IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1047/15

In the matter of:

Laval Joseph Romaine

Appellants

v/s

District Council of Flacq

Respondent

RULING

1. The present appeal is against a decision of the Council for having refused the application for a Building and Land Use Permit ('BLUP') made on behalf of the Appellant by Mr. B. Roopun, sworn land surveyor, for the excision of a plot of land of 295.46 sq.m from an original extent of 1487.50 sq.m for residential purposes at Mahatma Gandhi Road, Quatre Cocos. The excision is in fact being sought pursuant to an agreement reached before the Supreme Court. The ground of refusal was communicated to the Appellant *vide* letter dated 1st December 2015 under the signature of the Chief Executive, Mr. Thakoor, and is reproduced hereunder:

   "1. The proposal will result into two distinct surplus lots. Accordingly, it is recommended that the application be made at the level of Morcellement Board."

2. It is to be noted from the same letter that reference is made to the application made by the Appellant on 6th November 2015 and to the sitting of the Executive Committee on the 26th November 2015. A two limbed point in law was raised at the outset by the attorney appearing for the Appellant, to the effect that:

(i) Firstly, the letter of refusal having been issued clearly out of time is invalid, ineffective, null and void, so that the application is deemed to be issued;

(ii) Secondly, the nature of the excision emanates from an agreement of the settlement of a litigation between Mr. Thomas and Mr. Romaine and recorded before the Supreme Court which has been submitted by the surveyor and that is why the approval of the Local Authority is required before the agreement can be fully materialized and this agreement amounts to a donation, putting a long standing litigation between the parties.

3. As regards the first point, we have understood the attorney for the Appellant to be making reference to non-compliance with the provisions of the **Local Government Act** by the Council since it failed to notify the applicant within 14 working days of his application that it had been refused, the reasons for refusal are deemed invalid and the application is deemed to have been approved. As regards his second point, in essence we have understood the Appellant's stand to be that in order to give effect to the agreement reached amongst the parties before the Supreme Court an excision has to be done and an application for BLUP for excision to be granted by the Council. The Appellant's argument to the point of the Council that the excision is being done in a way that it cannot entertain but that it should rather be entertained by the Morcellement Board is that the application for excision cannot in any event go before the Morcellement Board as it amounts to a donation, which falls outside the purview of the Morcellement Board and therefore, it is for the Council to consider the matter. Counsel for the Respondent objected to the motions of the Appellant. The stand of the Council is that the refusal letter was issued within the prescribed time frame. As regards the second limb, the excision as proposed by the Appellant will result in 2 distinct lots which should be entertained by the Morcellement Board and finally, the agreement before the Supreme Court does not purport to be a donation but as "a titre de transaction". We have duly considered the submissions made on behalf of both parties. We will address the issues and only make reference to the submissions where we deem it fit.

4. Both Attorney for the Appellant and Counsel the Respondent agreed on the following set of facts, which are supported by documents on record. The application was submitted on the 6th November 2015, as per the acknowledgement receipt marked and annexed as Doc A to the Statement of Case of the Appellant and the same document makes mention at the bottom

   "You are requested to call in person between 12.30 to 14.30 on 27-NOV-15 to

   (i) Pay the permit fee and collect your permit, or

   (ii) Collect your refusal letter, or

   (iii)Collect your approval letter requesting for amendments"

   The refusal letter, marked as Doc A3 and annexed to the Statement of Case, is dated 1st December 2015 and refers to the decision taken by the Executive Committee on the 26th November 2015 to reject the application. The letter of the Council was posted and the original envelope was produced and marked, Doc A, bearing three rubber stamps of the Post Office, out of which two of them clearly bear the date "04.12.15" on the front and "4 De 15" on the back of the envelope respectively. It is not disputed by the Council that the refusal letter was posted on the 4th December 2015 and the date on which it was received.

5. For the purposes of the subject-matter of this ruling, **Section 117 (7) of the Local Government Act 2011** [hereinafter referred as the "LGA"] is partly reproduced herewith:

"(7) With the exception of an application under subsection (8) and subject to subsections (9) and (10), the Permits and Business Monitoring Committee shall, within 14 working days of the effective date of receipt of the application, and after approval of the Executive Committee -

   (a) issue to the applicant an Outline Planning Permission or a Building and Land Use Permit....

   (b) notify the applicant in writing that the application has not been approved and give the reasons thereof." [stress is ours]

6. Our reading of the law as it stood then, is that within 14 **working** days of the effective date the Permits and Business Monitoring Committee (the **'PBMC'**) must imperatively have taken a decision approved by the Executive Committee to either issue the BLUP or notify the applicant of the rejection of his application, as the case may be. The word "shall" must be taken to be mandatory in this context not only as per the **Interpretation and General Clauses Act** ["**IGCA**"], but we are also comforted in our interpretation upon a reading of section **117(11) (a) of the LGA** which follows wherein provision is made in the law for non-compliance with the **section 117(7) LGA**. **Section 117(11) (a)** which provides:

"(11) (a) Subject to paragraph (b), where an applicant has not been issued with a Building and Land Use Permit or has not been notified that his application has not been approved under subsection (7) or (8), as the case may be, within 2 working days of the expiry of the due date, the application shall, on payment of the fee referred to in subsection (10), be deemed to have been approved by the Municipal City Council, Municipal Town Council or District Council and the acknowledgement receipt, together with the receipt acknowledging payment of the fee, shall be deemed to be the Building and Land Use Permit." [The underlining is ours.]

7. The legislator had a clear intention from the abovementioned provisions of providing a default position where the Council failed to notify applicants that their application had been rejected and giving the reasons for the rejection. A computation of 14 **working** days from the 6th November 2015, excluding the 11th November 2015 where judicial notice is taken that it was a public holiday, takes us to Thursday 26th November 2015. In the present case, ex-facie the pleadings the letter of refusal to notify the Appellant of his application being unfavorably considered was only dated the 1st December 2015. The burden is clearly on the Council to notify the applicant of the refusal **within the 14 working days**, as per the wording of **section 117(7)(b) LGA 2011**. We reject the point of the respondent that the acknowledgment receipt places the burden on the applicant to *call in person between 12.30 to 14.30 on 27-NOV-15.* This cannot take precedence over the law. The burden is clearly placed on the Council.

8. This being said, we also addressed our mind to the ground of refusal. We have understood the Council's decision of refusal to be grounded in the fact that the development proposal as made in the application will not fall within the purview of the Council to determine, the reason being that it will result in two distinct surplus lots. It is worthy of note that Doc A1 annexed to the statement of case shows a map with proposed excision of a lot in the middle if an L-shaped plot of land thereby resulting in two distinct plots as surplusage after the excision, as opposed to one resultant surplus plot, as would typically be the case. In clearer terms, an excision entails the removal of a lot from a bigger plot so as that it results in a small lot and one remaining bigger plot. It stands to reason that the motion of the Appellant's attorney will only hold if the Council has the jurisdiction to consider an application for the type of development that is being proposed. From the ground of refusal as elicited in the latter dated 1st December 2015, the Council seems to be suggesting that the application should be made before the Morcellement Board. The Tribunal cannot allow an applicant to walk away with his BLUP after payment of the relevant fee where the jurisdiction of the Council to determine the application is in issue at this stage. That would also be an incorrect application of the law. The Council, for its part, is under a legal duty to consider the merits of an application where it falls within its purview. ***At Page 391 Administrative Law, 3rd Edition 1994, By P.P Craig*** *it is stated 'A public body endowed with discretionary powers is not entitled to adopt a policy or rule which allows it to dispose of a case without any consideration of the merits of the individual applicant who is before it: R v/s London County Council exparte Corrie (1918) 1KB 68'*

9. This takes us to our next point of whether at this stage the application for the proposed development falls within the purview of the Council. As a matter of law, under the Morcellement Act, where lots are divided so that they end up in more than 2 distinct lots, the application will fall within the purview of the Morcellement Board where a morcellement certificate should be obtained but this is subject to exceptions. The Appellant's argument is that **S.46 (5)(c) of the Planning and Development Act** applies so that a morcellement certificate is in any event not required as the excised lot amounts to a donation.

S.46 (5)(c) of the Planning and Development Act ["PDA"] provides *"No morcellement certificate shall be required in relation to any land which is divided for the purpose of-*

(c) sale or donation of more than one lot where that lot is excised from another lot for the purpose of the sale or the donation and-

*(i) **either lot** is not further parcelled out within 12 months of such sale or donation without a morcellement permit;*

(ii) not more than 3 excisions in all are made out of the original lot without a morcellement permit." (stress is ours)

10. There are *prima facie* several issues which require some evidence to be adduced for the Tribunal to have a better understanding of the situation and there are also several issues which require pre-determination before other forums so that the Tribunal can adjudicate on these. The **PDA** provides that a morcellement certificate is not required where "either lot", that is clearly, either the excised lot or the surplus lot, is not further parcelled out. In essence, the law is clear that there is the excised lot and the surplus. In the present case, from the document A1 provided by the Appellant the excision, as proposed, being of a lot in the middle of the L-shaped bigger plot will end up in 3 lots, that is, the lot proposed to be excised and 2 other lots on its either side being distinct and unconnected. The Tribunal cannot surmise on what would be the status of the surplus lots, whether they would be considered to be excised nor can we surmise on whether the proposed excision will be a donation or not. These issues seem to be inextricably linked in the present case and will have a bearing on the case. The versions of the two parties are conflicting on this point and it is not an issue that falls within the jurisdiction of the areas of adjudication of this Tribunal.

11. For all the reasons set out above, the motions of the Appellant are set aside. The matter cannot however proceed for hearing before this Tribunal since the ground of refusal relates to a jurisdictional issue of the Council. The Council's stand is that the application of this proposed development should be made before the Morcellement Board. The Tribunal, being an administrative one has its jurisdiction clearly set out under **s. 4 (1) of the Environment and Land Use Appeal Tribunal Act 2012**. It has no jurisdiction to confer upon the Council jurisdiction which the latter seems to be

claiming not to have as per the development proposal in the present case. The appeal is accordingly set aside. No order as to costs.

Ruling delivered on 16th October 2020 by

Mrs. J. RAMFUL	**Mr. B. RAJEE**	**Mr. P. MANNA**
Vice Chairperson	**Member**	**Member**