IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2085/22

In the matter of:

Abdool Malik Noordally

Appellant

v/s

Municipal Council of Quatre Bornes

Respondent

DETERMINATION

1. The present appeal is against a decision of the Municipal Council of Quatre Bornes (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (hereinafter referred to as "BLUP") for the construction of a building at semi-basement, Ground, 1st, 2nd and 3rd floor and staircase well/lift at 4th floor comprising 20 residential units, at Off Osman Avenue, Quatre-Bornes. The grounds of refusal as set out on the National E-Licensing System ['NELS'] are:

2. *"1. The access road serving the development site has a substandard width which does not allow for two-way traffic. Thus, the proposed development will cause traffic problems thereat.*

   2. Written consent from neighbours using the access road has not been submitted for the enlargement of said access to 5000 mm wide so as to allow proper in and out movement of vehicles to the development site.

3. The width of proposed entrance 3.9 m wide to access the basement is not appropriate.

4. Parking layout have not been dimensioned as per requirements of the Planning Policy Guidance.

5. Clearance from the Central Electricity Board has not been granted. Displacement of Service line/s required."

3. The Appellant and Mr. Oodally, Civil Engineer, testified on behalf of the Appellant who was legally represented. The Respondent's representative was Mr. Baurhoo, Planning and Development Officer. Mr. Veder was also present at the site visit on behalf of the Council. We have duly considered all evidence placed before us as well as submissions of Counsel appearing for both parties.

I. GROUNDS OF APPEAL

4. The grounds of appeal as per the notice of appeal of the Appellant are set out hereunder:

"Under Ground of Appeal 1

Because the Respondent erred in rejecting the application in as much as having failed to notify the Appellant of its decision within 14 working days, the Appellant's application is deemed to be approved.

Under Ground of Appeal 2

Because the Respondent erred in finding that the access road has substandard width and will cause traffic problems when the same is not the case on site.

Under Ground of Appeal 3

Because the Respondent erred in imposing a burden on the Appellant to secure the consent of neighbours in order to widen the access road, the more-so since the access road is of an adequate width.

Under Ground of Appeal 4

Because the Respondent erred in finding that a width of 3.9m at the entrance of the basement was not adequate when an entry and exit point is catered for and their widths are adequate in the circumstances.

Under Ground of Appeal 5

Because the Respondent erred in finding that the parking layout have not been dimensioned when the contrary is the case.

Under Ground of Appeal 6

Because the Respondent failed to find that the clearance from the CEB is deemed to have been approved in the circumstances and further that any absence of such clearance should not lead to the reject of the Appellant's application wholesale."

II. OUR DECISION

(i) Under Ground 1

5. It is the contention of the Appellant that the Respondent erred in rejecting the application since it failed to notify the Appellant of its decision within 14 working days, the application is thus deemed to be approved. It is apposite at this point to go through the timeline of the application until the appeal was lodged. As per the chronology of events

   - the application was submitted on the 26th May 2021.
   - On the 1st June 2021, four working days later, the application was put on hold and the Appellant was informed accordingly, as per Annex 1 of the Statement of Defence ['SOD']. Mr. Baurhoo explained that the application at hand being an unusual one since the site adjoins the metro alignment with the metro corridor, special clearances were needed from the Urban Transport Program Secretariat ['UTPS'] and that this cannot be done online via the National E-Licensing System ['NELS'] but through postal mail.

- On the 16th December 2021, the clearances were obtained and further requests for clarification were made to the Appellant, as per Annex A to the Statement of Case of the Appellant ['SOC'], a computer-generated extract of the Appellant's application history retrieved from the NELS.
- On the 26th December 2021, the clarification was provided by the Appellant. Annex B to the SOC is a report of Mr. Oodally on the enlargement of access road.
- On the 7th January 2022, amended plans were also uploaded and an effective date "07/01/2022" was provided to the Appellant as per Annex A of the SOC.
- The decision of the Council was communicated on the 26th January 2022.

6. The case of the Appellant is that pursuant to **section 117(7) of the Local Government Act 2011 ['LGA']** whereby the PBMC "shall within 14 working days of the effective date of receipt of the application..." approve or notify the applicant of any refusal with reasons, with the application having been submitted on the 26th May 2021, the refusal should have been communicated at the latest by 11th June 2021, that is, 14 working days later. The issue at hand being whether the Council's refusal is invalid for being out of time, the computation of the days as provided by law must be done in relation to the "effective date "as referred in the wording of **s.117 (7)** *supra*.

7. 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]. From the wording of the law which does not, in our view, lack clarity, an effective date is given when all the information requested has been submitted. As the decision-making body, the onus is on the Council, which after checking the application in its totality decides whether it is satisfied with the submission or more information or clarification is to be sought. In the present case, the Appellant's application could not be processed pending certain clearances in view of the specificities of the subject site and the application.

8. Not all applications can be processed with the same considerations or criteria being given that development proposals differ. The time it takes to process the application for the construction of wall will inevitably differ from that for the construction of a five-star resort, for instance.

9. In the case of **GBM Properties Ltd v The Municipal Town Council of Quatre Bornes [2022] SCJ 356**, where the application at hand was for a BLUP for the construction of 144 residential apartment units along St. Jean Road, Quatre Bornes, their Lordships considered the definition of "effective date" under the LGA in relation to applications for BLUP. They concluded *"Therefore, the "effective date" cannot be restricted to mean only the date on which receipt of the application is acknowledged. For obvious practical reasons, strict adherence to the 14 working days would make no sense as that would defeat the purpose of this piece of legislation aiming at diligence in the processing and determination of such applications. It would only be quite logical to expect that the effective date would start running as from the date of the application is in shape when all the required information and documents would have been made available by the applicant for a BLUP."*

10. The representative of the Respondent explained that some clearances cannot be obtained online but rather through the traditional postal method. While such processes take time due to the logistics, they are a necessity for the benefit of the applicants at the end of the day. Hence, we do not agree with the proposition that an application cannot be put "on hold" by the Council. This is a mechanism devised by the Council to ensure that all applications are complete before they are submitted for planning assessment so that an informed decision is taken on the matter by the Council. The Council was therefore perfectly entitled to do so and it also acted responsibly and with fairness when it informed the applicant that the application has been put on hold and the reason for doing so. Similarly, the NELS is a mechanism devised for usage in the application for BLUPs. The fact that the law does not make mention of this mechanism does not in any manner preclude the Council from using it.

11. On 7th January 2022, the last day on which the Appellant submitted his documents on the NELS, he was given an effective date by the NELS, which was the 7th January 2022, as evidenced by Annex A of the SOC, document emanating from the Respondent. We therefore accept this to be the effective date since it aligns with the evidence and chronology of events as that being the day when all the information and documents requested in the relation to the application have been submitted. A computation of 14 workings days from that day takes us beyond the 26th January 2022, this making the decision of the Council not time-barred. Judicial notice is taken of the fact that Tuesday 18th January 2022 was a public holiday. This ground therefore fails. Having come to this conclusion, we do not deem it necessary to address the issue of whether the BLUP application is deemed approved at the expiry of the 14 working days.

(ii) Under Grounds 2 and 3

12. The Appellant considered both these grounds which relate to the first two grounds of refusal, together. The Appellant's contention is that the Respondent erred in finding that the access road is of substandard width and will cause traffic problems and that it also erred in imposing a burden on the Appellant to secure the consent of neighbours in order to widen the access road when in fact the road is of adequate width. The Tribunal conducted a site visit on 19th August 2023 in the presence of all parties and it was noted as per the evidence on record especially the plan, Doc A, that the access road to the subject site is in fact a cul-de-sac which runs from Osman Avenue up until the last house which adjoins the metro corridor. This access road serves as access to 4 residential properties, including the two old houses belonging to the Appellant. There exists other residential properties that are bordered by the access road but those are not accessible through this road. The access road is of varying width but also has a rather sharp bend to the right near the subject site. This is noted from the photographs marked Doc D to D8 as well as the site visit, from which confirmation was also obtained about the varying width of the access road, from the measurements taken by the representatives of the Council on the locus at the time. As per the Council's measurements the width of the road at its entrance at the junction of Osman Avenue is 6200mm (6.2 metres) and thereafter it varies to the

following widths: 4.2m, 4.55m, 4.7m. 4.3m, 3.9m, 3.4m, 3.2m, 3.1m, 2.7m, 3.5m, 3.1m and finally 3.8m when reaching the cul-de-sac. Mr. Veder also took measurements for the width of the access road in the course of the site visit and they tallied with the evidence of the Respondent in that they ranged from 3 metres to less than 4 metres when taken at different points along the road. These measurements were not contested by the Appellant although according to the report of the Appellant's witness, Mr. Oodally, the road width is "5.5 m at the entrance the narrows to reach 4.7m over a distance of 44.50m to end with the site." In this respect, applying the provisions of the **Technical Sheet of the Planning Policy Guidance** ["**PPG**"] on Residential Roads, it appears that the dimensions of the access road do not match the minimum width requirement of 5.0 metres to 5.5 metres for a residential access road serving 1-20 plots. True it is that for serving this many plots, the Technical Sheet provides that the width of the access road depends on local circumstances but we do not subscribe to the interpretation of this provision as meaning that the lesser the number of plots the road serves, the less wide the road can be, even less than 5 metres. We read clearly from the provisions that even if an access road serves only one plot it should still be at least 5 metres in width with the logic being, in our view, to allow fluidity in human and vehicular traffic flow and prevent any traffic hazard resulting from such a narrow width. We find no reasonable justification provided by the Appellant that would justify deviating from such a provision of the **PPG**. The Urban Transport Program Secretariat may well have not objected to the proposed development but it is does not bear the responsibility of making an overall planning assessment of the Appellant's project. At best it would only consider how the development proposal is likely to have an impact on the metro line and its corridor.

13. The road, although technically allowing two-way traffic, being a cul-de-sac hence having no through road, is like a single lane due to its narrowness and this will undoubtedly be a challenge for 2 vehicles to cross consequently restricting traffic fluidity. The Appellant's contention is that the Respondent failed to take into account the fact that there will eventually be no enclosure to the Appellant's premises thereby resulting in greater setbacks varying from 5.8metres to 10.3 metres which would allow for manoeuvring of vehicles within the premises.

14. Based on the evidence especially Doc C and on our appreciation of the locus in the course of the site visit, the proposed development is a large yet compact one on a rather small surface area. The parking lots on the ground floor will also be compactly squeezed all along the frontage of the building, as per Doc C. It would be an incorrect assessment to take the setback with the building as being clear space which will at all times be free for all vehicles to manoeuvre. The shortest distance in terms of setback from the access road to the parking lots on the ground floor was not provided by the Appellant. At best the width of the road may increase slightly at the level of the subject site but the width of the rest of the access road will remain unchanged. It will barely resolve the situation at the entrance of the access road up to the subject site. The only way to access the subject site is through this road which culminates with the Appellant's property, beyond which is the metro reserve. Vehicles will still have to reverse or egress onto the access road which already has a fixed boundary wall on one side. The addition of a condition to the BLUP for safe pedestrian access, as suggested in the submissions of Learned Counsel appearing for the Appellant would be an academic debate since in practical terms, the width from the entrance of the road until the subject site will remain unchangeably narrow.

15. We agree with the submissions of learned Counsel appearing for the Respondent, that such a road was suited for accessing the handful of residential properties contained therein but not for dense developments such as 20 residential apartments housing some 20 families. It stands to reason that the vehicular and human traffic would exponentially increase with the proposed development, thus, making the access road more frequented and as a consequence, the safety and security of road users may be compromised in view of its limited width. We note from the site plan produced as part of the Appellant's case, marked Doc C and photographs Doc D2 and D3, there is a sudden contraction of the width of the access road when reaching up to the level where the plot *in lite* starts from Osman Avenue, which is due to the protrusion of the neighbour's boundary wall from the left-hand side onto the access road. Although the Appellant's case is that he cannot be penalized for the failure of his neighbours in not respecting the setback of their boundary wall, the state of affairs as it is on the locus is to be taken into account for planning assessment of the development.

16. In his report dated 26th December 2021 at Annex B of the Statement of Case, Mr. Oodally stated that with regards to the neighbours, "...their vehicular movement is unlikely to be hindered in light of clear visibility that exists along the access." We do not agree with this view. The existence of the sharp bend in between the two ramps, as noted on Doc C, is likely to mask visibility to some extent. This can also be gleaned from photographs marked Doc 7 and D8. It is also noted from this evidence as well as the site visit that the neighbour's gate opens right onto the bend. These aspects, in our view, would seriously compromise the safety of the road users and local inhabitants but may also become an accident-prone spot, the more so as the access road further curves to the left just after the sharp bend further reducing the visibility splay. The neighbours not having objected to the development cannot be taken to be a factor in the Appellant's favour in this particular case because as per Mr. Baurhoo, the application, being for a ground plus three storeyed building required no notification procedure.

17. The report of Mr. Oodally seems to suggest that traffic along the access road will not be affected. We found the averments contained therein such as "the use of vehicles is subsidiary", "...the project would rather attract those using the metro as their main mode of transport.", "The issue of traffic will be insignificant in the light of short travel distance of 44.5m between subject site and Avenue Osman. The said access is being used by only two or more neighbours..." to be highly speculative and devoid of merit. The metro is an added advantage and at best offers an alternative mode of transport for those inhabitants. Furthermore, the access will not be used by only two or more neighbours but all the residents of those 20 apartments, their visitors and workers as well as the refuse collectors and by the heavy-duty vehicles during the construction phase.

18. The case for the Appellant is that on the basis that the access road was adequate there was no need for the consent of the neighbours as suggested by the Council. According to the report of Mr. Oodally, the access road measures 5.5 metres at the entrance and narrows down to 4.7 metres in width over a distance of 44.5 metres. This was contradicted by the measurements provided by the officers of the Respondent in our

presence during the site visit. Infact the width varies throughout the road, as stated above, and is much narrower. This renders this piece of evidence of the witness rather doubtful and we cannot therefore attach much weight to this report. Having reached the conclusion that the width is below the minimum standard prescribed in the **PPG**, we agree with the position of the Council that the only possible alternative would be for the promoter to widen the access road to meet the minimum width requirement set by the **PPG**. This can only be achieved with the consent and collaboration of the neighbours who use the common access road. The Respondent cannot be said to have faltered in providing a solution to the Appellant, especially as it would involve only a handful of neighbours. The Appellant's position on this is provided in the report of Mr. Oodally that it will not be possible to enlarge the access road because the timeframe to serve a demolition order on the neighbours has lapsed. These grounds therefore fail.

(iii) Under Ground 4

19. The bone of contention under this ground is that the Respondent erred in finding that a width of 3.9m at the entrance of the basement was not adequate when an entry and exit point is catered for and their widths are adequate in the circumstances. We agree with the submissions of learned counsel appearing for the Appellant that the provision of an entry point to the basement and an exit point, as per the Appellant's plan, is a good mechanism for enhancing fluidity of traffic and that Technical Sheet of the PPG provides for typical vehicles turning through 90 degrees. The angle of curvature, as measured in the drawings by Mr. Oodally, is according to him 77 degrees. The turning radius has however not been provided in the plan of the basement, Annex C to the Statement of Case, nor on that of the ground floor, Doc C as drawn up by the Appellant's architect. We cannot surmise on the issue. In fact, there are likely to be too many variables which may affect the curve radius which need to be taken into account in the calculations, according to us, rather than just measuring the angle from the plan as done by Mr. Oodally; there will be a drop in level from ground to semi-basement at the points of entry and exit to the underground carpark and also the neighbours' wall boundary at the entry point, the boundary with the metro reserve

and the proposed building do not all sit squarely on the site. A point of entry and exit, especially underground, will only be functional if it caters for larger vehicles not just cars. As per the **Technical Sheet of the PPG**, a turning radius of 5.78 metres should be provided for a car that is 1.720 metres wide but the passage to the basement is 3.9 metres wide. We note that vehicles such as Pantechnicon of width 2.5 metres will take up a minimum width of 3.920 metres to turn at a 90 degrees angle. We cannot assess in the absence of clear evidence how this will pan out if the angle of curvature is 77 degrees, even if we are to accept the evidence of Mr. Oodally, an assessment that a width of 3.9 metres will suffice will be arbitrary, risky and unreasonable. We agree with the submissions of the Respondent's counsel that there is no appropriate turning radius for manoeuvring of vehicles from the access road to the basement. We have to take into account, for example, instances in case a fire engine needs to get in the underground carpark in case of flooding or a fire which is a possibility that exists. This ground therefore fails.

(iv) Under Ground 5

20. It is the contention of the Appellant that the Respondent erred in finding that the parking layout have not been dimensioned when the contrary is the case. The case of the Appellant in essence is that the parking dimensions are of the appropriate size and that if there was a confusion the Council could have requested for clarification or even held a meeting which it failed to do. As a matter of fact, we find that in Doc C, site plan of the ground floor, none of the parking lots have their dimensions set out. The Council could not have taken it for granted that they must be of appropriate dimensions as per the requirement of the PPG. As far as the basement plan of the parking area is concerned, Annex C to the Statement of Case, the dimensions of 4 out of 13 parking lots have been provided. Therefore, although we agree that this could have been clarified following a timely request, the Council was not wrong to have found that the parking layout have not been dimensioned. Most of them were not. It was submitted by the Respondent that no pre-requisite reversing aisle of 6 metres has been shown on the plan but no evidence was adduced to substantiate this so it is disregarded. Otherwise, this ground of appeal also fails.

(v) Under Ground 6

21. The basis of the Appellant's challenge under this ground is that the CEB is deemed to have approved the application under the circumstances and that in the absence of such clearance the Appellant's application should not have been rejected. The Appellant's counsel submitted that the CEB had 5 working days to submit its clearance upon receipt of the application from the Chief Executive as per the provisions of the **LGA**. Since the NELS automatically generates such a request to the CEB once the application is made, he submitted in the present case the CEB failed to take a decision within 5 working days of the application being made online, on 26th May 2021 and it was therefore deemed granted. The decision of the CEB was only communicated on 13th January 2022 and no clearance was granted as displacement of service lines was needed.

22. The evidence on record shows that the Appellant was aware of the stand of the CEB because he testified that the CEB had contacted him with a request to have the electric supply removed and that he told them that he could not agree to that unless he got the approval for the BLUP because should he not get it, he would not demolish his existing buildings. According to the submissions of the Respondent's counsel, from this it can be gleaned that the Appellant was contacted by the CEB prior to the application being rejected. This seems very plausible. There is no provision in the **LGA** that the Council has to automatically reject the decision of an authority whose decision has come in late. Besides, this challenge of whether or not the CEB's decision is deemed granted is beyond the jurisdiction of this Tribunal. Being given that the application was on hold and on the basis of the Supreme Court's decision in the case of **GBM Properties Ltd** *supra* that the law must be interpreted in a way which allows for the Council to take an informed decision after all the relevant information and clearances have been obtained, we find that the Council was right in taking into account the decision of the CEB to come to an informed decision. This ground therefore fails.

23. As a matter of proper procedure and in line with good housekeeping practices, an application for BLUP construction should also include application for demolition of the old building existing on the same premises for an informed assessment to be made by the Council.

24. For all the reasons set out above, the appeal is set aside. No order as to costs.

Determination delivered on 3rd February 2023 by

Mrs. J. RAMFUL-JHOWRY	**Mr. S. K. SULTOO**	**Mr. P. MANNA**
Vice Chairperson	**Member**	**Member**