BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 91/12

In the matter of:

Kumaraswamy Bulramaya & Ors

Appellants

v/s

The District Council of Flacq

Respondent

In the presence of:

Societe M. R. Rambarran Bros

Co-respondent

RULING

1. The appeal was lodged by one Vasudeva Bulramaya, who subsequently passed away, but the litigants are now four heirs of late Vasudema Bulramaya. Societe M. R. Rambarran Bros is the co-respondent in whose favour the Building and Land Use Permit ['BLUP'] was granted for extension to the ground floor of an existing building to be used as workshop for screen printing under corrugated iron sheet. The Council initially resisted the appeal and subsequently reversed its stand on the basis that one of the conditions, namely condition number 2 stipulated in the BLUP has not been complied with.

2. At the outset Counsel appearing for the Co-respondent, Me. N. Pillay, raised a plea *in limine* to effect this Tribunal has no jurisdiction to hear the matter in as much as the issue relates to a condition of the BLUP which imposes an obligation on a third party (who is infact the lessor of the property leased to Societe M. R. Rambarran Bros) who is not a party to the present proceedings. In fact, the *plea in limine* raised by the Co-respondent in its statement of case was thus couched, *"That the Environment and Land Use Appeal Tribunal has no jurisdiction to entertain the present appeal whereas the Respondent and Appellant have made it clear that their objection to Co-respondent's obtaining the extension to his Screen Printing Workshop licence is not actually based on the obtaining of the licence itself, but rather on the alleged fact that the Co-respondent has failed to comply with one of the condition attached with the delivery of the extension to the Screen Printing Workshop Licence."* In the circumstances, he opined that the Tribunal had no jurisdiction to adjudicate on the matter since the condition imposed by the Council relates to an obligation of fencing the property, to which Societe M.R Rambarran is not privy.

3. Although the *plea in limine* refers to "licence", after listening to Counsel for the Co-respondent, it appears that reference was being made to the Building and Land Use Permit ['BLUP']. For the purposes of the argument, Me. Pillay sought to adduce evidence by calling witnesses. He was precluded from doing so on the basis that if the jurisdiction of the Tribunal to hear the present matter was being challenged, it would stand to reason that the Tribunal cannot be required to hear, appreciate and make findings on evidence. Counsel therefore argued on the points on the basis of pleadings and motions on record. Any submissions on and references to unpleaded evidence are disregarded. Counsel appearing for the Appellants and Respondent resisted the motion on the basis that the BLUP was granted on the basis that all conditions would be satisfied and that one of the said conditions was that the property will be fenced as per an undertaking given by the lessor, Mr. Panjanaden Muneesawmy on the 2nd December 2010. We have

duly considered all submissions of learned counsel. It is not necessary to set them out unless where we deem it fit to do so.

4. In Mauritius, any planning development is governed mainly by the Local Government Act 2011, planning instruments, Planning and Development Act which Local Authorities must apply before approving the granting of a BLUP, where one is needed.

"Development" is defined in the **Planning and Development Act 2004** as

> *(a)* *"means the carrying out of any building, engineering, mining, or other works or operations in, on, under or over land, or the making of any material change to the use of land or to any building or morcellement;*
>
> *(b)* *includes -*
>
> *(i)* *the use of land;*
>
> *(ii)* *morcellement;*
>
> *(iii)* *the erection of a building;*
>
> *(iv)* *the carrying out of a work;*
>
> *(v)* *the demolition of a building or work;*
>
> (vi) *any other act, matter or thing that is controlled by a planning instrument"*

Now, it is important to note that obviously not all applications made to local authorities can and will be approved. It will all depend on whether a particular development and land use can be accommodated in a particular locus. In other words, the starting point is to determine whether a particular development and use can be approved. The outcome is usually either it can (with or without conditions being imposed), or it cannot. Finally, an assessment needs to be made on whether the local authority should approve the application.

5. Those aggrieved by the decision of the Council may either appeal by objecting against the granting of a BLUP in favour of the permit holder, or by objecting against the refusal of a BLUP, or by objecting against the imposition of conditions in the BLUP. It is important to note that local authorities have the power to impose conditions. The purpose for which conditions are set by the local authority, is so that the decision-maker can modify the form or scale of the physical development and maintain control of the operations of the activity over time. This is so because planning conditions run with the land, not with an individual applicant: **Phillips and Shire of Mundaring [2009] WASAT 193,** decision of the State Administrative Tribunal of Western Australia. Since our local caselaw is still developing, we have to turn to jurisdictions that are well established and have settled principles. It is important to note that Western Australia is the jurisdiction on which the local planning laws and instruments are based.

6. In planning law, an important factor to consider is the relationship of the proposed development on adjoining or other land in the locality including but not limited to any negative effect that may be felt. It is of course then for the authority or the tribunal to weigh up these considerations along with all other relevant considerations relating to the application, and make an assessment of the situation to determine whether in the light of all relevant considerations it is appropriate to grant approval of the BLUP, and if so, subject to what conditions. Now, conditions must also be valid and they are considered to be valid if pass the test of validity. The test of validity of planning approval was set in the English case of **Newbury District Council v Secretary of State for the Environment [1981] AC 578**, and subsequently endorsed by the High Court of Australia in **Western Australian Planning Commission v Temwood Holdings Pty Ltd [2004] 221 CLR 30**. From these cases, it can be gathered that (with the exception of the last condition which though not mentioned in the caselaw above, was subsequently added to the test of validity in Western Australian jurisdiction) a condition is considered to be a valid one if:

(i) it has a planning purpose,

(ii) it fairly and reasonably relates to the development,

(iii) it is not so unreasonable that that no reasonable authority could have imposed it, and

(iv) the condition is certain and final.

7. In order to stay within the ambit of this ruling, we only deal with the condition no.2 attached to the BLUP of the co-respondent to which their Counsel has raised an objection to provide as basis for his contention that this Tribunal has no jurisdiction to hear the present matter. As stated above, the BLUP dated 15 March 2011 and issued to the Societe M.R.Rambarran Bros for a proposed development described as *"Ground floor extension under CIS to an existing building to be used as workshop for screen printing"*, contains a condition (at number 2) attached to the BLUP which stipulates *"The property to be fenced as per undertaking given by Mr. Panjanaden Muneesawmy on 02 December 2010."* It remains uncontested from the pleadings exchanged that such an undertaking was given by Mr. Panjanaden Muneesawmy, who is the owner of the property where Societe Rambarran is carrying out its business, as per the record. The issue at hand is whether this Tribunal will be traveling outside its jurisdiction if it were to adjudicate on a condition imposed by the Council on a third party who is not a party to the case and that the Co-respondent company is not privy to and has no control over.

8. We agree with Counsel for the Co-respondent to the extent that the local authority should not impose conditions on an applicant to the extent that it is unenforceable. It seems that in law such a condition may fail the test of validity. A condition may be unenforceable on the ground that the local authority has no power to secure compliance with the condition. In the case of **British Airports Authority v Secretary of State for Scotland [1980] JPL 260**, a condition was imposed in the grant of permission for development at Aberdeen Airport concerning the flight path of aircraft taking off and landing at the airport. The condition was concerned with matters over which the

applicants had no control, since statutory authority to prescribe the direction of flight or aircrafts lies with the Civil Aviation Authority. Since there were no steps that the applicants could take to secure the result required by the condition, for that additional reason, the authority was held to have no power to impose it under the relevant statutory authority.

9. Although at this stage, the Tribunal will not make any findings of fact, it finds it relevant to note that according to the annexes of the Statement of Defence of the Respondent produced before this Tribunal on the 11th June 2013, the minutes of the hearing held before the District Council of Moka Flacq on Tuesday 26th October 2010 show that the applicants of the BLUP as represented by Mr. Raffick Rambarran and Mr. Manodge Rambarran, stated that they were not the owners of the property where they already have an existing business which they are carrying out but that they were willing to incur the costs of any changes that needed to be brought to the premises subject to the authorization of the owner Mr. Panjananden Muneesawmy. It was decided that the committee would convene a meeting with Mr. P. Muneesawmy. According to the minutes of PBMC held on Tuesday 7th December 2010, the matter was taken up and it was decided by the committee that "the undertaking of Mr. Panjanaden for fencing to be inserted in the condition". The chain of events is such that it cannot be said that the Co-respondent has no control over. There was clearly a relationship between the Rambarrans and Mr. Panjananden Mooneesawmy in that the former are already occupying the premises owned by the latter.

10. The Council has a duty to impose conditions to control development not only to enhance the quality of the development but to ameliorate any adverse effects that might otherwise flow from the development such as encroachment on the existing use rights of other adjoining land owners/users. This is a matter which vests within the administrative discretion of the local authorities but subject to scrutiny by judicial or quasi-judicial bodies such as this Tribunal. In imposing a condition to have the proposed

development adequately fenced, the Council was simply exercising its jurisdiction of ensuring control over the development such that the proposed development did not affect and was not a constant nuisance to adjoining land users, who have a right to a peaceful enjoyment of their property, the moreso as there were complaints made by the appellants before the same committee of the District Council of Moka Flacq on Tuesday 26th October 2010 in the presence of the co-respondents and respondent's representatives. The condition imposed by the Council is with regard to the state of the premises where the development is to take place and this was done so that the proposal can gain planning acceptance. If the Co-respondents are to operate on those premises, they are to ensure compliance with the conditions imposed and it was on the basis of the undertaking given by Mr. P. Muneesawmy, that the Council issued the BLUP for the extension to the Co-respondents, in the first place. Now, this cannot be a one way traffic. If the BLUP was granted to the Co-respondents upon the Council being satisfied at the time that the development as proposed (with the undertaking given by the owner of the property *in lite*) would not affect the adjoining land users, the co-respondents cannot say that they were not privy to the undertaking which was granted to their benefit. The condition imposed by the Council was to make the premises for conducive to the development proposed, and not on any third party as such. For reminders, it was an undertaking given by the owner of the premises, Mr. Panjananden Muneesawmy, not a condition imposed on him.

11. Therefore, we are of the view that conditions imposed by the local authorities are within the purview of the jurisdiction of this Tribunal. Furthermore **section 117 (10) of the LGA 2011** (which is referred to under **subsection (7)** appealable before this Tribunal under **section 117 (14)**) clearly stipulates at subsection (a) that *"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)

12. For all the reasons set out above, we find that the *plea in limine* is devoid of merit and is therefore set aside.

Ruling delivered on 1st September 2017 by

Mrs. J. RAMFUL	**Mr. V. Reddi**	**Mr.G. Seetohul**
Vice Chairperson	**Assessor**	**Assessor**