

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2141/22

In the matter of :-

William Andrew TSIN SA AH-VI

Appellant

v/s

The Municipal Council of Beau Bassin-Rose Hill

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having refused the application of the Appellant for a Building and Land Use Permit ["BLUP"] for the conversion of an existing house at ground and first floor to be used as dormitory at Lot 85, 13, Andrew Avenue, Morcellement New Town, Roche Brunes, Beau Bassin. The Appellant was informed of the decision of the Council on the 14th November 2022. The reasons for refusal set out in the letter are as follows:

"1. Objections from immediate neighbours have been received against the proposed dormitory. The Council is under a duty to consider these objections in the interest of those who will be impacted upon by the proposed development.

2. The amenity of the area may not change but the character of the area is sure to change with the presence of persons who are not "homemakers" who will have no attachment to the neighbourhoods."

2. The Appellant, who was legally represented, deponed and did not call any witness. The Respondent was represented by Mr. Nawoor, Planning and Development Inspector and was also legally represented. We have duly considered the evidence before us as well as the submissions, Counsel for the Appellant having chosen to go by the submissions in the Statement of Case.

I. **CONTEXT ANALYSIS**

3. The undisputed facts are that the building *in lite* is existing one storeyed residential property having a basement and ground plus one at Lot 85, 13, Andrew Avenue, Morcellement New Town, Roche Brunes, Beau Bassin. As per the documents annexed to the Statement of Case ['SOC'], the basement contains a kitchen and dining hall. The ground floor contains 3 bedrooms and washrooms while the first floor contains 3 bedrooms. The house is situated in a purely residential morcellement with a road of 4.80 metres in width running in front of it as per the site plan annexed to the SOC and residential buildings on all 3 sides of the subject site and it is also from these owners that objections against the proposed development have been made.
4. The case for the Appellant in essence is that the building will be used as a dormitory for 62 male workers who are Nepalese nationals who will be employed by UDIS Ltee. His contention based on the grounds of refusal is that the mere fact of having objections is not in itself a ground for rejection. He also contends that these 62 workers are entitled to be housed there because they should be treated equally to locals and that by advancing those reasons for refusal the Council has acted in a way which is wrong, biased, prejudicial and discriminatory to the workers and contrary to the laws of Mauritius and to the provisions of international conventions to which Mauritius is a signatory. Furthermore, the Appellant produced evidence to show that the Ministry of Labour, Human Resources Development and Training as well as the Ministry of Health and Wellness have given the relevant clearances to UDIS Ltee. for 62 male workers to be lodged in the said house.

Under Reason 2

2. *The decision of the Respondent is wrong in law, biased and prejudicial, in so much as,*
- (i) It contravenes, inter alia, the obligations of any public authority not to act indiscriminately, and to ensure that its decisions do not violate human dignity and rights, irrespective of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.*

 - (ii) It would, if allowed to stand,*
 - (a) Infringe the rights of foreign workers to live in adequate and suitable accommodation, and within a proper living environment.*

 - (b) Contravene the policy of government to protect the rights of foreign workers in Mauritius through, inter alia, the enactment of regulations and signatories of International Treaties which seek to cater for their decent living and working conditions.*

 - (c) Impair the efforts and initiatives of any entrepreneur – in this case, the Appellant – willing to align with both local and international standards’ and offer good living and working conditions to foreign workers, whilst they are posted in Mauritius.*

(a) Under Ground 1

8. The first ground of refusal is that there have been objections from immediate neighbours against the proposed dormitory which the Council is under a duty to consider in the interest of those who will be impacted upon by the proposed development. The Appellant contests this on the basis that the ground as couched merely states the jurisdictional purview of the Respondent without a proper and/or valid legal ground(s) motivating its decision for refusing the application.

9. It is borne out in the evidence that on the 7th November 2022 the Appellant was convened to attend a hearing at the seat of the Council which took place on the 11th November 2022 in the presence of the Appellant's father, who represented him and the objectors. On the 14th November 2022 the Appellant was informed that his application was rejected based on 2 grounds, one of them being that the Council considered the objections.
10. The Council, as the local authority, has jurisdiction over planning control and development. This authority is derived from multiple pieces of legislation, including Acts governing town and country planning, land subdivisions, and building construction standards. These laws directly influence the types of development and activities permissible on land, constituting the land use aspect of the permit process. Essentially, when evaluating the planning merits of an application, the local authority must determine both if a proposed development aligns with the intended use of the building and if it aligns with the proposed location.
11. The Council holds broad authority in this regard, with one of its primary responsibilities being the evaluation of whether a proposed development aligns with the suitability of its location. A key aspect of this assessment involves considering the potential impact on residents in the area. To facilitate this, the Council typically arranges meetings between the Appellant and objectors, as was the case on the 11th November 2022, in accordance with common practice. These meetings allow both parties to express their viewpoints.
12. However, it's important to note that the Council has the discretion to decide whether such a meeting is necessary based on the specific circumstances, as it did in this instance. It is borne out in evidence that the neighbours residing in close proximity to the subject site, including some whose properties directly adjoin it, have expressed objections. According to the Respondent's representative, Mr. Nawoor, there were 7 objectors at the hearing scheduled before the Council and with the exception of 3 who are the contiguous neighbours, as per the map marked Doc C, the others are from the neighbourhood although their houses could not be located on the map produced by

the representative of the Council. He explained that the morcellement is an exclusively residential one without any dormitory or any place housing foreign workers in the vicinity. He set out the objections raised were on several issues including security, comfort, nuisance, noise, unsocial behaviour, depreciation of their property and that the activities of these foreign workers will not be suited for their neighbourhood. These objections were officially recorded during the hearing of the Permits and Business Monitoring Committee ['PBMC'] in the presence of the Appellant's representative. Consequently, when there exists discretion in convening a meeting, there is no obligation to provide the objections in advance, especially when objectors are being brought together for the first time. The veracity of the objections and the identities of the objectors are typically ascertained during such meetings, in practical terms. We are therefore unable to agree with the contention of the Appellant that in these circumstances the Council was wrong not to have communicated the objections to the Appellant beforehand.

13. As regards the objections, what is of importance is the Appellant should be made aware of the nature of objections so that he can adequately either refute them or offer clarification. In the present case, we have not heard evidence of any prejudice being caused to the Appellant. Despite him stating that prior to the hearing at the Council he was unaware of the nature of the objections, he agreed in cross-examination that through his representative he took cognizance of all the objections raised by the neighbours living in the surrounding of the subject site and he also agreed that when the Council stated that it had taken into consideration the objections of the inhabitants in the neighbourhood, he knew what those objections were. He agreed to all the following: that these objections are in relation to the 60 foreign workers who are meant to be living in the neighbourhood due to which the objectors will not have a peaceful enjoyment of their property and morcellement which will be affected due to the going and coming of these foreigners; that the area is an exclusively residential one where families reside; that the objectors have also raised the issue of nuisance in this context as well as other apprehensions such as them having young girls residing in the area; and that the Council heard all those objections.

14. His evidence remained unrebutted and leads to the conclusion that he was well aware of the objections raised against his development proposal prior to the decision of the Council. The Appellant lodged his appeal before the Tribunal on the basis of the refusal letter which was sent to him following the PBMC hearing. He was therefore well in the loop as regards the objections raised and the case that he had to meet. We believe that while it may have been desirable for the Council to set out the various grounds of objections raised by the objectors, there is nothing wrong with the Council having made reference broadly to the objections raised without enumerating each of them when coming to the conclusion that the application was rejected, so long as the reason motivating that decision is set out. In the present case, the Council has clearly stated as the basis being “*objections in the interest of those who will be impacted upon by the proposed development*”, which a sound planning criterion since objections from neighbours within a 50 metres radius is set out in several policies which regulate new developments in residential areas where there is likely to be a material change in the original use. In our view, the Council in its wisdom having ascertained the nature and veracity of the objections raised, ascertained the proximity of the objectors and having done so, it rightly applied planning principles in relation to the impact of the proposed development on the inhabitants within a purely residential neighbourhood and has decided to reject the application after having allowed the Appellant to take cognizance of the objections. As regards the first ground of refusal, the Appellant knew what the objections were and what case he had to meet, irrespective of how satisfactorily it was couched. This ground therefore fails.

15. It was raised as part of the Appellant’s submission that nowhere is the activity of Dormitory mentioned under the **Local Government Act 2011** and that the law needs to be amended to include it. We agree that the “Dormitory” is not classified under the **Local Government Act 2011 [‘LGA’]** and this is not a desirable state of affairs since it is not be listed as an activity in the schedule of the **LGA** nor does it seem to fall within any particular cluster of activities but in principle the fact remains that the local authority is the sole authority vested with powers of planning control over all developments, and a dormitory is no different from any other development.

16. This was considered lengthily in the case of RT Knits v/s The City Council of Port Louis [ELAT 547/13] where after due consideration the Tribunal found that since there was a material change in the use of the building, the Council was justified to have requested a BLUP. The Tribunal came to the following conclusion after considering the meaning of what constitutes a “development” under **section 2 of the Planning and Development Act 2004**

*“In the present context since the one-storeyed building would no longer cater for the residence of a couple of regular sized families (as would normally be the case) but for 45 housemates, it is in our view a material change to the use for which the building was initially intended. Therefore, we believe that the Council was right to have taken the stand that the appellant requires a BLUP, not because development was initially residential and now falls within the “services cluster”, but because it constitutes a “development” within the meaning of the law. The Appellant was issued with a Lodging Accommodation Permit by the Ministry of Labour under the **Occupational Health and Safety Act** following a clearance from the Ministry of Health. These do not absolve the Company from the requirement of having a relevant BLUP as there has been a material change in the initial intended use of the building which is found within a residential area.”*

(b) Under Ground 2

17. The Respondent’s second ground of refusal is that the character of the area will change with the presence of persons who are not “homemakers” who will have no attachment to the neighbourhood. The contention of the Appellant under this ground in essence is that the decision of the Respondent is wrong in law, biased and prejudicial in that it contravenes the obligations of any public authority not to act indiscriminately, and to ensure that its decisions do not violate human dignity and rights without discrimination. And, if allowed it would infringe the rights of foreign workers to live in adequate and suitable accommodation, and within a proper living environment, contravene government policy of protecting the rights of foreign

workers in Mauritius regarding catering for their decent living and working conditions and impair the efforts and initiatives of any entrepreneur who are willing to align with both local and international standards' and offer good living and working conditions to foreign workers, whilst in Mauritius.

18. We shall deal with all the limbs together since they relate to the same evidence and are inter-related. We have duly considered the Appellant's lengthy submissions on this issue, as set out in his SOC. This Tribunal, drawing upon its legal expertise, recognizes the paramount importance of upholding and adhering to the Fundamental Rights and Freedoms of individuals as enshrined in the Constitution, including the right to be free from discrimination. Additionally, it acknowledges the significance of complying with both the laws of the country and international conventions to which Mauritius is a signatory. However, it's essential to underscore that this Tribunal operates within the confines established by its parent legislation, namely the **Environment and Land Use Appeal Tribunal Act 2012 ['ELUAT Act']**. The grounds of appeal, as couched, aim to contest the legality of the local authority's decision, alleging breaches of obligations and government policies. Furthermore, it seeks redress for what appears to be violations of the fundamental rights of foreign workers, as well as hindrances to the efforts and initiatives of entrepreneurs. It is not within the jurisdiction of the Tribunal to adjudicate on such issues nor to grant the redress sought. On a broader note, the Council is not in any way purporting to deny or discriminate against, the rights of foreign workers. Its remit is limited to the suitability of this development for use as a dormitory in accordance with planning norms. These grounds therefore fail.

19. The Tribunal will however in accordance with **section 4 (1) of the ELUAT Act**, assess the decision of the Council and make a determination on the basis of certain live issues which were canvassed under the second ground of refusal. During cross-examination, the Appellant acknowledged that the house in question was a ground plus one structure and is not large building. He further testified that originally the basement contained a kitchen, while the upper floor had three bedrooms, and the ground floor featured a combined living and dining area. This, in our view, is a house typically designed for a regular sized nuclear family.

20. Mr. Nawoor also stated that the individual room sizes were approximately 18 square meters each. The Health Clearance issued by the Ministry of Health and Wellness, dated 10.08.22, and marked as Doc B in relation to the subject property, provided specific dimensions for the six bedrooms. These bedroom sizes ranged from 18.3 square meters for rooms accommodating six individuals each (two rooms of the same size) to a maximum floor area of 47.61 square meters for the largest room intended to sleep 18 people. The Appellant also conceded that housing 60 people in a building of this size significantly alters the context, regardless of their nationality.
21. Regarding the foreign workers, the Council has chosen not to grant the BLUP for security reasons, primarily due to concerns related to the substantial influx and turnover of individuals in the area, resulting in significant human traffic and the arrival of “new” residents within the morcellement. When it was pointed out to Mr. Nawoor why the Council would express security concerns if the Ministry of Labour and the Ministry of Health had determined that 62 people can comfortably reside in that particular location and house, he responded by asserting the Council's "droit de regard" or oversight role in such matters. He explained that with the arrival of new individuals in the neighborhood, security issues such as theft become a potential concern. It was argued that these security concerns were speculative and lacked concrete evidence. However, Mr. Nawoor insisted that the Council should consider the objections and concerns raised by local residents. He also emphasized the potential noise disturbances that could arise from accommodating 62 people in a single house. When questioned about the Ministry of Health's findings regarding the suitability of the house for 62 occupants, Mr. Nawoor clarified that the ultimate decision to grant a permit rested with the Council.
22. The Council's decision was also influenced by the character of the neighborhood, which is predominantly residential. They believed that permitting such a significant change in occupancy would constitute a material change in the way the building is being used. Mr. Nawoor stated that the Council had also noted that this change would impact the local neighbourhood.

23. Furthermore, from Mr. Nawoor's explanations we understand him to mean that the term "not being homemakers" signified that these foreign workers were not permanent residents who would have a long-term interest in the area but rather individuals who would temporarily reside in the residential morcellement. This, he argued, would fundamentally alter the neighbourhood's character.
24. We are of the view that the comfort, security and adaptability of strangers in the existing environment are all issues of consideration for the Council as much as these same issues are important for the inhabitants who have already been living there or who own houses over there. As a guiding principle, it is important to also consider the intensification of the use. We believe that based on the evidence the Council was right to have refused to BLUP on the basis that it would be incompatible to have the dormitory of 62 people within a residential morcellement where the inhabitants are expected to have a peaceful enjoyment of their property. The mere presence of such a large number of people in the dormitory can result in increased noise levels and human traffic flow, which can disrupt the peaceful atmosphere of a residential neighbourhood.
25. There can also be conflict due to cultural differences and sensibilities. Mr. Nawoor in fact explained while acknowledging that a foreign worker could potentially be a "homemaker", the Council's concern was rooted in preserving the neighbourhood's character, which it believed would be disrupted by housing 62 foreign workers in one location. Mr. Nawoor clarified that the decision of the Council is not discriminatory.
26. We also do not view the Respondent's decision to be so but rather a response to the fact that the foreign workers were intended to reside in a communal dormitory setting which was incongruent with the morcellement's residential nature. There are thousands of foreign workers currently legally residing in Mauritius with the Council having granted the relevant BLUPs but it has to be in an area which can promote the integration of these foreign workers in the local community for a harmonious co-existence and mitigate the likelihood of clashes.

27. An influx of human traffic is also likely to be a cause for concern to the local residents who may feel their security can be compromised due to suddenly having large groups of overseas workers living nearby, particularly if they are not familiar with these workers and their background. The Council is entitled to take this on board.
28. The Lodging Accommodation Permit issued to UDIS Ltee by the Ministry of Labour, Human Resources Development and Training authorizing it to accommodate 62 male workers in the building *in lite* and Health Clearance issued by the Ministry of Health and Wellness to UDIS Ltee on the basis of the amenities provided within the building only relate to the structure of the building. The integral planning including the locational aspect of the development rests with the Council.
29. From a planning perspective, the building despite currently being used as residence , a material change takes place with the conversion from a nuclear-family home into a dormitory due to the consequential changes which include an obvious increase in the number of residents in the building as well as a marked increase in human and vehicular traffic in and out of the building at potentially odd hours along the access road, noise disturbance, adaptability of overseas workers to that specific environment and disturbance of the tranquility caused to a residential morcellement.
30. For all the reasons set out above we find that this appeal is devoid of merit and is accordingly set aside. No order as to costs.

Determination delivered on 11th September 2023 by

Mrs. J. RAMFUL
Vice Chairperson

Mr. R. ACHEEMOOTOO
Member

Mr. A. SOOGALI
Member

