

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

1978/20  
ELAT ~~1978/18~~ *HS*

**In the matter of :-**

Yatindranath Hans Dwarka

Appellant

v/s

Municipal Council of Vacoas-Phoenix

Respondent

**In the presence of:**

The Economic Development Board

Co-respondent

**RULING**

1. This is an appeal against the decision of the Respondent ["the Council"] for having refused to the Appellant the granting of a Building and Land Use Permit ["BLUP"] for an extension at ground and first floors and re-roofing of an existing residential building Nalletamby Road, Phoenix.
2. The Respondent raised a preliminary objection in its Statement of Defence as follows:
  - "A. The Respondent avers that as per the statement of case filed by the Appellant, the latter at Paragraph D [conclusion] thereof as stated that Viz "The appellant is already holder of the building and land use permit as applied" As such the present appeal is devoid of merits and has "no raison d'être" there being no live issues, since according to the Appellant he is already the holder of the building and land use permit applied by him.
  - B. In the premises the Respondent moves that the present appeal be set aside."

3. Paragraph D of the Statement of Case reads as follows:

*"The appellants move that since the respondent failed to treat his application within the timeframe as specified in Section 117 of the Act and has accepted a bank transfer of Rs 6250/- being the BLUP Fee made on Friday 16<sup>th</sup> October 2020, the appellant is already the holder of the BLUP as applied."*

4. Counsel for the Respondent in essence went through the grounds of appeal of the Appellant to submit that ex-facie the grounds, the Appellant's case is that he is already in possession of a Building and Land Use Permit ['BLUP'] on account of the fact that it is deemed to have been issued under **s.117 (11) (a) of the Local Government Act [LGA]** and this being the position of the Appellant, there is *raison d'être* for this this appeal and the Tribunal has no power to adjudicate on the issue since the Appellant is essentially seeking a declaratory order from the Tribunal to say that the Appellant holds a valid BLUP, contrary to its jurisdiction as set out under the **s.117(14) of the LGA**. Counsel for the Appellant objected to the preliminary objection while the Co-respondent chose to abide by the decision of the Tribunal.

5. Counsel for the Respondent made reference to the following sections of the **LGA** to show the process relied upon by the Appellant:

(a) **s.117(7)** which sets out the delay within which the PBMC must act, reads as:

*"The PBMC shall within 14 working days of the effective date of receipt of the application, approve or notify".*

(b) **s.117(11) (a)** reads: *"Where an applicant has not been issued with the BLUP and has not been notified that his application has not been approved, under sub section 7 or 8, within 2 working days of the expiry of the due date. The application shall on payment of the fee and where applicable penalty fee, be deemed to have been approved by the Municipal Council, Town Council, District Council, etc..."*

(c) **s.117(14)** *"Any person aggrieved by the decision of the Municipal City, Town Council or District Council, under sub section 7(b) may within 21 days of the notification appeal to the Environment and Land Use Appeal Tribunal".*

6. On the issue of the jurisdiction of the Tribunal, Counsel for the Respondent submitted that if the appellant's position is that he has been issued with a BLUP, he cannot ask the Tribunal to make a declaratory order as it would be outside the jurisdiction of the Tribunal. He added that the jurisdiction of the Tribunal is confined to **s.117(14) LGA**. He further added that if the position of the appellant is that he has received a permit, he cannot be a "person aggrieved". Counsel added that the Tribunal does not have jurisdiction to approve or validate an implied or tacit approval and if the position is that the BLUP has been approved then he cannot appeal before this Tribunal and that there would be no *raison d'être* of this appeal.
7. Under **s.4 (1) of the Environment and Land Use Appeal Tribunal Act 2012 ["ELUAT Act"]**, the Tribunal's jurisdiction is to hear and determine appeals from decisions of Councils. It is important to note that the Tribunal must "hear and determine" appeals. This is a clear pointer that there can be no declaratory order made without hearing any appeal on its merits. The only so-called derogation to this provision is found under **s.5(8) of the ELUAT Act 2012** as amended by the Finance (Miscellaneous Provisions) Act 2021 is that the Tribunal has the power to dismiss appeals which are trivial, frivolous and vexatious after examination of the pleadings.
8. The Respondent in the present case has filed a Statement of Defence in which it has clearly set out its stand that it is not making any admission of the contents of paragraph D of the Statement of case. The Respondent has, at the two paragraphs before last, set out its position clearly, that is that its refusal to grant the BLUP was fair, reasonable and justified, and its prayer and motion was that the appeal be set aside. What we read from the Statement of Defence, the position of the Respondent does not accord with the averments made by the Appellant as regards the BLUP being deemed to have been granted where the Council is maintaining that it has refused the application. The Tribunal cannot reach a decision on the merits of the case on the basis of *unadmitted averments*.
9. As a matter of procedure, an objection that a Court or Tribunal lacks substantive jurisdiction must be raised at the outset of the proceedings by a party to contest the

forum hearing the case or as soon as possible after the hearing starts, the underlying reasoning being that a Court or Tribunal should not hear evidence or adjudicate on matters where it has no jurisdiction to do so in the first place. It would be acting *ultra vires* if it did act beyond its jurisdiction and that would vitiate the proceedings. This being said, we do not believe that in the present case the jurisdiction of the Tribunal is questionable. In our view, the Tribunal has a clear jurisdiction to hear and determine a decision of refusal of BLUP by the Municipal Council to the Appellant for which the latter feels aggrieved, within the meaning of the **s.117 of the LGA**, and wishes to appeal against the impugned decision. On the facts of the present case, the decision to refuse the granting of a BLUP is dated 2<sup>nd</sup> October 2020. We consider that one of the grounds of appeal of the Appellant that he has put forward to substantiate his case is that in law, under **s. 117 (11)(a) of the LGA**, the decision of the Council cannot stand. The Council then put in a defence stating that it had refused the Appellant a BLUP and that its refusal was fair, reasonable and justified. For these purposes and from our reasoning above, we are of the view that the Appellant is an aggrieved party whose application for a BLUP has been turned down by the Municipal Council and for which he has a right of appeal before the Tribunal. There are live issues to be canvassed *ex-facie* the pleadings as regards the application for the BLUP and the refusal and even as regards the grounds of appeal raised which have to be adjudicated upon. Therefore, we reject the contention that it is accepted that the Appellant holds a valid BLUP as if it is an established fact. This is not admitted by the Respondent as undisputed facts and furthermore the Respondent cannot argue the point on the basis of assumptions or hypotheses. We therefore reject the submissions of learned Counsel for the Respondent. On the face of the record, the case is appealable before this Tribunal. Whether there has been an approval, silent or not, is a question to be decided on the merits. The Tribunal cannot surmise on these issues. The Tribunal can interpret the law, especially when it comes to planning legislation such as the Local Government Act. However, as regards the content of the plea *in limine* evidence will have to be adduced on the merits for us to come to an informed decision whether on the issue of jurisdiction of the Tribunal or the *raison d'être* of the appeal. The plea *in limine* is accordingly set aside for being pre-mature and inconsistent with the body of the Statement of Defence.

10. Counsel for Appellant finally invited the Tribunal to find that the refusal should be set aside and acknowledge that it was preceded by a silent approval. As we have stated above, the Tribunal will have to hear evidence to determine the fate of this appeal on the basis that it has the jurisdiction to do so. The submissions of Counsel for the Appellant on this point are dismissed. The case is to proceed on its merits.

Ruling delivered on 15<sup>th</sup> November 2021 by

**Mrs. J. RAMFUL-JHOWRY**

**Vice Chairperson**

**Mr. MOOTHOSAMY**

**Member**

**Mr. MANNA**

**Member**