of buildings and car parking. This is normally done to achieve particular outcomes such as infill development or to maintain the local character. The **Design Guidance on Residential Development** and the **Design Sheet on Individual Household Development** both have similar provisions as regards setbacks which essentially “serve to protect the amenity of adjoining properties, to provide spatial barriers against fire spread, to reserve utility and road corridors and to assist in the establishment of street character.” It stands to reason that these setbacks will have an impact on the adjoining properties hence the need to have the consent of the neighbours if the required setbacks are not to be observed by the developer.
8. The **Design Sheet on Individual Household Development [PPG1]** provides “Setbacks should normally increase with additional building height...and also in relation to the particular requirements of an existing context.” It also provides for a minimum setback of 2 metres for buildings that are 7.5 metres in height. Furthermore, the Design Sheet also stipulates “Where a setback is created it may normally be acceptable for minor architectural elements such as overhanging roofs and lightweight window canopies to encroach into the established side space up to a maximum of 1 m.” The statement of consent produced at Annex 3 of the SOC provides *“This is to certify that we, Mr. Bardwaj Jekarahjee and Mr. Namnarian Jekarahjee, hereby authorize Mr. Liladhur Gossagne Sewtohul to construct a reinforced concrete building on the edge of our land situated at Royal Road, Arsenal, Pamplemousses.”* The document has been signed by both these persons and dated as “26.06.2010” by both. It appears that these neighbours, as shown in the map produced as Doc A, had authorized the Appellant to build his house on the edge of their land in 2010, which we understand to mean, without the need to respect the 0.9 m setback as prescribed. It stands to reason therefore that if the second floor has to have a setback of 2 m but that a derogation is allowed as provided under the Design Sheet so that an overhanging roof can encroach into the side space up to a maximum of 1 metre, we believe that this can be done provided that the resulting setback still has its

utility of serving “to protect the amenity of adjoining properties, to provide spatial barriers against fire spread, to reserve utility and road corridors and to assist in the establishment of street character.”

9. The evidence on record shows that Mr. B. Jekarahjee, adjoining property owner, has complained that the Appellant is constructing a second storey with part of the iron sheets being on his premises and thus all rain water is falling on his land, causing him inconvenience, as per Doc B, complaint against Mr. Sewtohul registered at the Citizen Advice Bureau [CAB] in Pamplemousses. The Council was fully entitled to look into the matter and consider the veracity of such a complaint since it amounts to an adjoining landowner protecting the amenity of his property.

10. The Appellant has raised the issue of valid consent from neighbours which is for a lifetime. The Tribunal’s jurisdiction as set out under **Section 4 (1) of the Environment and Land Use Appeal Tribunal Act 2012** does not allow it to travel outside the boundaries provided by the law. To us, this document, which is found at Annex 3 of the SOC, is an authorization given by Mr. B. Jekarahjee and Mr. N. Jekarahjee allowing the Appellant to construct a reinforced concrete building on the edge on their land. We cannot read more into this document than what has been provided. Therefore, we shall not comment on the perpetuity of the authorization contained therein save to say that it is normally the practice that where there is an agreement between the buyer and the seller of a property to have any condition in favour of a party, it is usually inserted in the title deed so that it binds the successors in title. The ‘statement of consent’ in the present instance has been signed by the neighbours to authorize the Appellant to construct a concrete building on the edge of their land. The Appellant is building a structure under CIS roof, not a concrete building. In the absence of unequivocal evidence on record, especially with reference to Annex 3 of the SOC, we cannot surmise on what the neighbours had allegedly consented to initially, as the Appellant seems to suggest, and therefore, we believe that Respondent cannot be taxed for requesting a fresh consent. In any event if there is an issue as regards to what amounts to a valid consent that will have to be thrashed out before another jurisdiction. These grounds therefore fail.

(ii) Under Ground (c)

11. It is the contention of the Appellant that ID cards are valid for the purposes of the BLUP application. In our view this cannot be taken on its own to be a ground of refusal or a ground of appeal for that matter. The issue is basically one of consent of the neighbours. The ID cards at best are to be produced for identification purposes when filing their consents for completeness. The validity of the ID cards in itself is a non-issue for planning purposes, for the purposes of the rejection nor for the purposes of the appeal. In any event the validity of the ID cards as addressed under this ground of appeal is neither here nor there and it therefore fails.

(iii) Under Ground (d)

12. Under this ground of appeal, the Appellant seeks to challenge the decision of the Council on the basis that it failed to disclose the nature of the alleged complaint by the neighbours to the Appellant whether before or during the evaluation of the application for BLUP. When cross-examined on the issue, Mr. Banjhu admitted that the nature of the complaint was not disclosed to the Appellant and explained that it is not the practice of the Council to do so but that following the complaint, a site visit was done and a request was made to the Appellant not to cause any nuisance to the one who complained but Mr. Banjhu was not very clear on the details of the site visit.

13. Mr. Banjhu produced a copy of the complaint made by Mr. B. Jekarahjee to the CAB of Pamplémousses, marked Doc B, registered on the 20th March 2019 whereby, as stated earlier, he complained of inconvenience being caused to him due to the rain water draining onto his land because of iron sheets from the property of the Appellant coming onto his premises. Upon perusal of the document, it appears that the task of attending to the complaint at the CAB was assigned to one Mr. Rajen Appiah. At Annex 7 of the SOC, the Appellant has produced a letter dated 10th June 2019 emanating from the Council under the signature "R. Appiah", Building Inspector, making reference to a complaint at the address of the Appellant for improper rain water disposal and requesting the latter to provide "a proper rain water

disposal system (Absorption pit/soak away) within the curtilage of the site whilst providing down pipes of adequate size for the conveyance of rain water.”

14. Whether the Council informed the Appellant of the nature of the complaint prior to and at the time of the assessment of the BLUP application is not material in our view because it has no direct bearing on the issue at hand which is an application for a BLUP for construction that does not comply with the prescribed setback. It would obviously have been desirable for the Council to inform the Appellant in the letter dated 10th June 2019 in greater detail what the nature of the complaint was so that the Appellant could take remedial action to prevent nuisance being caused from the rain water being drained onto the neighbour’s property, which is the subject matter of the complaint from Mr. B. Jekarahjee. The Council explained their reason for the requirement consent on the basis that the same neighbour is complaining that rain water from the iron sheets which have been placed as part of the new construction is getting drained on his land. This does not however absolve the Appellant of the responsibility of constructing his building within the parameters set by the planning instruments. This ground therefore fails.

(iv) Under Ground (e)

15. The Appellant denies the complaints referred to by the Council on the basis that they are false and maliciously made by Mr. B. Jekarahjee. This does not amount to a ground of appeal in that it does not seek to challenge the impugned decision of the decision-maker but rather seeks to deny an alleged complaint which is not the purpose of this appeal. This ground therefore amounts to no ground of appeal and is therefore dismissed.

(v) Under Ground (f)

16. It is the contention of the Appellant that the Respondent has shown a propensity to act against the interest of Appellant’s property, which may amount to harassment and persecution. This ground of appeal seeks to challenge the way the Respondent has behaved and proceeded in its machinery which is a ground for judicial review, not within the jurisdiction of this Tribunal. The ground of appeal is therefore dismissed.

(vi) Under Ground (g)

17. The Appellant challenges the decision of the Respondent on the basis that the latter failed to do a balancing exercise of considering the position of the Appellant against that of his neighbours as a responsible authority should have. The way in which this ground of appeal has been couched is tantamount to the Appellant challenging the manner in which the Council proceeded when dealing with his case, thereby suggesting that it has acted irresponsibly as an authority by not carrying out its functions as conferred upon it to act in the public interest but that it acted in the private interest of some. This is a ground for judicial review challengeable before another jurisdiction. There was no evidence to suggest that the Council capitulated due to pressure, it is merely speculative and at best, it is a ground for judicial review, not a ground challengeable before the Tribunal. This ground therefore fails.

(vii) Under Grounds (h) and (i)

18. These two grounds are being considered together since they are inter-related. We are of the view that both these grounds as couched do not amount to grounds of appeal but rather mere statements of speculation. There is in fact not an iota of evidence on record to even suggest that the Appellant has been deprived of his right to a peaceful enjoyment and occupation of his land. These grounds are therefore dismissed.

19. We wish to point out that although photographs were made available by the Appellant, reference were never made to them which could have assisted the Tribunal. It was risky to rely on the photographs because of the angles from which they were taken. No weight could be attached to them.

20. For all the reasons set out above, the appeal is set aside. Should the Appellant make a fresh application, we invite the Council to consider it in the light of the provisions set out in the **Design Sheet on Individual Household Development [PPG1]** as regards the acceptable setbacks for minor architectural elements provided an acceptable setback is observed by the proposed development as per planning instruments and any possible nuisance to neighbours is abated. No order as to costs.

Determination delivered on the 13th December 2022

Mrs. J. RAMFUL-JHOWRY
Vice Chairperson

Mr. R. ACHEMOOTOO
Member

Mr. R. SEEBOO
Member