BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 307/12

In the matter of:

Dindyal Rawa

Appellant

v/s

District Council of Pamplemousses

Respondent

DETERMINATION

The present appeal lodged before the Tribunal on 13th December 2012 is against a decision taken by the District Council (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (BLUP) for erection of a concrete wall at Shivala Road, Riche Terre, Terre Rouge. The ground for refusal was set out in a letter dated 16th November 2012 as follows:

"No development/ construction is permitted on access road"

The Appellant's wife deponed under solemn affirmation on his behalf and was cross-examined by the Counsel for the Respondent. Mr. Gontier subsequently deposed on behalf of the Council and was also subjected to cross-examination by the Appellant.

We have duly considered all the evidence adduced by both parties. First of all it is worthy of note that the decision having been communicated by the Council to the Appellant vide letter dated 16th November 2012 with the appeal being lodged at the registry of the Tribunal on the 13th December 2013, this appeal has clearly been lodged outside the prescribed delay.

water from his property to be discharged on a path that leads to her property and that such state of affairs causes great inconvenience because the water finds its way everywhere onto her property. She stated that according to the District Council the development has been done on the access road and according to her neighbour he is entitled to use the passage that has been created to give her a right of way to her property. Both issues are being disputed by the appellant.

The main issue is whether there has been a development *on the access road.* It is undisputed that there has been a development but whether the development was on the access road is an issue of encroachment. For this Tribunal to make a determination on whether or not the Council was right to have refused the BLUP to the appellant, the Council first needs to know with certainty whether the appellant has encroached on public property, the access road in this case. The appellant is in essence disputing this particular issue with the argument that the strip of land bridging their property and the original access road was the property of his late father. It is not for this Tribunal to determine issues of encroachment. Although this Tribunal can read and interpret contractual documents such as title deeds and therefore can appreciate how a plot of land is bounded, when the issue goes further and involves a consideration of various title deeds to see if one person's development has encroached on another's land albeit state land, and considerations such as the status of roads, that is, whether an access road has been declared a public road and hence whether it is public property, all this is beyond the jurisdiction of this Tribunal. This Tribunal has a well defined jurisdiction as set out under **section 4 of the Environment and Land Use Appeal Tribunal Act 2012** and having to decide on an issue of encroachment is well outside the jurisdiction of this Tribunal.

Furthermore, having assessed the evidence, we believe that the evidence adduced by both parties before this Tribunal were insufficient to prove the case of either. The original title deed of Deeanan Rawa sets out how his property is bounded and it mentions that on one side it is bounded "...par l'axe d'un chemin mitoyen et commun de trois metres cinq ou dix pieds de large..." where as the title deed of the appellant uses the term "un chemin de sortie" when setting out the boundary of Lot 2 which now belongs to him and the same term is used when the boundary of Lot 1, which is now owned by his brother Madan Rawa, is described in the title deed. How does a "chemin mitoyen et commun" become "un chemin de sortie" as Lot 1 is bounded? It was for the Council to have ascertained the status of that passage. The Respondent's evidence was not of much enlightenment in that the representative stated at no point whether the Council did carry out a site visit to make a visual appreciation of the state of affairs. Instead he referred to a report made by Mr. Rashid Jeewa, Sworn Land Surveyor submitted by the appellant to the Council was on which the Respondent based itself to reach its decision but no such report was produced before the Tribunal. A plan was produced by the representative of the respondent and it was marked Document B but there is no indication as

However, since the Respondent did not challenge the validity of the appeal on this issue, the appeal is entertained.

Merits of the appeal

The decision of the Council for refusing the BLUP to the appellant is that the wall was constructed on an access road where no development is allowed. It is rather surprising therefore that the statement of defence of the respondent refers to other issues but the main ground of refusal itself. Similarly, in the course of the hearing the issues raised in the statement of defence were hardly canvassed. It was admitted however by the appellant that the wall was erected without a BLUP. This being a ground raised in the statement of defence is in itself, we believe, **not** a valid ground for refusal of a BLUP. If the wall was illegally erected, the recourse for the Council should have been to prosecute the Appellant before the appropriate forum. This being said, a development made without a BLUP does not necessarily mean that it cannot be subsequently validated if it otherwise complies with all other legal and planning requirements. The distinction should be drawn between the two. This ties up with the third ground raised by the respondent that 2 notices were issued to the appellant to stop the construction. As stated, these issues are relevant for the purposes of prosecuting the appellant before another forum but irrelevant for a case where an appellant is claiming his legal right of entitlement to be granted a BLUP.

Another ground raised in the statement of defence was that the Appellant failed to take into account the objection of the neighbour. This ground was not only unsubstantiated but it would appear that the Council has overlooked the fact that the decision making body is the Council whose decision is being challenged, not the Appellant. Therefore, whether there is an objection from a neighbour does not add anything to the case of the appellant whose main objective is to convince this tribunal that he has a right to be issued with a BLUP.

Coming to the crux of the matter, the Council has refused the appellant a BLUP for the wall constructed on the ground that the appellant has allegedly erected a wall on an access road, whereas no development is allowed on access roads. This is in fact the case for the respondent. The appellant's wife deponed lengthily on where she has allegedly caused the wall to be erected and according to her it is on her property. It would appear from the evidence adduced that after the subdivision of the land inherited from her father-in-law into two lots, lot 1 now owned by her brother-in-law Mr Madan Rawa and lot 2 owned by her husband, the appellant, a passage was created from part of the lot 1 to lead onto lot 2 so that lot 2 is not landlocked and this passage has joined the access road. The title deed of the appellant infact refers to the appellant's property being bounded "Du troisieme cote, par un chemin de sortie d'un metre et cinquante deux centimetre (1m52) de large..." The reason behind her putting up the block wall is because her neighbour, whose property bounds hers on one side has allegedly caused the

to who prepared this plan and therefore the Tribunal cannot attach any weight to such evidence. In a case of such nature which involves an appreciation of how the plots are subdivided and the location and dimensions of an access road, the evidence of a sworn land surveyor is crucial. The tribunal cannot surmise on these issues based solely on the title deed of one person. The tribunal should have a wholistic picture of the size of the lots and the boundaries of the lots to know where the access road starts and ends. In addition, the fact that the appellant's wife disputed the accuracy of the plan allegedly prepared by the appellant's own architect, one Mr. Khadun, who was not called as a witness before the Tribunal coupled with the fact that there are adjoining neighbours, whose title deeds will have to be considered before it can be decided where the access road is meant to culminate, renders the evidence unsafe to be relied upon.

For all the reasons set out above, we believe that for this tribunal to be able to take a decision, the issue of encroachment should first be determined before another forum. The matter before this tribunal is premature. The appeal is therefore dismissed. No order for cost.

Determination delivered on 26th September 2014 by

Mrs. J. RAMFUL	**Mrs. B. KANIAH**	**Mr. A. BUSSAWON**
Vice President	**Assessor**	**Assessor**