BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1681/18

In the matter of :-

B & O Transport and Food Co Ltd

Appellant

v/s

District Council of Riviere du Rempart

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having refused the application for a Building and Land Use Permit ["BLUP"] to the Appellant for the installation of electric motors in an existing bakery at Royal Road, Cottage. The Appellant was informed of the decision of the Council by way of a letter dated 17th August 2018. The reasons for refusal set out in the letter are as follows:

   "1. Building has been put up contrary to planning norms in terms of setback with road side boundary.

   2. No onsite parking is available."

2. Both the Appellant and the Respondent were legally represented. The Appellant was represented by its Managing Director, Mrs. Luchmun Roy and a Sworn land Surveyor, Mr. Mohammad Said Hasan Miyan, also deponed on behalf of the Appellant. The Respondent was represented by its planning and development inspector, Mr. Abboyyee. At the outset the Respondent dropped the second ground of refusal set out in its letter dated 17th August 2018. The main bone of contention of the Appellant is that the bakery has been operating for a number of years with the Council accepting their trading licence fees, and with the letter of refusal having been issued after the prescribed time frame, the application is deemed to be accepted under the provisions of the Local Government Act 2011.

3. The Appellant initially raised 3 grounds of appeal as per its notice of appeal, namely:

(1) The Respondent was wrong in holding that the building has been built contrary to planning norms in terms of setback (of) with road side boundary when there are more than 5 feet;

(2) The Respondent was wrong to find that there is no onsite parking; and

(3) The Respondent erred in not issuing the licence (as) inasmuch as by operation of **section 117(7)(b) of the Local Government Act 2011**, the application is deemed to have been approved.

The second ground of appeal was dropped in response to a motion of the Respondent. We have duly considered all the evidence before us as well as the submissions of counsel.

(i) Under Ground 1: There is a setback of more than 5 feet

4. It is the contention of the Appellant that there is a setback of more than 5 feet from the road side boundary to the actual building. The Appellant's surveyor deponed to the effect that the setback is approximately 1.85 metres from the main road, which is Forback road. In cross-examination the witness agreed that as per the planning norms, the requirement of a 3 metre setback from the main road to the building has not been satisfied. In terms of evidence, it suffices from the surveyor's testimony that the building where the bakery lies does not satisfy the setback required by law, as stipulated in the letter of the Respondent dated 17th August 2018. The question is in what way does the setback of the building affect the operation of the electric motors and what is the connection between a building setback which has, agreeably, been flouted but nevertheless has been operational since 2012 and the operation of the machinery. Mr. Abooyyee testified that the Council cannot grant a BLUP for installation of electric motors in a building which does not meet the planning norms.

5. While the Council may look at the overall development, we believe that this discretion is to be exercised when circumstances so demand. The approach should be, in our view, whether the proposed development/the new application will have a bearing on the existing building? If so, then the Council can look at the development site as a whole in its context. If not, then it may not be relevant to the current application. In the present case, will the installation of electric motors have a bearing on the premises of the existing bakery? The answer is in the negative. The electric motors will not alter set back of the building from the main road.

6. In our view, the application as made by the Appellant for installation of electric motors will have no bearing on the existing structure which houses the bakery. In any event, the Council, if it believed that the Appellant was not respecting the conditions of the BLUP attached to that building or that the building was put up contrary to planning norms, could then have revoked the trading licence for the operation of the bakery granted to the Appellant at the outset. It appears that there were laches on the part of the Council too. We have it in evidence that the building was granted a building permit and development permit as far back at 1980 and the bakery has been operational since 2012 after the owner of the Appellant company purchased the building. The Appellant's representative also testified that the bakery had a valid trading licence for many years since 2012 which was renewed every year by the Council until 2018 when objections were received. The Council effected a visit then and noted that there was no BLUP for the electric motors used for the bakery and since then the trading fees have also not been accepted by the Council hence the application for BLUP.

7. The bakery had been given a trading licence on the basis of which it had been operating. It is the contention of the Appellant that the personnel of the Council had inspected the premises when operation started in 2012 and it was upon their satisfaction, which we accept in the absence of any evidence to the contrary, that the trading licence was allowed to be transferred to the name of the new owner of the premises which he used as bakery. It stands therefore to reason that as far as its operation is concerned, it has gained planning acceptance from the Council. Therefore, the Council cannot argue that it is an illegal development or that it is devoid of planning acceptance. We are past that stage. Specifically, the application for BLUP is in relation to the equipment. We believe the Council cannot now use the ground in relation to setback, which was never used back then and for so many years when the bakery has been operating successfully when such a ground is not related to the use of equipment. Agreeably, there may exist valid grounds which are in relation to dust, discharge and noise, amongst others, which relate to the operation of the equipment. However, in the present case we are unable to agree that an effective planning appraisal of the proposed development has been done. Each planning appraisal needs to relate to a specific application because every decision of the Council is based on the planning merits of an application.

8. The fact of the matter is the bakery has been a long-established business in the area for almost eight years which has benefitted the local community. The building was put up since 1980 and was purchased in 2012 by the owner, Mr. Luchmun Roy, who decided to operate a bakery for which he had to convert the Trading licence from it being on the name of the previous owner onto his name. Even though the building flouted the requirement of 3 metres setback from the main road, which we believe in the present context is not a valid ground of refusal, the Council had approved the trading licence of Mr. Luchmun Roy which was subsequently put on the name of the Appellant company. Whether this was done by the Respondent in its wisdom or it is a lacuna, it is a matter of fact that the Appellant had been operating with a valid licence and the Council's blessings for a number of years and providing a service to the local community. We believe that the Council can allow continuity in the service of the service provider by considering mitigative measures being imposed as regards to the installation and operation of the electric motors since the bakery has been operating its industrial activities for many years albeit with objections being received more recently. Ceasing the operation of an 8 year-old bakery which has served the local community for so long will deprive the community of its amenity and this may not be in its interest. There is no evidence on record to show whether the Council considered allowing the operation of the electric motors but by imposing mitigative measures as regards any nuisance that it may create.

(ii) Under Ground 2: application is deemed approved under s.117 (7)(b) LGA

9. The motion of the Appellant is that the Respondent erred in law under **section 117(7)(b) of the Local Government Act 2011**, by not issuing the BLUP hence the application is deemed to have been approved. The evidence reveals that the Appellant submitted its application for BLUP on 27th July 2018 and there has been no communication from the Council to the Appellant until the latter dated 17th August 2018 was issued which was received by the Appellant by post on the 21st August 2018. The position of the Council is that this happened through administrative error.

10. For the purposes of the subject-matter of this ruling, **Section 117 (7) of the Local Government Act 2011** [hereinafter referred as the "LGA"] is partly reproduced herewith:

> *"(7) With the exception of an application under subsection (8) and subject to subsections (9) and (10), the Permits and Business Monitoring Committee shall, within 14 working days of the effective date of receipt of the application, and after approval of the Executive Committee -*
>
> *(a) issue to the applicant an Outline Planning Permission or a Building and Land Use Permit....*
> *(b) notify the applicant in writing that the application has not been approved and give the reasons thereof."* [stress is ours]

11. Our reading of the law is that within **working** 14 days of the effective date the Permits and Business Monitoring Committee (the **'PBMC'**) must imperatively have taken a decision approved by the Executive Committee to either issue the BLUP or notify the applicant of the rejection of his application, as the case may be. The word "shall" must be taken to be mandatory in this context not only as per the **Interpretation and General Clauses Act** ["**IGCA**"], but we are also comforted in our interpretation upon reading of section **117(11) (a) of the LGA** which follows wherein provision is made in the law in case of non-compliance with the **section 117(7) LGA. Section 117(11) (a)** provides:

> *"(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), 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."* [The underlining is ours.]

12. It can be gathered from the above-mentioned provision that the legislator had a clear intention of providing a default position in the case of those applications where the Council failed in discharging its burden of notifying the applicants of the fate of an application and giving the reasons where the application had been rejected.

13. This point had been canvassed previously in the case of **AKM Rana C. Ltd v/s Municipal Council of Vacoas-Phoenix [ELAT 163/12]** where the decision of the Tribunal was subsequently upheld by the Supreme Court. From the documents submitted in the present case, it appears that the Appellant duly submitted its application which was received at the Council on 27th July 2018, for which it was given a receipt upon a payment of a fee for the processing of the application. No other letter was communicated to it until the refusal letter dated 17th August 2018 was received on the 21st August 2018 by post although there is no independent evidence was produced to confirm the date of notification of the refusal, we can take it that it was not before the 17th August 2018. Upon application of the law as explained above, to the fact, we believe that the Council acted in breach of **s. 117 (7) (b) of the LGA 2011** for having failed to notify the applicant that its application was rejected within the statutory time frame of 14 working days. There is a clear understanding that weekends and public holidays are not included in the computation. The Tribunal can take judicial notice of fact that there was a public holiday in August 2018 in between the period of submission of the application and the notification of the decision to the applicant. Nevertheless, a computation of the days between the time the application was made and the notification of the refusal totals up to more than 14 working days. Since there was no other notification or communication between the Council and the applicant in between, it is to be taken that the effective date is on the date when all the documents were submitted to the Council at the time of application.

14. For all the reasons set out above, the appeal is therefore allowed. It is worthy of note that the Council has the discretion to impose any condition it deems fit that would mitigate any nuisance associated with the operation of the electric motors of the Bakery. No order as to costs.

Determination delivered on 8th December 2020 by

Mrs. J. RAMFUL	**Mr. SOYFOO**	**Mr. MEETOO**
Vice Chairperson	**Member**	**Member**