

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 1061/16

In the matter of:

MRS. KHAYRATTEE HAFSABI

Appellant

v.

DISTRICT COUNCIL OF MOKA

Respondent

DETERMINATION

The appeal is against the decision of the District Council of Moka for having refused to grant a Building and Land Use Permit to the Appellant for the conversion of part of an existing building situated at Royal Road L'Avenir, to be used as General Retailer (Foodstuff excluding liquor and non Foodstuff (Foodstuff predominant)).

The sole ground of refusal is that "As per the title deed no commercial activity is allowed in the Morcellement". The Appellant has enlisted three grounds of appeal, which are: (1) There is no mention of 'No commercial activities' in her title deed. (2) The building will remain a residential one and the application is for the conversion of only part of it into a commercial outlet. (3) Her land is situated in the extreme edge of the morcellement on the Royal road and adjacent to a common road, so that she can have access to her place without going through the roads within the morcellement.

At the hearing, the Appellant conducted her case from two standpoints. Firstly, although this was not taken as a preliminary point in law, the Appellant raised the issue of the effective and the delay in giving a response to the Appellant, so much so that the application was deemed to be approved. Secondly, the Appellant challenged substance of the ground of refusal.

The issue of effective date

Emphasis was placed by the Appellant on the fact that the Appellant had deposited her application for BLUP on the 3rd November 2015 and, as per her statement, she had been informed that she would receive a reply from the Council within a delay of fifteen days. We note that no receipt or other document has been produced by the Appellant to show that an 'effective date' had been given to her. As per the testimony of the Appellant, there had been no request for further information by the Council.

Then, on the 17th November 2015, the Appellant received a letter from the Respondent (Document D) informing her that her application had been assessed and certain particulars were required for the processing of the application and '*consequently the effective date no longer applies*'. A delay of four weeks was given for her to submit the required particulars. The Respondent's letter specified that "*A new effective date will be given once the above have been submitted*".

We pause here to look at what the law provides on this process. Section 117(7) of the Local Government Act (LGA) 2011 provides that: "*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 the 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, as the case may be.....or notify the applicant in writing that the application has not been approved and give reasons thereof.*"

The definition of an 'effective date' given at section 2 of the LGA 2011 is as follows: '*effective date.....means the date by which all the information, particulars and documents specified in the application form are submitted*'.

At the outset, we observe that no evidence has been put before us to show that the Council was satisfied with all the information provided by the Appellant at the time of submitting the application, which would justify that the application was accepted and an effective date be given to it. We can only rely on the content of the letter emanating from the Council itself, dated 17th November 2015 (Document D), which speaks for itself. It states that '*the effective date given no longer applies*'. The letter goes on to say that '*A new effective date will be given once the above have been submitted*'.

This being the case, the Council had only two options, either to process the application, obtain the approval of the Executive Committee and issue the BLUP within 14 working days of the effective date (section 117 (7)(a) LGA 2011, or notify the Appellant of its refusal if that was the decision reached, and give reasons thereof (section 117(7)(b) LGA 2011). Section 2 of the LGA gives the Council the latitude to request for information, particulars and documents for the purpose of assessing the application,

and the application is accepted and an effective date is given once it is satisfied that the application can be processed. The LGA makes no provision for the Council to 'shift' the delay, or impose a further delay in order to secure further particulars by cancelling a given effective date and subjecting the issue of another effective date to conditions to be complied with, nor the holding of a hearing at a late stage (the hearing being convened on the 16th December 2015 to be held on 22 December 2015).

Therefore, for all intents and purposes, the Council, not having complied with the delay provided in section 117(7) LGA, section 117(11) (a) comes into play and provides that "*.... within two working days of the expiry of the due date, the application shall on payment of the fee....be deemed to be approved by the Municipal Council.....and the acknowledgement receipt, together with the receipt acknowledging the payment of the fee shall be deemed to be the BLUP.*" We note that there is no evidence put before this Tribunal on whether this procedure has been complied with. We also note that the law does not provide the Council with a discretion to refuse the payment of the fee in a case where section 117(11) applies.

The merits of the application

The rationale for the above provisions has been the need felt by the Legislator to curb delay in determining applications by local authorities (Hansard on the parliamentary debates on the Business Facilitation Act refers). The assessment of the merits of the application has to be done within the mandatory time frame contained in the law. We therefore have to make certain observations on the merits of the proposed development.

The Council relied on the content of the title deed to reject the application, the specific clause being that "*As per the title deed no commercial activity is allowed in the morcellement*". This refusal is based on condition 3 contained in the title deed which reads as follows: "*Que le lotissement etant reserve aux constructions a usage d'habitation exclusivement bourgeoise et a celles qui en sont le complement indispensable...*".

It has been submitted on behalf of the Appellant that the operation of a 'tabagie' is not incompatible with such a condition, so much so that it would be a 'complement indispensable' to a residential area. On this score, we agree with this position. Although as per the refusal letter (Document F) the application was for the conversion of part of an existing building to be used as general retailer Foodstuff (Excluding Liquor) and non-foodstuff, it has come out in evidence that the proposed activity is in fact the running of a 'tabagie', and this has not been rebutted. The policy as regards the running of a 'corner shop' or 'tabagie' is contained in the Design Guidance for Commercial

Development in the Planning Policy Guidance 1. It provides that '*New corner shops will not normally be permitted if they have a gross floor area in excess of 60 square metres*'. Policy CR1 contained in the Outline Planning Schemes for the rural areas make provision for such activities: "*Shops including tabagie, small groceries and snack foods premises which serve local neighbourhood needs may be located within settlement boundaries and within predominantly residential areas provided that the gross floor space does not exceed 60 square metres and such developments have due regard to traffic and pedestrian safety.*"

We find no difficulty in accepting that the proposed shop can qualify as a corner shop within the definition of policy CR 1. As such, this complies with the abovementioned position that the proposed development is not incompatible with the area and can be accommodated within that residential area. Besides, we note that Document C was produced by the Appellant showing that the consent of no less than twenty nine inhabitants of the 'morcellement' has been registered for the proposed development.

Fettering of discretion.

The onus was on the Council to assess the planning merits of the application by conducting an 'in concreto' assessment. By limiting its assessment of the application to the title deed and its interpretation thereof, without addressing its mind to the planning merits of the proposed development and all the other relevant factors, the Council has fettered its discretion. (Reference made here to the cases of District Council of Black River v. Davemala Boulhaya 2016 SCJ 203 and the case of Redmont Hart de Keating v. District Council of Riviere du Rempart ipo Moonesh Nemdharry and anor. ELAT 589/14).

In view of the above reasoning and in view of the fact that the grounds of appeal raised by the Appellant are substantiated and have merit, we allow the appeal.

We further refer the matter to the Respondent for needful to be done for the pursuance of the formalities for the issue of a BLUP, and more importantly, for setting conditions that the Respondent deems fit, taking into account the planning parameters that should apply to this activity.

Delivered by:

Mrs. Vedalini Bhadain, Chairperson

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Mr. Pravin Manna, Assessor

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Mr. Basdeo Rajee, Assessor

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Date:

6 November 2018