BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2088/22

In the matter of :-

Majara Group Ltd.

Appellant

v/s

Municipal Council of Curepipe

Respondent

DETERMINATION

1. This is an appeal against the decision of the Respondent ["the Council"] for having rejected the application of the Appellant for the construction of a building at Dr. Ernest Harel Street, Floreal, comprising of ground plus 5 floors including a lower ground floor comprising of five commercial units and covered parking at the lower ground floor and 22 residential apartments at upper ground, first, second, third, fourth and fifth floors and 43 parking spaces. The application was rejected on the grounds that:
   "(I) The subject site is located within 200 m from British High Commission (British Embassy). As per letter dated 09/11/2021, Reference MLG/POL/BLP/5, from the Ministry of local Development and Disaster Risk Management, the Council has been requested to keep in abeyance all applications within a radius of 200 m from sensitive locations including Diplomatic missions.
   (II) Clearance from the TMRSU has not been obtained. As per Policy TB2 of the Curepipe Outline Scheme, projects for tall buildings have to be accompanied by TIA clearance (Traffic Impact Assessment)- to be assessed by TMRSU."

2. Following exchanges between the parties at the start of the case the second ground of refusal was dropped by the Respondent consequently the last ground of appeal is disregarded. The corresponding relevant grounds of appeal are as follows:

"1. Respondent failed to comply with the mandatory requirements to request for additional information, particulars or documents in relation to the Application within 8 working days from the date of receipt of the Application contrary to Section 117 (5) (a) of the Local Government Act inasmuch as:

- *The application was submitted on 25.11.2021*
- *Request for documents was made on 8.12.2021 at 23.13hrs (outside 8 working days delay)*
- *Therefore, the effective date according to section 117 (5) (b) is the date of submission, that is, 25.11.2021. Thus the application has been determined well after 14 days contrary to Section 117 (7) – Vide SMS notifications* ***Annexures K, L, M.***

2. Alternatively and without prejudice to the above, Respondent failed to comply with the statutory requirement to determine the application within a delay of 14 working days contrary to section 117 (7) of the Act taking into account the effective date as being 17.01.2022 (when the Appellant submitted additional requested documents).

3. Respondent erred and was wrong to have rejected the Application merely on the basis of a letter dated 09/11/2021 emanating from the Ministry of Local Development and Disaster Risk Management inasmuch as:

(a) the said ground is nowhere mentioned in the provisions of the law applicable when determining an application for a Building and Land Use Permit (BLUP);

(b) the contents of the said letter are not binding on the Respondent when considering an application for a BLUP, the more so as same does not form part of the "reserved matters" of the Outline Planning Permission granted on 6 May 2021 for the said project;

(c) Alternatively, the Respondent was wrong to have rejected the application outright on the said ground and should have kept the application in abeyance to give effect to the contents of the said letter;

(d) The Respondent never made any mention of the said letter in its request to furnish additional information on 08.12.2021 and therefore failed to give an opportunity to the Appellant to make representations and/or to comment on same and therefore it could not rely on the said letter to reject the application."

3. The Council totally lacked diligence in this case in failing to file its Statement of Defence within the statutory time frame despite reminders by the Tribunal and following a ruling of the Tribunal delivered on 4th May 2022 to an objection raised by the Appellant against the filing of the Statement of Defence, the Council would only be allowed to cross-examine the Appellant, raise points in law and offer submissions. Consequently, this has led to the Respondent not being able to adduce any evidence to sustain its grounds of refusal that are on record. We also note that in the refusal letter the name of the ministry should read as "Ministry of Local Government and Disaster Risk Management." The Head of the Planning department of the Council, Mr. Cundasamy, was present at the Tribunal to answer a few questions put to him. The Appellant was represented by its managing director, Mr. Roy Mungra as well as legally represented. We have duly considered all the evidence on record as well as submission of Counsel.

(I) <u>Under Ground 1</u>

4. It is the contention of the Appellant that the Respondent failed to comply with the statutory time frame of 8 days provided in the law for the request of additional information, particulars or documents in relation to the application. **Section 117 (5) (a) of the Local Government Act ['LGA']** provides *"On receipt of an application under subsection (4), the Chief Executive of the Municipal City Council, Municipal Town Council or District Council or his representative shall not later than 8 working days from the date of receipt, seek from the applicant any additional information, particulars or documents in relation thereto..."* According to the evidence on record, Docs L and N, the application for BLUP was submitted on the National E-Licensing System ['NELS'] on 25th November 2021. According to the Appellant's unchallenged evidence, on the 8th December 2021, the latter was requested to provide amended plans. An effective date, which is "17/01/2022", was generated as per Doc N. It is the case for the Appellant that the request for documents made on 8th December 2021 was outside the statutory time frame of 8 working days and therefore, the effective date according to **section 117 (5) (b) LGA** is the date of submission, that is, 25th November 2021. The application was thus determined well after 14 days contrary to **Section 117 (7) LGA.**

5. The definition of "effective date" under **Section 2 of the LGA** *"in relation to an application under Sub-part F of Part VIII, means the date by which all the information, particulars and documents specified in the application form are submitted."* [stress is ours]. We believe that the words of the law are clear, that is, an effective date is given when all the information requested have been submitted. It is for the Council, as the decision-making body to state upon checking the application in its totality whether the application is complete and to its satisfaction and to request any missing information needed to adequately assess the application. In the present case, some information and clarification were requested from the Appellant as evidence by Doc L, produced by the Appellant and the latter was given an effective date, which was the 17th January 2022, as evidenced by Doc N, also produced by the Appellant. The contention of the Appellant is that the law provides for a time frame of 8 days to request for information. That is the case, however the law is silent on the outcome of such a failure. In any event, even if we were to take **s.117 (5) (a) LGA** to mean that past the time frame of 8 working days from the receipt of the application, the Council is precluded from requesting additional information, particulars or documents, even if the Council is of the view that such information is missing, this would only lead to the conclusion that the Council would be in the presence of an incomplete application which justifies a rejection of the application. We believe that the law has to be read in a manner way which favours due process more so in matters having planning implication.

6. Furthermore, if a comparison is to be made between the wording of **section 117(5) LGA and those of sections 117 (7) (b) and (8) (b),** this shows the difference intended by the Legislator in how strictly the law has to be applied and this is apparent where the Legislator has provided a default position under **S. 117(11) of the LGA**, reproduced hereunder

" (11) (a) Subject to paragraph (b), where an applicant has not been issued with a Building and Land Use Permit or has not been notified that his application has not been approved under subsection (7) or (8), as the case may be, within 2 working days of the expiry of the due date, the application shall, on payment of the fee referred to in subsection (10) and, where applicable, on payment of the penalty fee referred to in

section 127A(5)(a), be deemed to have been approved by the Municipal City Council, Municipal Town Council or District Council and the acknowledgement receipt, together with the receipt acknowledging payment of the fee, shall be deemed to be the Building and Land Use Permit. (b) Paragraph (a) shall not apply to an application for an Outline Planning Permission or a Building and Land Use Permit referred to in subsections 4(b), (9) or (12)." [the underlining is ours] The implication of this section is that the Council is precluded from deciding the matter beyond the specified time frame. We are therefore minded to accept the effective date as being that which the Council provided as there is then a clear starting point from which it would have verified that all the information, particulars and documents needed for make an assessment and take an informed decision on the application. This ground therefore fails.

(II) <u>Under Ground 2</u>

7. It is the contention of the Appellant under this ground that Respondent also failed to comply with the statutory requirement to determine the application within 14 working days contrary to **section 117 (7) of the LGA** even if the effective date were to be taken as being 17.01.2022. In view of our above conclusion, the effective date is taken to be the 17th January 2022, when the application is deemed to be complete and a decision has to be taken within 14 workings days of the effective date as per **section 117(7) LGA**. A computation of 14 workings days from the 17th January 2022 leads us to the 7th February 2022. This is the last day when the Council could have notified the applicant that its application has not been approved. Failing which, the application of **section 117(11) LGA** *supra* is triggered. We agree with the submissions in law of learned counsel appearing for the Appellant on this issue: **<u>AKM RANA CO. LTD v Municipal Council of Vacoas-Phoenix [ELAT 163/12]</u>**; **<u>Yatindranath Hans Dwarka v Municipal Council of Vacoas-Phoenix IPO EDB [ELAT 1978/20].</u>** Although this section is not, in our opinion, conducive to sound planning principles since it does open an avenue for unmeritorious applications, we are bound to apply the law as it is provided in the statute. This ground is allowed.

(III) Under Ground 3

8. Under this ground, it is the contention of the Appellant that the Respondent's rejection of the application on the basis of a letter dated 09/11/2021 emanating from the Ministry of Local Government and Disaster Risk Management was wrong for several reasons. Firstly, there is no legal provision that exists with regards to the determination of an application for BLUP on this basis, that is, the Council has to keep in abeyance all applications within a radius of 200 m from sensitive locations including Diplomatic missions. Secondly, the contents of the said letter are not binding on the Respondent when considering an application for a BLUP, the more so as same does not form part of the "reserved matters" of the Outline Planning Permission granted on 6 May 2021 for the said project. The Appellant's alternative argument is that the Respondent was wrong to have rejected the application outright on the said ground and should have kept the application in abeyance to give effect to the contents of the said letter. It is also the Appellant's contention that the Respondent never made any mention of the said letter in its request to furnish additional information on 08.12.2021 and therefore failed to give an opportunity to the Appellant to make representations and/or to comment on same and therefore it could not rely on the said letter to reject the application.

9. This ground of appeal directly relates to the first ground of rejection. As regards subparagraphs (a) and (b) under this ground, the letter under reference has not been adduced as evidence before the Tribunal. This has severely curtailed the case for the Respondent and restricted its position. The various limbs to the third ground of appeal challenge the Ministry's letter not just in form but also in substance. When this evidence is not before the Tribunal, we cannot surmise on the issue. The letter in its totality should have been produced. As such, we can simply take note that the Council has rejected the Appellant's application by giving as reason that the site is located within a 200 m buffer from the British High Commission and that it has stated therein, making reference to a letter dated 09/11/2021, Reference MLG/POL/BLP/5, emanating from the Ministry of Local Government and Disaster Risk Management with an instruction that the Council was requested to keep in abeyance all applications

within a radius of 200 m from sensitive locations including Diplomatic missions. The Tribunal cannot, however, adjudicate on the issue. We agree, however, with the position of the Appellant, as raised in ground 3 (c), that if the Council was acting in accordance with instructions given by its parent Ministry, then it was only appropriate for the Respondent to have kept the application in abeyance to give effect to the contents of the said letter and not rejected the application. The Tribunal also takes note from the google earth image submitted by the Appellant, the subject site is in close proximity of the British High Commission in Floreal, within a radius of 200 metres. The last limb (d) under this ground of appeal seeks to challenge the mechanism adopted by the Council and the way it proceeded in failing to give the Appellant an opportunity to make representations and in failing to inform the latter about the Ministry's letter. This is a ground for judicial review challengeable before another forum.

10. For all the reasons set out above, the appeal is allowed as far as the planning issues falling within the jurisdiction of this Tribunal as set out under **s.117 of the LGA**. We believe that the proper course of action is for the Council to take a decision in accordance with policy directives issued from its parent ministry. No order as to costs.

Determination delivered on 29th July 2022 by

Mrs. J. RAMFUL-JHOWRY	**Mr. MOOTHOOSAMY**	**Mr. MANNA**
Vice Chairperson	**Member**	**Member**