BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 547/13

In the matter of :-

RT Knits Ltd

Appellant

v/s

The City Council of Port Louis

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the City Council (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant company for a Building and Land Use Permit (BLUP) for the conversion of an existing building to be used as Dormitory at 71, Trochettias Street, Morcellement Rey, Pointe aux Sables. The decision of the Council was communicated to the Appellant by a letter dated 21st October 2013 which stated that the Council rejected the application on the grounds that-

(i) The proposed dormitory is an incompatible use within the residential area as there are repeated complaints which have been made from inhabitants for odour and noise nuisance caused.

(ii) In anticipation as to any negative social impact which the operation of the dormitory might have on the neighbourhood.

2. We have duly considered the evidence placed before us including documents produced and the depositions of all witnesses as well as submission of counsel. The appellant company's representative, Mr. Sultanti, deponed and was cross-examined by counsel for the respondent. Mr. Santokee, the Head of the planning and Land Use department of the Council deponed on behalf of the respondent and was cross-examined by the appellant's representative, the appellant not being legally represented.

I. CONTEXT ANALYSIS

3. It is accepted that the development site is a residential building of ground plus first floor which is already being used as a dormitory by the appellant. It is located at 71, Trochettias Street, Morcellement Rey at Pointe aux Sables. Morcellement Rey is a predominantly residential morcellement. The property, as per evidence, is taken on rent by the appellant. Some improvements have been made to the septic tank and some refurbishment within the building itself. There are currently some 45 migrant workers living there and the building has at least 10 rooms used as bedrooms. There have been objections from neighbours living in the vicinity regarding odour and noise nuisance and since the use of the building, according to the Council, has changed from its initial use of being a residential property to a dormitory, it has urged the appellant to apply for a BLUP, hence the present appeal.

II. THE INSTRUMENTS AND THE LAW

4. The site being in Pointe aux Sables, the applicable outline scheme is **Outline Planning Scheme for Port Louis ['OPS']** issued under the **Planning and Development Act 2004**. The relevant legislation is the **Local Government Act 2011 ['LGA']. Section 117 (1) & (2) of the LGA** confers the authority to execute and enforce a BLUP upon the council and an obligation upon every person to apply for a BLUP to the Council

"(1) The authority for execution and enforcement of the Building Act and Town and Country Planning Act shall be the Municipal City Council, Municipal Town Council or District Council of the respective city, town or district where the relevant building, structure or tenement or where the land is to be developed.

(2) Every person who intends to-

(a) commence the construction or demolition of a building or effect extensive alterations, additions or repairs to an existing building;

(b) carry out development of land; or

(c) carry out development, including demolition of a building, in the Buffer Zones,

shall apply to the Municipal City Council, Municipal Town Council or District Council, as the case may be, for an Outline Planning Permission or Building and Land Use Permit.

(3) Every Application for a Building and Land Use Permit shall be in accordance with the guidelines issued under-

(a) The Building Act

(b) The Town and Country Planning Act

(c) The Planning and Development Act; and

(d) The Environment Protection Act "

The above provisions illustrate not only the obligation upon those seeking to carry out a development to apply for a BLUP to the Council but also that every application for BLUP shall be in compliance with the legislation.

III. THE ISSUES

5. The grounds of appeal in essence contest the fact there is any type of nuisance due to the use of the premises as a dormitory on account of the appellant having obtained clearances from Health authorities and a Lodging Accommodation Permit granted to RT Knits Ltd. According to the appellant no police complaints have ever been made, a security guard has been assigned the duties of ensuring that there is no noise nuisance and that the workers are at work from early morning until late evening so the premises remain mostly unoccupied during the day. Furthermore, it is submitted that anticipatory negative social impact is untenable as there is no factual evidence of this.

6. The bone of contention of the Council, on the other hand, is that once there is a material change of use from what it was initially destined to serve as, there should be an application for a BLUP under the **LGA.** Mr. Santokee explained that there were objectors and their main concern was odour and noise nuisance. Now, the Council seems to have deemed it fit to request the appellant to apply for a BLUP for the building that is currently being used as dormitory so that it could assess the planning merits of the application bearing in mind that developments of such nature are normally assessed in terms of their impact on the amenity of the locality. The one storeyed building, as we know it, currently houses 45 people and the application made was BLUP for a "dormitory".

7. The question we face is: *Within which category of development does a "dormitory" fall?* Operating a dormitory is an activity which relates to the provision of services, typically the provision of lodging facilities against payment for medium or long term stay. This would normally entail a certain dynamic flow of human traffic in and out of the building.

8. It was submitted by the Council that the provision of a "dormitory" would fall within the ambit of the *"services cluster"* under the **11th Schedule of the LGA**. We do not subscribe to this. Activities within the *"services cluster"* clearly relates to those economic activities

which entail the provision of financial services, professional services and the like. This cluster has been defined in the **Eleventh Schedule of the LGA** as

"Service activities relate to the provision of financial and professional services and include banks and other financial services and professional services such as estate agents and employment agencies."

9. According to the **Eleventh** and **Twelfth Schedules** of the **Local Government Act 2011**, which set out those categories of development which can be *"classified trade"* and which lists out the *"economic activity"* respectively, a *"dormitory"* does not seem to fall within the meaning of either. This means that for all intents and purposes it is an unclassified trade and is not a recognized economic activity within the purview of the **Local Government Act 2011**. The development cannot, in our view, be categorized as commercial, industrial, services nor *Sui Generis* since it cannot be categorized as an "economic activity".

10. We pause here to make an observation as regards the law on the issue of categorization of developments. It is a rather unsatisfactory state of affairs that the **Eleventh Schedule** of the **Local Government Act 2011** sets out clusters for economic activities in very definite terms with a limited vision for future novel types of developments, afterall planning is for the future. There are several types of developments which currently exist in this country but is not categorized under the **Eleventh Schedule** or even the **Twelfth Schedule** such as a car wash, a hostel and dormitory to name but a few. The *Sui Generis* cluster under the **Eleventh Schedule of the LGA 2011** gives a list of economic activities which are not catered for under the three other clusters (commercial, industrial and services) but from the language used, this cluster relates to an exhaustive list of activities as compared to it being a blanket provision or a "catch-all" provision. This therefore leads to an undesirable situation of some activities not finding an apt category within the meaning of the **Local Government Act**, which is an issue that we believe, must be addressed by the relevant Ministry and remedied.

11. This being said, since the development cannot be categorized as an "economic activity", in our view, on the fact of this case, it can only be categorized as a "residential" development. While offering dormitory facilities would normally be considered an economic activity which could be similar to residential care homes (which is listed in the **Twelfth Schedule of the 2011 Act**), on the facts of this case, the dormitory cannot be considered an economic activity. It is being used as a private residence to house foreign workers who are engaged to perform industrial activities. Since the dormitory can only house workers, here off-site workers, employed by RT Knits Ltd, the appellant and the lessee of the building, the latter is not receiving money in exchange for offering lodging facilities to the migrant workers. RT Knits is the lessee who is providing lodging facilities to its workers in performance of its contractual obligations towards its factory workers and presumably its legal obligations to provide accommodation. Doc A, which is the lease agreement, clearly shows that it is the lessee is RT Knits and there is no evidence to show that the appellant is letting rooms to the factory employees who are lodging at the site.

12. The next question is whether *if the development has not changed categories, in that its initial use was that of residential and is still being used as residential, whether there is infact a need to apply for a fresh BLUP? Does the present development of setting up a "dormitory" need a BLUP?* **Section 117(2) (b) LGA** *supra* stipulates that every person who intends to "carry out development of land" shall apply to the Council for a BLUP. Under **section 2 of the LGA**, that is the 'Interpretation' section, it is stipulated *""development", in relation to land, has the same meaning as in the Planning and Development Act."*

Under **section 2 of the Planning and Development Act 2004**, it is stipulated that *"development"*

> *"a) means the carrying out of any building, engineering, mining, or other works or operations in, on, under or over land, or <u>the making of any material</u>*

change to the use of land or to any building or morcellement; (stress is ours)

(b) includes -

(i) the use of land;

(ii) morcellement;

(iii) the erection of a building;

(iv) the carrying out of a work;

(v) the demolition of a building or work;

(vi) any other act, matter or thing that is controlled by a planning instrument;"

13. From the above provisions, it can be interpreted that any material change to the use of a building constitutes a "development" of the land for which a BLUP is required. 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.

14. *Was the Council wrong to have refused the BLUP?* The subject site being located within a residential morcellement, the Council, which is the authority that issues permits for development in order to maintain control over the operations of the activity has deemed it fit to take on board the complaints of the neighbours who have expressed the inconvenience being caused to them daily due to noise and odour nuisance. This amounts to prejudice being caused to them and hence leading to a deprivation of their right to a peaceful enjoyment of their property. The one storeyed house is now being used to house 45 housemates instead of accommodating a couple of families. The sheer number of people within the house per floor area has increased drastically. This would inevitably lead to nuisance to the surroundings in view of the population density. As per **Policy CR2 of the OPS** only small corner shops are to be allowed within residential areas if they do not cause any nuisance to the neighbours and does not disturb the amenity and character of the neighbourhood. Therefore a lot of emphasis is laid on the impact that the development is likely to have on the existing neighbourhood and people living in the area.

15. It was submitted by the appellant that these situations are regulated by law enforcement agencies. The clearances obtained are in respect of the type, quality and standard of accommodation being put to the expatriates. The land use, the nature of the development and its impact on the surrounding environment, are distinct issues which have to be considered with a planning assessment through a BLUP application. An important consideration in Planning Law is the impact that a proposed development will have on the neighbours and the neighbourhood. The Council, after assessing the planning merits of the proposed development and its potential impact had reservations in granting a BLUP to the appellant for the conversion of an existing building to be used for the purposes of a dormitory which already is operational. The appellant argued that there was a security guard who was infact one of the housemates and that no complaints were made to the police. No witnesses were called nor documents produced in support of these contentions. Although we take on board the point of the appellant, as stated, we are of the view that the scale of the development in terms of the number

of people now living in the house is rather overbearing and the nuisance associated is more than likely, in our view. Furthermore, there is also a need to prevent dwelling overcrowding in order to protect the health and safety of the occupants of the house and to maintain adequate sanitary conditions. For these reasons also, there should be a maximum occupancy limit which applies to such residential buildings. 45 residents in one house amounts to a serious overcrowding which we believe cannot gain planning acceptance. We are therefore satisfied that the Council in these circumstances rightly decided to refuse the BLUP due to it being incompatible within the residential morcellement where the inhabitants expect to have a peaceful enjoyment of their property. It has done so after done a planning assessment and been satisfied that it will be detrimental to the character and amenity of the locality especially as the situation is already prevailing.

16. Our conclusion being thus, we do not deem it necessary to address the second ground of appeal which relates to the second ground of refusal. The Council also argued that substantial structural changes were made by the appellant to the septic tank etc without a proper BLUP, we believe that the Council's recourse lies before the District Court by way of prosecution.

17. For all the reasons set out above, we find that the appeal is devoid of merit. It is accordingly dismissed. No order as to cost.

Determination delivered on 16th May 2017 by

Mrs. J. RAMFUL	**Mr. Seetohul**	**Mr. Karupudayyan**
Vice Chairperson	**Assessor**	**Assessor**