BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1805/19

In the matter of :-

Societe Servio

Appellant

v/s

The District Council of Riviere du Rempart

Respondent

RULING

1. This is an appeal against the decision of the Respondent ["the Council"] for having added the following condition to a Building and Land Use Permit ["BLUP"] granted to the Appellant for an extension/renovation to an existing building and construction of a duplex reinforced concrete building at ground and first floors at Lot 11B, Coastal Road, Roches Noires:
   "No extension or addition shall be allowed to take place within the 30m setback from High Water Mark except for renovation works while respecting the actual footprint of the existing building."

2. The issue disputed t by the Appellant is that the condition was added months after the BLUP was granted. The Respondent raised a preliminary objection in law as follows:

   "The present appeal should be set aside as the Tribunal has no jurisdiction to hear the present matter as the dispute, the subject matter of the grounds of appeal raises an issue or issues of public law which is or amenable solely to redress by way of judicial review."

I. Section 37A of the IGCA

3. We have duly considered the submissions of both counsel on the issues raised. The submissions of Counsel for the Respondent in essence were that the appeal should be set aside for five main reasons: (1) The addition of a further condition in the BLUP was made pursuant to the Respondent exercising its powers under **Section 37A of the Interpretation and General Clauses Act 1974 ['IGCA']** and that **Section 4 (1)(a) of the Environment and Land Use Appeal Tribunal Act 2012 ['ELUAT Act'],** which sets out the jurisdiction of the Tribunal, does not make any provision for the Tribunal hearing and determining an appeal from a decision of the Respondent strictly pursuant to **Section 37A of the IGCA 1974.** There is no other enactment which makes provision for the jurisdiction of the Tribunal to be exercised when a decision is made by the Respondent strictly pursuant to **Section 37A of the IGCA 1974**. He further added that the decision to add a further condition to the BLUP was not and could not have been made pursuant to **Section 117 (4) of the Local Government Act 2011 ['LGA']** for the following three reasons: The decision was not and could not have been made under **s.117 (7)(b), s.117(8)(b) or s.117(12) of the LGA** respectively which pertain to cases where the Respondent notifies an Applicant that his application has not been approved, where the Respondent notifies an Applicant who is either a micro enterprise or a small enterprise ,or to instances where the Minister directs the respondent to refer an application to him for determination by him, respectively. He submitted that it would be misconceived to invoke **Section 117(14) LGA** as the legal provision under which the Respondent took its decision to add a further condition to the BLUP. That could only be done pursuant to **Section 37A of the IGCA**.

4. Counsel for the Appellant submitted that after the Respondent approved the permit in June 2018, it was not open to the Council to amend the BLUP already issued as the latter would have been *functus officio* on the sole operation of the provisions of the LGA but that it could only do so through the operation of **section 37A of the IGCA** which allows it to amend the permits already granted. Counsel submitted that the initial decision of the Respondent to grant the BLUP under **Section 117 of the LGA** was revisited through operation of **Section 37A of the IGCA**.

5. **S.37A of the IGCA** deals with the issue of licences:

Where a licence, permit or authority is issued under an enactment, it shall at all times be subject to such terms and conditions as may be imposed whether at the time of issue or renewal or during its currency.

From our reading of this section of the law, it is not an empowering section, giving the Local Authority the power to add new conditions to an existing BLUP. In our view, this section which is generic in nature, simply enjoins a permit or licence holder to act in accordance with the terms of such permit or licence and is therefore principally directed at licence and permit holders. It is not an empowering provision prescribed for the authority to derive powers from but it is rather directed at permit and licence holders who needs to understand how the provision is meant to apply for good order.

6. This being said local authority has the power to impose conditions at any point even during the currency of the BLUP, as implied under **s.37A of the ICGA**, since it's a question of public law. **Section 117(10) (a) LGA** provides *"Every Outline Planning Permission or Building and Land Use Permit shall be issued subject to such conditions as the Municipal City Council, Municipal Town Council or District Council may deem appropriate and on payment of such fee as may be prescribed by regulations made by the Council."*[stress is ours] The function of the Council is to monitor development so that it is done according to planning norms and therefore the Council cannot be said to be *functus officio* once it has issued the BLUP. Ex-post control is very much part of its functions and powers such as issuing stop notices and pulling down orders, revoking BLUPs or adding new conditions are part and parcel of the mechanism to control development which is unauthorized or against sound planning norms. Therefore, addition of conditions subsequent to a BLUP being issued in the present context is not *ultra vires* or beyond the powers of the Council.

7. **Sections 25 and 26 of the IGCA**, reproduced hereunder clearly gives the Council powers to vary and amend and enforce the law:

"Section 25- Exercise of powers and duties

Where an enactment confers a power or imposes a duty - (a) the power may be exercised and the duty shall be performed as occasion requires; (b) an act done in the exercise of the power may be cancelled or varied in the same manner as the power was exercised.

Section 26 - Enabling words

Where an enactment confers on a person the power to do or enforce the doing of any actor thing, that person shall be deemed to have every power that is reasonably necessary to enable him to do or enforce the doing of the act or thing and in particular - (a) to control or regulate by way of licensing or prohibition; (b) to grant a licence, permit, authority, approval or exemption, subject to conditions; (c) to give directions in the form of prohibitions."

8. Conditions may be imposed not only to enhance the quality of the development but also to mitigate any adverse effects that might flow from the development. Some of these adverse effects may only come to light after granting a BLUP. It is an inherent power of the Council which it can exercise at its discretion. Similarly, a developer who applies for planning permission retrospectively after the development has been carried out, the local authority is entitled to consider the application for planning acceptance. In the present case it appears that the condition imposed on the Appellant is actually tailored to tackle a specific problem rather than a standardized one just to impose a broad control, which it is perfectly entitled to do. It is important also that the Council imposes conditions which do not allow development which breaches a law of this country.

II. Jurisdiction of the Tribunal

9. It was submitted that **Section 117 (14) LGA** provides for a right of appeal in case of a refusal by the Council to grant a permit. Counsel for the Appellant submitted that this Tribunal is the proper forum and that it is set up by the **ELUAT Act** and is thus an administrative Tribunal whose purpose to relieve the Courts of the overflow of applications for Judicial Review which is a remedy of last resort.

10. We do not agree with the submissions of learned Counsel for the Appellant on this point. The present Tribunal is a creation of statute with its jurisdiction very clearly set out in the **Environment and Land Use Appeal Tribunal Act 2012 ["ELUAT Act"]. Section 4(1)(a)(ii)** of the Act empowers the Tribunal to hear and determine appeals from a decision of a Municipal City Council, Municipal Town Council or District Council under sections **117(14) and 120C (4)(d) of the Local Government Act 2011. Section 117(14) LGA,** which concerns the subject-matter of the present appeal, provides that *"Any person aggrieved by a decision of a Municipal City Council, Municipal Town Council or District Council under subsections (7)(b), (8)(b) or (12) may... appeal to the Environment and Land Use Appeal Tribunal"* **Sections 7(b) and 8(b)** relate to applicants whose applications for BLUP have not been approved and **section 12** relates to decisions where the Minister has a *droit de regard.* The LGA has been recently amended (Act 7 of 2020) to define a "person aggrieved" as being "a person whose application for an OPP or BLUP has not been approved by a Municipal City Council, Municipal Town Council or District Council".

11. The amendment to the law came in the aftermath of the judgment of **Baumann v The District Council of Riviere du Rempart [2019] SCJ 311** where the Supreme Court held that only a person who has been notified that his application for BLUP has not been approved is considered to be a " person aggrieved". The Supreme Court went on to say in the judgment that those who are aggrieved that a BLUP has been granted have alternative recourse *"but certainly not before the Tribunal which does not have jurisdiction to consider and determine complaints from persons who are not*

"aggrieved persons" within the definition of the Local Government Act 2011." With clarification brought by the Supreme Court and in the law, there is little doubt in our minds that one who has been granted a BLUP albeit with conditions which they may be aggrieved about, do not have a right of appeal before this Tribunal as they are not considered to be "aggrieved persons" whose applications for BLUP have been turned down under the LGA.

12. We are alive to the fact that this case was lodged before the Tribunal in April 2019 when the judgment in *Baumann* supra had not been delivered nor was the amendment to the LGA made. However, we are of the view that both *Baumann* and the subsequent amendment to the law simply clarified the state of the law in line with the intention of the legislator. We will therefore not read in the law more than what has clearly been stipulated as to the meaning of "aggrieved persons". On the facts of the present case, the Appellant is not an "aggrieved person" within the meaning of **s.117(14) of the LGA** since a BLUP has been granted to it albeit with conditions attached. The Appellant therefore, in our view, has no *locus standi* to bring the present appeal before the Tribunal.

13. Counsel for the Appellant submitted English authorities on Judicial Review. As we understand it, his contention that judicial review is only available as a last resort provided all other remedies have been exhausted hence, the Appellant's avenue before this Tribunal. We agree with the principle except that they are not applicable in the present context since the Appellant does not really have a recourse before this Tribunal. It is no *locus standi*.

III. Grounds of Appeal

14. For the sake of completeness, we will also consider the challenge out forward by the Respondent as regards the grounds of appeal. Counsel for the Respondent submitted that the three grounds of appeal as couched are in fact judicial review grounds and do not raise planning issues. Under the first ground of appeal, it was submitted that this

ground is challenged for lack of clarity in the additional condition. Under the second ground of appeal, it was submitted that the decision of the Respondent for adding a condition is being challenged for being arbitrary and irrational as the new condition was unwarranted with an alleged failure to give reason for imposition of the new condition and for allegedly flouting the legitimate expectations of the Appellant amongst other reasons. Under the third ground of appeal, it was submitted that this ground is couched as an *ultra vires* ground by averring that the Respondent acted outside the powers under **Section 37A of the IGCA**.

15. Having analysed the grounds of appeal, we agree with the submissions of counsel for the Respondent on this issue. The grounds of appeal seek to challenge the way the additional condition was couched and the manner in which the Respondent proceeded. These are grounds susceptible to the judicial review process and therefore amenable before another forum. The power of the Tribunal under **s.117(14) LGA**, for the purposes of the subject-matter of the present ruling, allows it to only hear and determine applications for BLUP which have been refused.

16. For all the reasons set out above, we find that the preliminary objection in law is well taken. The appeal is set aside. No order as to costs.

Ruling delivered on the 13th December 2021 by

Mrs. J. RAMFUL-JHOWRY	**Mr. S. MOOTHOOSAMY**	**Mr. S. BUSGEETH**
Vice Chairperson	**Member**	**Member**