BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 119/12

In the matter of :-

Societe S.A Domaine

Appellant

v/s

Municipal Council of Curepipe

Respondent

IPO:

Societe Queen Mary Heights

Co-Respondent

And, In the matter of

ELAT 119A/12

Syndicat des Co-proprietaires Residences Les Colophanes

Appellant

v/s

Municipal Council of Curepipe

Respondent

IPO:

Societe Queen Mary Heights

Co-Respondent

RULING

1. At the outset, Counsel appearing for the Appellants, Residences Les Colophanes and Syndicat des Co-proprietaires, raised a point in law to the effect the Tribunal should make a determination by finding that the Outline Planning Permission ["OPP'] granted to the co-respondent which is subject of the appeal has already lapsed on the basis that the co-respondent has applied for, obtained and implemented a BLUP for residential purposes on the subject site and hence there has been an abandonment of the OPP. The OPP has become defunct. Furthermore, the planning policy for high rise buildings has changed and the proposed development will not meet the minimum requirements for a high rise building by reason of its limited area. Counsel for Societe S.A Domaine essentially joined in the submissions. The respondent and co-respondent objected to the motion. We have duly considered the submissions of all learned counsel. We shall not reproduce them save where we deem it fit to do so.

2. By way of background to this case, the co-respondent applied for an OPP for a high rise building (G +6) on Queen Mary Avenue in Floreal, as per the pleadings, which was granted by the Council in the year 2011. This file consists of two appeals which have been consolidated. The Appellants have interests in property found in the vicinity. They objected to this decision of the Council and appealed against it initially before the Town and Country Planning Board and subsequently the matter was referred to this Tribunal. A few years later, following an application for a BLUP for refurbishment of the pre-existing residential building on the subject site, the permit was granted to the co-respondent in 2016 which has been fully implemented.

3. There is an agreed statement of facts by all parties on record on three crucial points, to the effect that, firstly, a more recent BLUP for residential redevelopment in respect of the same premises has been granted to the co-respondent. The new BLUP which was granted two years ago has been acted upon. Finally, the Outline Planning Scheme ['OPS'] for the area having changed for high rise buildings since the OPP was granted in 2013, the plot size of the site *in lite* no longer satisfies the minimum plot size for such high rise buildings under the OPS presently in force.

4. It was submitted by Mrs. Saha that the dimensions of the site do not meet the new criteria of the Outline Scheme. The plot size of the co-respondent's property is 1044 sqm, which is undisputed. An extract from the policy TB2, Doc C, was produced to show the new criteria for tall buildings in residential zones as per the newly approved Outline Planning Scheme. A photograph, DOC A, showing the residential building as it currently stands on the subject site following the implementation of the latest BLUP issued.

5. The new Outline Planning Scheme for the Municipal Council of Curepipe approved in May 2015 sets out new criteria for high rise buildings. The area of Floreal where the subject site lies, as it falls under the jurisdiction of this Council, is subject to the provisions of the new OPS. It is undisputed that the site is situated within a residential zone of Floreal. The OPP of the co-respondent was in respect of a high rise building on Queen Mary Avenue, in Floreal. It is therefore apposite to seek guidance from applicable policies under the OPS. In this context we have been referred to Policy TB2 under the new OPS which regulates high rise buildings within a residential area and which is reproduced hereunder:

"TB2 : Tall Buildings in Residential Zones

There should be a presumption against applications for buildings of more than four floors (G+3) in predominantly residential zones where more than 90 percent of the existing housing is limited to two floors (G+1) in the relevant street block.

Applications for the development of the buildings upto four floors (G+3) should be favourably considered in predominantly residential zones if the development is in compliance with the requirements for

- *setbacks*
- *Onsite/offsite sewage disposal and storm water drainage*
- *Parking space and maoeuvring*
- *Landscaping*

In locations which abut main roads and junctions or where a cluster of high rise buildings has already been established that has changed the character of the area, there should be a presumption in favour of high rise development.

Justification:

i. *The policy is designed to protect the amenity of established residential areas from tall buildings which do not comply with the comprehensive provisions of PPG1 as amended.*

ii. ***The minimum plot size for high-rise residential/apartments should not be less than 2,110sqm. [the stress is ours]***

iii. *Applications for tall buildings in locations which abut main roads and junctions or where a cluster of high rise buildings has already been established should be accompanied by a comprehensive Design Statement and TIA clearance referred to under Policy TB1."*

6. On the basis of the above provision, it is clear that under the new OPS, one of the criteria for high rise buildings in a residential area is that the minimum plot size that is allowed to accommodate a high rise building should be 2110 sq.m, which is about half an acre, where as the subject site does not meet this minimum requirement regarding plot size since as the co-respondent's plot of land covers an area of 1044 sq.m, which is less than a quarter acre. This implies that the OPP as granted by the Council cannot be acted upon by the co-respondent to now apply for a **BLUP** as the criteria now set under the planning policy, TB 2, would not allow the co-respondent to build a high rise apartment block, not just of the type it has obtained an OPP for that is for G+6 but infact not for any type of high rise building since the subject site on which the proposed development was meant to stand does not meet the criteria in terms of minimum plot size.

7. Consequently, the raison d'etre of the OPP has become obsolete. This has been rendered so by the new OPS, which sets new criteria regarding plot size for which an application for BLUP needs now to be made and which cannot physically be met by the co-respondent's property. In circumstances, we are of the view that there is now no live issue for this Tribunal to decide upon. Furthermore, contrary to the submissions of learned Counsel appearing for the co-respondent, the basis upon which an OPP is to be assessed will be on criteria and guidelines applicable in the present day, with the logic that with newer guidelines come criteria which are better suited to the circumstances of the present times. Therefore, even if this Tribunal were to hear this case on its merits and give a determination, it would serve no useful purpose. The

intervention of the Tribunal will not turn back the clock for it to make a finding that the OPP rightly granted back then. In essence, the Tribunal will have to reassess the application for the OPP. It cannot be assessed on outdated planning criteria.

8. While we agree with the submissions of Counsel appearing for the respondent that the Appellants cannot outright seek a declaration or determination from the Tribunal and that would travel outside the jurisdiction of the Tribunal, we cannot overlook the fact that with the OPP being now obsolete it serves no practical purpose making a determination of this appeal. In **Mc Naughton v Mc Naughton's Trs (1953) SC 387**, Lord Justice Clark Thomson stated
"Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and they have no concern with hypothetical, premature or academic question, nor do they exist to advise litigants as the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau."

9. For all the reasons set out above, and with our finding that the OPP is obsolete, the impugned decision is consequently rendered obsolete and therefore there is no raison d'etre of this appeal. The appeal is therefore set aside with no order as to costs.

Ruling delivered on 18th October 2018 by

Mrs. J. RAMFUL-JHOWRY	**Mr. P. MANNA**	**Mr. G. LEPOIGNEUR**
Vice Chairperson	**Assessor**	**Assessor**