BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2180/23

In the matter of:

Nageeb Allybocus

Appellant

v.

The Municipal Council of Curepipe

Respondent

Determination

The Appeal is against the decision of the Respondent for having declined to grant a Building and Land Use Permit (BLUP) for the construction of a building at ground and two floors at Quartier Militaire New Road, Couvent de Lorette, Curepipe. The proposed construction is for a ground floor to be used as commercial units for general retailer foodstuff and non-foodstuff, and the first and second floors for residential purposes.
The grounds of refusal, as contained in the letter dated 25th June 2023, are that firstly, the proposed development does not have adequate parking facilities and, secondly, it is likely to cause traffic nuisance as it is a small corner plot along a busy street.

Eight grounds of appeal have been listed in a Notice of Appeal lodged before the Tribunal on the 14th July 2023. These are as follows:

(a) The decision is arbitrary and unjustified as a BLUP had already been issued in 2018.
(b) The decision is unfair and unreasonable as the vicinity is a commercial area.
(c) In relation to the traffic, practical arrangements can be made to ensure fluidity, the more so that the said development has two access entrances and Quartier Militaire road is a main road.
(d) The parking has two access to the road.
(e) Deprivation of the use of property without valid reasons, the more so since there is no objection from neighbours.
(f) Quartier Militaire Road is wide enough to enter/exit the parking.
(g) No change in economic activity of the premises in respect of previously issued permit.
(h) Due to Municipal Council's acts and doings, the access to the parking along QM has been deprived. Decision is contradictory as on one hand, it itself states that there is no adequate parking at one go only three cars can be parked, on the other hand, it states that it will create traffic.

The Statement of Case filed by the Appellant dated 15 July 2023 sets out the background of facts and 'Grounds and Particulars of the Appeal'. It is noted that although this embodies most of the grounds of appeal as listed in the notice of appeal, some grounds have been added. Although some of those additions can be construed as giving a more detailed description of the grounds themselves, some are simply new grounds *per se*, namely paragraphs 7(e), 8, 9 and 11. The filing of the notice of appeal in the form set out in the Schedule to the ELUAT Act and within delay of 21 days is a statutory requirement. The notice of appeal filed on the 14 July 2023 responds to those criteria and has been deposited at the registry of the Tribunal on 14 July 2023.
In the Statement of Defence, the Respondent reiterated the grounds on which the application had been rejected and further averred that the required clearances had not been obtained and the recommendations from the TMRSU dated 26 October 2018 had not been complied with. Furthermore, the proposed development is likely to cause traffic nuisance as it is proposed on a corner plot along a busy street.
In the Statement of Reply, the Appellant averred that some modifications were made to the structure of the vicinity by the relevant authorities without notifying the Appellant where the new building was to be erected which changed the surrounding. It was also replied that since the construction under the BLUP dated 2018 had not been executed, there was no need to comply with any recommendation from the TMRSU. These elements do not find their way in the notice of appeal that was deposited before the tribunal.
For all intents and purposes, the grounds of appeal set out in the notice of appeal will be considered for the purpose of the appeal.

At the hearing, the first point that called for attention was the stand of the representative of the Respondent. The officer kept referring to an earlier application for BLUP that, as per his evidence, had been approved, and stated that the PBMC was wrong to have departed from the first approval and to have rejected the second application. It came out that the Appellant had not proceeded with the first proposed development due to the 'lock down' period when he had been unable to travel to Mauritius.

As stated above, this Tribunal is in presence of an appeal against a decision taken by the Respondent on the 25th June 2023 to reject the application for BLUP. The earlier application and decision have no bearing on the present appeal.

The position of the representative, Mr. Molaye, Planning and Development Officer of the Council, calls for concern, as he was adducing evidence that was at a tangent with decision of the Council, whom he is representing. He ought to be aware that earlier decisions of the Council are not part of the present appeal on one hand, and, on the other, he is the mouthpiece of the Council before the Tribunal. Decisions of the Council are taken by the Permits and Business Monitoring Committee (PBMC) as per sections 117(6) and 117(7) of the Local Government Act. The planning department, as referred to by Mr. Molaye, may make its position known to the PBMC, yet it is the PBMC that is the decision-making body. The witness, deposing as the representative of the Municipal Council, is duty bound to put forward the stand of the Respondent, which is the Municipal Council. Should he have had any reservation on the stand of the PBMC, he should have expressed it at the level of the Council.

We now address the grounds of appeal, as raised in the Notice of Appeal.

Grounds (a) and (b), namely that the decision is 'arbitrary and unjustified' and that it is 'unfair and unreasonable', bring into perspective the issues of fairness and reasonableness. Firstly, as

observed above, the fate of the earlier decision in respect of the same proposed development is not material in the assessment of the present appeal. Secondly, what this Tribunal is called upon to assess is the decision of the Respondent as per the provisions of section 117(14) of the Local Government Act, which reads as follows: "*Any person aggrieved by a decision of a Municipal City Council, Municipal Town Council or District Council under section 7(b), 8(b) or 12 may, within 21 days of the receipt of the notification, appeal to the Environment and Land Use Appeal Tribunal.*"
The process by which the decision is made, or any lacuna therein, is being questioned by the Appellant under these two grounds of appeal. It has also been submitted on behalf of the Appellant that '*we are not in the realm of a judicial review, however, one would expect the Respondent, a public body, to act with consistency and predictability ...without breaching any citizen's legitimate expectation*'. The Appellant went on to highlight that there had been a failure on the part of the Respondent to '*uphold the principles of fairness, transparency and consistency in arriving at the said decision*'.
Clearly, the intervention that is sought under these two grounds of appeal call for an assessment of the process by which the decision was made by the local authority. The Tribunal has no jurisdiction to hear an appeal against the decision-making process of the Respondent, which ought rather to be the subject matter of an application for judicial review.
For this reason, grounds (a) and (b) are rejected.

Grounds (c), (d), (f) and (h) can be taken together, being all related to the parking and access issues. The Appellant was represented at the hearing by his sister, Mrs. Nazneen Kureemun, by virtue of a 'procuration speciale' produced as Document A and the latter deposed on behalf of the Appellant.
We note from the evidence adduced that no traffic assessment has been requested in respect of the application subject matter of the present appeal. The planning parameters that the Respondent has considered, as per the evidence, are the Design Guidance for Commercial Development and the Design Sheet for Tall Buildings, which provide for one parking slot to be provided for each 30m2 of floor area for commercial development and one parking slot for each residential unit. The Appellant's 'mandataire' conceded that these requirements have not been satisfied. We therefore find no reason to uphold these grounds of appeal. Grounds (c), (d), (f) and (h) are set aside.

Ground (e) relates to the deprivation of the use of the property without valid reasons. In this respect, it is observed that reasons have been given by the Respondent, and they are based on planning considerations. As stated above, it has been conceded by the Appellant's 'mandataire' and also unrebutted in cross examination that the planning parameters have not been observed. This ground cannot be upheld and is set aside.

Ground (g) stating that there has been no change of the economic activity from the previously issued permit. We take note of that and, again, hold that factors that may have been considered in an earlier application are not before us, nor is the earlier decision. We shall refrain from addressing extraneous matters.

We find it appropriate to comment on the submissions made by counsel for the respective parties.
The first submission made by the Appellant is in respect of a breach of section 117(7) of the Local Government Act since the Respondent took more than six months to notify the Appellant in writing as to the status of his application. The Respondent has rightly pointed out that this is

not part of the grounds of appeal raised in the notice of appeal. We agree that this new ground of appeal cannot be introduced at this stage.
Furthermore, the Respondent has also laid down the chronology of events that led to the decision that was communicated to the Appellant. This disclosed that there is no evidence on record as to what was the effective date with respect to the application and which could have triggered the 14 working days delay that is provided for at section 117(7) of the Local Government Act, so much so that it is not established that the Respondent had fallen foul of section 117(7).
These two elements suffice for this part of the submission to be rejected.

The second part of the submission relates to the issues of fairness and reasonableness of the decision as contained in grounds (a) and (b). We have addressed these issues above and grounds (a) and (b) have been set aside.

The third part of the submission relates to parking facilities. The evidence of the Respondent has amply shown that the requirements as laid down in the planning parameters have not been observed and the Appellant's representative has herself conceded that the proposed development would cause traffic problems.

The fourth leg of the submission named 'Unchanged zoning and traffic conditions', it has been rightly submitted that this does not fall in the grounds of appeal as per the Notice of Appeal. The Appellant cannot travel outside the Notice of Appeal.

At paragraph 8 of the Statement of Case, the Appellant refers to practical arrangements that can be made to ensure traffic fluidity and conditions that can be set by the Respondent authority. These are options that the Appellant may consider raising with the Respondent authority in the context of a new application where such possibilities can be brought to the attention of the latter for its consideration. Also, in view of the changes brought to the surroundings by new developments, the enlisting of the expert advice of the TMRSU and other appropriate authorities is recommended should a new application be made.

As matters stand, in the light of the abovementioned considerations, we find no reason to interfere with the decision of the Respondent. The appeal is therefore set aside.
No order as to cost.

Determination delivered by:

Mrs. V. Phoolchund- Bhadain, Chairperson ....

Mr. Roshan Seeboo, Member ....

Mr. R. Acheemootoo, Member ....

Date: ...14...October...2024.