BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1207/16

In the matter of :-

Hilfoul-Fouzoul Society

Appellant

v/s

City Council of Port Louis

Respondent

IPO:

The Central Electricity Board

Co-respondent

ELAT 1213/16

And, In the matter of :-

Abdool Farad Nunnoo

Appellant

v/s

City Council of Port Louis

Respondent

IPO:

Central Electricity Board

Co-respondent

RULING

1. The above two appeals having been consolidated a single ruling is being delivered in the matter. This is an appeal against the decision of the City Council of Port Louis ("the Council") for having granted a Building and Land Use Permit ("BLUP") to the Co-respondent for a development that has been described as the re-development of the St. Louis Power Station with installation of Powerhouse, GIS Sub Station, Tank Perm and Fuel Oil Treatment Building at the Industrial Area, Plaine Lauzun.

2. At the outset Counsel for the Respondent moved that those connected appeals for which the appellants were not present to sustain their appeals, be set aside. Co-respondent chose to abide by the decision of the Tribunal. Counsel for the appellants confirmed that those present at the hearing of the appeal, that is Mr. Nunnoo and Mr. Sahebjaan, were not duly mandated to represent the appellants in cases ELAT 1208/16, 1209/16,1210/16,1211/16 and 1212/16. These appeals were therefore set aside. The appeals before the Tribunal are the present ones whereby the appellants were duly represented.

3. The Respondent raised a *plea in limine* and moved that the present appeal and appeal bearing ELAT 1213/16 be set aside on the ground that there is no raison d'etre of the appeal as the development is completed by the CEB and that hearing the appeal would be an abuse of the process of the Tribunal. Counsel for the co-respondent joined in and submitted that the objective of the project having been met, the case would only continue for academic reasons which the Tribunal cannot entertain and that the appeal has no relevance. Counsel for the Appellant submitted that the appeal was not purely an academic debate but that the whole development consisted of the construction part and the operational part of the development. He submitted in essence that although the building was already up, the contention of the appellants was also that they were aggrieved by the operational aspect of the development.

4. We have duly considered the submissions of all Counsel. We do not intend to overburden this ruling with submissions of counsel but reference will only be made where we deem it necessary to do so. We agree that as far as the re-development of the Power Station Building is concerned, the building did in fact exist well before the redevelopment project and this is not disputed by the Appellants. Therefore any debate on the issue of the construction or re-development of the existing Power Station Buildinghas no practical purpose in as much as the building itself already stands on the site *in lite* as a matter of fact and has been there since 1955. What is of relevance is that, there was no injunction to stop the construction irrespective of whether an application was made and rejected, or no application was made. The construction carried on and is now complete. The Tribunal can also take judicial notice of the fact that the St Louis Power station is now fully operational, following its redevelopment.

5. The position taken by the co-respondent and the respondent is that if the Tribunal is now to decide whether the BLUP was rightly granted or not, this will be nothing but a purely academic exercise. The guiding principle as set out in the dictum of ***Lord Justice Clerk Thomson*** in **Mc Naughton v/s Mc Naughton's Trs [1953]SC 387,392** is reproduced hereunder: *" 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 to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau."*

6. From the statement of case of the appellants, it would appear that it is not so much that they are aggrieved by the construction of the building but more by the operation of any machinery contained therein or possible associated emissions as a result of the activities that are carried out that may cause pollution and inconvenience the people living in the surrounding including the appellants. Counsel for the Appellant did argue that it was the operation side of the project that would cause nuisance to the appellants and for which

they were aggrieved and he also submitted that the case for the Appellants was that planning instruments such as the National Development Strategy ["NDS"] were not (correctly) applied. In their statement of case, the Appellants also aver that there was a blatant violation of the Environmental stewardship as entrenched in **section 2 of the Environment Protection Act 2002** as well as some elements of non-compliance with the Planning Policy Guidance regarding the "bad neighbour" development principles.

7. This Tribunal has a duty to determine whether the local authority was right or not in its assessment of the proposed development and the effect that the proposal is likely to have on the environment, amongst other issues, since it is an industrial development which is likely to generate industrial effluents, as is normally the case for all industrial projects. In its determination, the Tribunal will also need to look into the aspect of industrial pollution and if the discharge of effluents violates the prescribed norms and standards, measures and conditions imposed by the Council so that there is no need for any retrospective measures for abating the pollution.It will also need to look into whether the prescribed parameters of effluent discharge are maintained. In this context the Tribunal is duty bound to look at compliance or non-compliance with the planning instruments. In the case of **Beau Songe Development Limited v/s UBP Ltd [2018]UKPC 1** their Lordships stressed on the careful analysis and reconciliation of the planning policies by the Tribunal and that *"their first task was one of legal interpretation of planning documents to be decided by reference to "the language used, read as always in its proper context,"."*

8. We therefore agree with learned Counsel for the Appellant on the principle of it,that at this stage, with the operational phase of the development having begun, there are still litigious issues in the present appeal that can be adjudicated upon and determined by the Tribunal especially regarding nuisances associated with vibrations and escapes such as air and noise which may be pollutants.

9. The fact that the project is up and running does not preclude the Tribunal from making a determination on whether the BLUP was rightly or wrongly granted by the Council. The present situation is akin to a scenario where for example a BLUP holder has been allowed to operate an automotive workshop within an area where residents are objecting due to the pollution and disturbance that is generated. Simply because the BLUP has already been granted and its holder has already started operating does not make it an academic debate. The Tribunal can still hear the matter and adjudicate on whether it is a bad neighbor development, for instance, and may make a determination on the issue. The fact that it has started operating, which is typically the situation in most cases,, does not preclude the Tribunal from reviewing the decision of the Council and making a determination.The issues at hand ultimately boil down to the planning merits of the application.

10. The specificity of this case, however, is not about whether this particular development can gain planning acceptance on the site *in lite*.The site has been accommodating CEB's Power Station since 1958. The objections received against the development cannot undo what has been in existence since long. It may, at best, simply cause a reversal of the decision of the Council and possibly revert the situation to its original state of affairs, that is, prior to the re-development of the St. Louis Power Station. Although this Tribunal is ready to hear the appeal on its merits, the appellants have to bear in mind that matters to be thrashed out can only be with regard to their grievance in relation to the development. Any prejudice they may have suffered prior to the application for the re-development of the St. Louis Power Station cannot be abated by a decision of this Tribunal. Hence in terms of time line, the state of affairs arising prior to the application for re-development of the Power Station cannot be negated or undone by the Tribunal in its assessment of the appeal.

11. For all the reasons set out above, the preliminary objection is set aside. The case is to proceed on its merits but the Appellants are to bear in mind the directions given in this ruling.

Ruling delivered on the 6th April 2018 by

Mrs. J. RAMFUL	**Dr. Y. Mihilall**	**Mr. P. Manna**
Vice Chairperson	**Member**	**Member**