

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No.: ELAT 1257/16

In the matter of:

MR. & MRS.ABDOOL AMID CHOOMKA

Appellants

v.

CITY COUNCIL OF PORT-LOUIS

Respondent

DETERMINATION

The Appellants are appealing against the decision of the City Council of Port-Louis (the Respondent) which has refused to grant a Building and Land Use Permit (BLUP) to them for the addition of a first floor for residential purposes at No.26, Trichnapoly Street, Plaine Verte, Port-Louis. The grounds of refusal are three-fold: 1. The setback from the edge of the road is not adequate, 2. Complaint has been received regarding the application, 3. Part of the building has been put up illegally and has not been included in the BLUP application.

The Appellant has listed four grounds of appeal as follows:

1. The setback of all buildings adjacent and opposite to the building in question is along the same line.
2. The building in question was an existing one. The BLUP concerned an addition on the first floor on the existing building for residential purposes. It is unfair for the Respondent to refuse the application on the ground that the setback from the road is inadequate.
3. The Appellants have never been convened to any hearing with regards to any complaint against the BLUP application.

4. The Appellants bought the building in question and is not aware of any illegal construction prior to the purchase thereof. The Appellants intended to add a first floor on the building and have thus applied for a BLUP for same.

From the statement of reply filed by the Respondent, it is averred that the application for BLUP had been made on the 28 July 2016 and was rejected by the Executive Committee of the City Council on the 10th August 2016 and the Appellant was informed of same on the 19th August 2016. Yet, a site visit was effected by the representative of the Council and this revealed that the construction had already been put up illegally. The Council served a stop order notice on 14 July 2017. We observe at this juncture that the stop order notice served would be of no purpose since the building had allegedly been put up already. In the course of the hearing, it came out that: (i) The construction had already started when the application for BLUP was made to the Respondent. (ii) The application had been submitted only after a site visit that was effected by the Respondent's representative following a complaint received by the latter. (iii) The Appellant maintained that the presence of the wall, which is an enclosure wall dates back to the time when he purchased the property. He had had to erect columns alongside the wall which were meant to be the support for the construction at the first floor.

The contention of the Respondent is that the Appellant had not included these structures in the application for BLUP, which is the basis for the third ground of rejection. As can be seen from the photographs produced as Documents A and A1, the first floor stood on concrete columns that were freshly put up, and as explained by the Appellant, were required to support the construction at the first floor.

We note from the plan (Annex C to the statement of case), that the existing ground floor is indicated, and the application is made for the first floor. True it is that the concrete columns that are disputed by the Respondent are not shown on the plan as such. Yet, being the structural support for the upper floor, for which the application for BLUP was being sought, they could be considered as part of the subject matter of the application. It appears that the Appellant wished to 'regularize' the construction, albeit with the columns. It is our view that these, being part of the construction of the upper floor, could, by all means, be covered" by the application for BLUP that had been submitted. It is also our view that the failure to indicate the columns on the plan ought to have been drawn to the attention of the then applicant (now Appellant). It stands to no reason that the application for an upper floor be declined on the ground that those columns had not been shown on the plan, the more so that this particular ground of refusal (ground 3 in the letter of refusal dated 19 August 2016) stipulates that 'Part of the building has been put up illegally and has not been included in the BLUP application', without specifying the part to which reference is made.

The issue of inadequate setback:

From a planning perspective, we agree that the setback from the edge of the road is a requirement that has to be observed. We also, as pointed out by counsel for the Appellant, take judicial notice of the fact that the building at the ground floor is an old and existing one and that all the buildings along that row are aligned. We have not been favored with an explanation from either party as to this state of things. We can only assume that these are old and existing buildings and must have been erected prior to the existence of the planning norms relating to setbacks. If this was not the case, the onus ought to have been on the Respondent to take remedial action against such encroachment on the road reserve/or lack of road reserve. In the absence of any such action, as pointed out by the Appellant, it would be unfair for the Appellant to be held responsible for the lack of setback.

The above reasoning would apply however to the required setback at the ground floor. The construction on the first floor cannot benefit from the above state of things, namely that the building predates the planning instrument relating to setback. The setback from the road has to be observed for the construction that is now being done. Document B produced shows that the upper floor has been constructed right up to the edge of the 'au vent', leaving no room for a setback. In addition, the ground floor has been completely enclosed by metallic doors in such manner that the enclosing wall has become part and parcel of the building in clear defiance of the planning requirement of three feet from the edge of the road. One cannot construe this as a wall any more but as a building, leaving no setback from the road edge at all, bringing support to the first ground of refusal. Document A produced shows the discrepancy between the alignment of the building with the other building adjacent to it. Document B, a photograph of the Appellant's building and the adjacent ones, shows that, unlike the Appellant, the upper floors in the adjacent buildings have left room for a setback.

We have given due consideration to the submission of counsel for the Appellant, who highlighted the fact that the pictures produced as Documents A and B had been taken much after the decision was taken by the Respondent and should not be a relevant matter for assessing the correctness of the decision. We cannot however turn a blind eye to what the fact that the building, as it stands today, turns out to be one which has not complied with the planning regulations, as rightly considered the Respondent at the time of the decision. We do not subscribe to the submission of counsel for the Appellant that this is a matter that should be left to jurisdiction of the criminal court. As stated above, this Tribunal will not turn a blind eye to non-compliance of planning norms, the more so that it is on record that the Appellant did not comply with the stop

notice issued to him for construction without a BLUP. For this reason, the first two grounds of appeal as contained in the notice of appeal cannot be upheld.

The issue of hearing to be held at the Council:

The testimony of the representative of the Respondent is to the effect that the Council had received a complaint at the time of the construction. It had been conceded by the Appellants that the construction was illegal and this led to their attempt to 'regularize' the status of their construction by the submission of an application for a BLUP. The representative also explained that the Council does not hold a hearing in all cases of complaints made at their level. In view of the fact that the 'illegal construction' was acknowledged by the Appellant, and the cursums that the Council followed in deciding on whether to hold a hearing or not, we find no reason to interfere with this discretion in the present matter. The third ground of appeal is not upheld.

The fourth ground of appeal relates to the status of the building at the ground floor, namely that it was constructed without a BLUP and this was not to the knowledge of the Appellants. The decision of the Respondent is in respect to the construction at the first floor. The third ground of refusal as contained in the letter dated 19th August 2016, relates to 'part of the building has been put up illegally'. It has come out in evidence that the part that is referred to relates to the concrete columns that have been put at the ground floor as supporting columns. The status of the 'old structure' existing at the ground floor, although mentioned by the representative of the Respondent, is not a consideration as per the grounds of refusal mentioned in the Respondent's decision. This ground of appeal has no basis and is set aside.

For all the above reasons, the appeal is set aside.

Delivered by:

Mrs. Vedalini Bhadain, Chairperson

Mr. Pravin Manna, Assessor

Mr. Basdeo Rajee, Assessor

Date:

15th October 2019