BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 124/12

In the matter of:

Telfair International Primary School Ltd

Appellant

v/s

District Council of Black River

Respondent

DETERMINATION

The present appeal is against a decision taken by the Council for having rejected an application by the Appellant for a Building and Land Use Permit (BLUP) for the conversion of an existing building into a primary school at the corner of Avenues Dauphins and Cordonniers in Morcellement Saltpans, Tamarin. The application was also for the use of 2 containers to be used as offices within the same premises. The grounds for refusal as set out in a letter dated 12th February 2012 are that as per the title deed the morcellement was approved for residential purposes and secondly, there were objections from immediate neighbours.

Mrs Samouilhan-Holmes and Me. B. Marie, counsel, deponed on behalf of the appellant and Mr. Dunputh, Senior Works Inspector at the Council deponed on behalf of the respondent and they were all subjected to cross examination by counsel of the adversary.

We have duly considered all the evidence adduced. Before assessing the merits of the case, we deem it fit at this point to address the point raised by the appellant with regards to pre-hearing issues.

UNFAIRNESS

As part of its case, at the outset the Appellant raised an issue of unfairness of the hearing before the Permits and Business Monitoring Committee. The other grounds of appeal relating to this issue in the Appellant's statement of case are deemed to be dropped since they were not canvassed. The contention is that the representative of the appellant was allegedly not given sufficient time to prepare for the hearing before the committee that took place at the Council on the 14th February 2012 because she had only received the convocation letter earlier on the same day. Consequently, she was also denied the right to be legally represented at the hearing. To substantiate this, the appellant's then counsel, Me. B. Marie, was also called to give evidence under oath on behalf of the appellant. While we do not doubt the words of counsel, we have some difficulty in assessing the veracity of the evidence of the appellant's representative since she contradicted herself on this issue in cross-examination. Her initial contention was that she had received the letter in the morning of the 14th February 2012 and that had disrupted her schedule. In cross-examination she stated that infact she received the letter on Monday 13th February 2012, and that the stamp on the envelope showed that it was dated 12th February 2012 when it was put to her that the date on the envelope was 2nd February. This Tribunal takes judicial notice of the fact that 12th February 2012 was a Sunday and that no post office in this country works on a Sunday. While we can take cognizance of the fact that as part of its case the Appellant is seeking to show that it has been dealt with unfairly, we believe that we need not rule on the merits of this issue. The ground, being that Mrs Holmes has not been given a fair hearing at the Council, is one of breach of the rules of "Natural Justice" which falls outside the jurisdiction of this Tribunal. In other words, there has allegedly been a breach of her right to be heard *audi alteram partem*. This principle of fairness supports the right to legal representation, and for any person to be given adequate prior notice of charges or a hearing and a reasonable opportunity to put his or her case. It could also include the right to call witness, to cross-examine and the right to be given reasons for decision. The remedy for such alleged breaches is to be sought before the Supreme Court by way of judicial review. This ground therefore fails.

MERITS OF THE CASE

(a) Residential Morcellement

The Appellant is in essence contesting the first reason given by the Council on the basis that as per the wording in the title deed the morcellement is described as *"**principalement** au logement de caractere residential"* (the stress is ours). It was submitted that it cannot therefore be taken to mean that the morcellement was intended to be exclusively residential. As an off-

shoot to the reasoning of the Council that the morcellement was intended for residential purposes only, the Appellant sought to prove the inconsistency of the respondent's stand by confronting it with its own previous decision. The Council's representative confirmed a BLUP has been granted by the respondent in favour of Tiny Tots, a nursery that Mrs. Holmes runs right next to the premises *in lite*. Mrs. Holmes produced several photographs in support of the contention that there exist within Morcellement Saltpans other commercial developments, including a day care centre called Ti Bout Labas. Mr.Dunputh, appearing for the Council rather surprisingly, did not have his record to confirm whether these commercial developments had been granted their relevant BLUPs despite having presumably taken cognizance of the Appellant's statement of case.

Whether the Council has issued BLUPs to other commercial developments in the morcellement or they are simply operating illegally, should in our view no longer be the debate in the present case. Likewise, irrespective of the wording of the title deed, an issue that ultimately boils down to an interpretation of contractual terms in a 'contrat de vente', we believe that the question that has to be answered when considering a proposed development is whether it should gain planning acceptance within a given locality. To be able to do so inevitably requires an objective planning assessment of the proposed development applying planning criteria and guidelines.

We are now faced with a situation where the current context is that the morcellement is no longer an exclusively residential one, even if it had been so at some earlier point in time. **Document G**, a google map of Morcellement Saltpans, was produced by Mrs Holmes and since this evidence was not contested, we can rely on it to appreciate the few sites that have been plotted on the map are infact commercial enterprises. The morcellement is otherwise, as per **Doc G**, a predominantly residential one.

Although the issues revolved around the title deed and the alleged mixed nature of the Morcellement, we believe that the real issues which would have enlightened this Tribunal have hardly been touched upon, let alone canvassed. For the Tribunal to consider whether the proposed development can gain planning acceptance, it was incumbent on the Appellant to provide us with more evidence on the project and the premises to be used. The number of classrooms, the number of children who will be attending the school and their various age groups, an assessment of the traffic conditions in an area, an assessment of the impact of the proposed development on the traffic in the area, the width of the roads within the morcellement, safety conditions to be taken into account to minimize the risk of accidents; the moreso as the site in lite is found at the corner of two roads. These are all issues which would have assisted the Tribunal to come to an informed decision. While common sense dictates that a primary school is generally on much larger scale than a nursery and therefore, the level of noise as well as human and vehicular traffic will also proportionately be greater, we will not surmise on facts in the absence of evidence. Since this is a civil case, the burden rests on the Appellant not just to prove in what way the Council was wrong in its decision but also to prove why this Tribunal should order the Council to grant the application in allowing the appeal. Infact most of the averments made in the statement of case of the Appellant were grounded on the way the PBMC wrongly acted but the minutes of proceedings before the PBMC, which we

believe should have been the starting point when looking into the merits of the Appellant's case, was never produced before us for our appreciation of all the facts. Infact at some point Me. Sookhoo sought to produce this document but then chose not to do so following an objection. In the absence of such crucial evidence, this Tribunal cannot speculate on issues which allegedly show wrongful manner in which the committee acted. It is not sufficient just to produce a list of names and signatures before us to show that there are people who are in favour of the establishment of the school. Infact, there can be no weight attached to such a document when no independent witnesses have been called by the Appellant to prove the veracity of this document. Likewise, it is not sufficient for the Appellant to simply state that there are other commercial enterprises in the area which equally generate noise and traffic, therefore the Council should have also approved its application. The logic being that two wrongs cannot make one right.

(b) Objections by neighbours

Objections of neighbours, especially if they are contiguous, are relevant considerations to be taken into account. The Council, when considering the planning merits of each case is duty bound to take into account the interest of those who will be impacted upon by the development. It is only fair to take on board any representation made by the neighbours who feel their right to enjoy their property is likely to be curtailed. I could not agree more with Justice Domah when he said *"One cannot put a price to the peace and quiet enjoyment of citizens in their homes.":* **Suhootoorah & Ors v/s Al Rahman Co. Ltd & Anor (2013) SCJ 273.** One's right to the peaceful enjoyment of one's property should not be understated or trivialised in anyway. Although Mrs Holmes stated that Tiny Tots is on the same property as where the proposed development is to take place, it is only common sense that the level of noise generated by primary school children with presumably higher levels of energy, cannot be compared to the noise made by infants. The school will be operating every working day of the week, there will be peak traffic times when children will be dropped and picked up, times when they will be on breaks. Contiguous neighbours could have a number of issues ranging from the proximity of the development site to noise pollution, health, traffic hazards and qualitative degradation of the location. In short, the prejudice that would be caused to them is usually their main concern.

Now, with the minutes of proceedings before the PBMC not having been produced, what were the representations made and what weight did they carry, again precludes us from making an independent assessment. In evidence it came out that one Mr. Appaya had objected. At a different point, the Tribunal took cognizance of the existence of another objector- one Mr. Speville. It was never clearly elicited in evidence by either side the number of objectors, their names and their grounds of objection to the proposed development. It was submitted by the

Appellant's representative that Mr Appaya does not live there based upon what the latter's brother-in-law had stated to her. The brother-in-law in question was never called as a witness and we cannot base ourselves on hearsay evidence on the basis that there is a danger of such statements being self-serving. On the other hand, the evidence forthcoming on this issue from the Council was sketchy, to say the least. Mr. Dunputh stated he was not aware whether Mr Appaya was the next door neighbour, the owner of the property or not, but that he was simply basing himself on the plan made by the Appellant's representative which was annexed to the statement of case, to deduce that Mr. Appaya was living there. We believe that the Council should act with more diligence when dealing with applications, bearing in mind the provisions of the Business Facilitation Act, as it is of utmost importance to ascertain not only the veracity of objections but also of objectors. The nature of the objections of Mr. Speville was also not elicited. In the circumstances, we cannot make an informed assessment whether the objections are valid or not.

For all the reasons set out above, the appeal is dismissed. No order as to costs.

Determination delivered on 30th March 2015 by

Mrs. J. RAMFUL	**Me. R. Ramdewar**	**Mr. G. Seetohul**
Vice President	**Assessor**	**Assessor**