IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1328/17

In the matter of:

Sahood Gogoah

Appellant

v/s

Municipal Council of Vacoas-Phoenix

Respondent

DETERMINATION

1. The present appeal is against a decision of the Municipal Council of Vacoas-Phoenix (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (hereinafter referred to as "BLUP") for an extension to the first floor of a building situated at Royal Road, Phoenix. The grounds of refusal set out in a letter dated 19th December 2016 under the signature of the Chief Executive addressed to the Appellant are as follows:

   "1. THE FIRST FLOOR STANDS ON A BUILDING PART OF WHICH HAD BEEN ORDERED BY INTERMEDIATE COURT TO BE PULLED DOWN. THE STRUCTURE HAS NOT YET BEEN PULLED DOWN AND A MISE EN DEM[E]URE HAS BEEN SERVED UPON THE APPLICANT.
   2. PLANS SUBMITTED DOES NOT REFLECT THE BUILDING AND SETBACK AS BEING BUILT ON SITE.
   3. CONSENT FROM CO-OWNER HAS NOT BEEN SUBMITTED."

2. The Appellant testified and Mr. Cundasamy, the Head of the Planning Department of the Council deponed on behalf of the respondent. Both parties were legally represented. We have duly considered the evidence placed before us including documents produced and the testimony of all witnesses as well as submissions of counsel appearing for both parties. We will not reproduce the testimony of witnesses except where we deem it fit to do so.

3. The Appellant lodged three grounds of appeal which are set out below:
"1. The judgment referred to by the Municipal Council of Vacoas/Phoenix cannot be relied upon in as much as same has lapsed and is no longer enforceable.
2. The judgment was obtained as far back as the year 1990 and it was against the father of the Appellant and the latter is not bound to comply with the said judgment.
3. The part that had to be allegedly pulled down is to be found at the back of the building whilst the extension to be carried out is at the front."

I. CONTEXT ANALYSIS

4. The development, which has in fact already been completed, consists of an extension to an existing one storeyed residential building. The Appellant has put up a staircase as well as an exit structure from the staircase, a "cabine" as Mr. Cundasamy called it, onto the roof. We have understood the "cabine" to mean the passage exit of the staircase, subject matter of the extension, from the floor leading onto the second floor. The subject site is located at Royal Road, Phoenix. Complaints were received at the Council from a contiguous neighbour by the name of Mr. Toofanny to the effect that the extension was being done by the Appellant without observing the statutory distance from the boundary line. It is undisputed that there had been an issue of encroachment in litigation between Mr. Toofanny and the Appellant's father whereby the Intermediate Court [hereinafter referred as "IC"] ruled in favour of Mr. Toofanny and ordered that the offending part of some fifteen feet of the Appellant's father's building be pulled down so that it no longer encroaches onto Mr. Toofanny's property and also observes the statutory setback from the boundary line. The Appellant's father appealed against the judgment of the Intermediate Court and his appeal was set aside

by the Supreme Court. It appears that there was non- compliance with the order of the Court. After many years the Appellant has now constructed his house upstairs in the same building. The Appellant had already undertaken the extension work and the structure has already been completed at the time that the Appellant put in an application for the BLUP.

II. THE ISSUES

5. The first two grounds of appeal will be dealt with together as they both relate to the first ground in the refusal letter of the Respondent. Under grounds 1 and 2, it is the contention of the Appellant that the judgment referred to by the Municipal Council of Vacoas/Phoenix cannot be relied upon it dates back to 1990, it has lapsed and is no longer enforceable and that since it was against the father of the Appellant, the latter is not bound to comply with it. The position of the Council is that the latter is relying on the fact that there is a judgment from the Intermediate Court whereby a pulling down order was made. Evidence was produced that the Supreme Court upheld the judgment of the Intermediate Court.

6. We have not been enlightened by the Appellant's counsel as regards the legal basis for submitting that the judgment of the Intermediate Court has lapsed nor was any authority submitted in support of this position. In limited circumstances there may be situations where a judgment may lapse but we do not find their application in the present circumstances. Furthermore, this Tribunal is not the competent jurisdiction to decide on issues of encroachment. What is of concern to us is whether there has been a flouting of the planning laws in that the required setback from the boundary line has not been respected.

7. It has been placed before us that a court of law has found that the building *in lite* does not respect the setback from the boundary line to the extent that it even encroaches on the property of the neighbour. The evidence shows that a first floor had been added to the same building with a staircase as extension at the rear. The position of

the Council is that it could be gathered from the measurements of the building that the extension does not respect the required setback from the boundary line.

8. Mr. Cundasamy testified that there was a site visit on the locus at the beginning of December 2016 by the building inspector, Mr. Kevin Mungur and the then Supervising Officer, Miss Ramroop and the Engineer, Mr. Permala. He stated that measurements as per the plans approved in 2005 showed that the depth of the building was intended to be 17700mm. However, when the site visit was made in 2016 and measurements were taken by the Council, the depth of the building was found to be 18.5 metres. Mr. Cundasamy's testimony was very revealing when he explained the extent of the breach of the setback in that *"the depth of the building and the depth of the site is the same. Mr. Sahood Gogoah constructed c'est a dire on the boundary line in the front, upto the boundary line at the rear."* The building inspector also made an assessment that the extension was being constructed contrary to approved plans and without a BLUP. These measurements were also subsequently reflected in the new plans put in by the Appellant showing the depth of the building as being 18.5 metres. The plans approved in 2005 as well as those approved subsequent to the visit by the Council in 2016, marked Docs B and C, were produced where the disparity in depth of the building measurement is clear. We have no qualms on the basis of the evidence before us in finding that the extension to building of the Appellant flouts the setback required by from boundary lines. The staircase that has been constructed by the Appellant is found on the first floor at the rear of the building without respecting the setback from the boundary of the neighbour who lives behind them, thereby constituting a breach of **s.10 Building Regulations GN 210/1919,** which provides for a 900mm rear setback between the wall of any house and the boundary of the property and **section 3.2** of **Planning Policy Guidance 1** which provides for residential development with a required setback of 0.9m between side boundaries. The BLUP guide also provides for it.

9. It was submitted on behalf of the Appellant that no surveyor's report was submitted by the Respondent to determine that the Appellant had not respected the setback. The evidence of the Head Planner was sufficient. He based himself on the

measurements taken by the building inspector in the course of the site visit and found in his file. These measurements were also confirmed by the Appellant's new plans. It leaves no room for doubt that there has been non-observance of the required setback, if that is his case.

10. The Respondent's representative also stated that the "cabine" is illegal as it was on the plans approved by the Council in 2005. This structure is not on the plans. It was also made a live issue the fact that the Appellant built the first floor without a valid BLUP since it is invalidated upon the expiry of 6 months from the date of issuance. As per the BLUP, construction works should commence within a time frame of 6 months which was not observed by the Appellant. Although this may be technically correct, it is beyond the scope of this appeal since the appeal is with respect to the application for the extension.

11. Whether the judgment of the Intermediate Court was against the father of the Appellant hence not enforceable against the Appellant is, in our view, besides the point for the purposes of planning law. The construction of new buildings and substantial structural changes to existing buildings usually require consent from the local authority, which is the planning authority. The Council may not have been a party to the case before the IC, yet, in view of the wide powers vested in it by law, it has a supervisory and regulatory jurisdiction over all development whether private or public. The Council would have to consider this not as a private interest but in the interest of those who will be impacted upon by the development. As well as a consideration of the adjoining landowner's contractual or legal rights, wider questions of planning and the public interest would still have to be taken into account by the Council. It would be contrary to policy if planning laws and regulations were to be restricted by private rights and obligations. The raison d'etre for a planning system is for the control of inappropriate development.

12. Under ground 3, it is the contention of the Appellant that the part that had to be allegedly pulled down is to be found at the back of the building whilst the extension to be carried out is at the front. Before the Tribunal no evidence was elicited from any

witness especially the Appellant as regards this ground of appeal. The evidence from the Appellant was far from clear on this issue. From the testimony of the Appellant as well as that of Mr. Cundasamy the extension consists of the staircase and the so-called "cabine". From the plans produced and the evidence of Mr. Cundasamy these structures are found at the rear of the building *in lite*. This ground is therefore set aside.

13. As regards the last ground of refusal, the Appellant stated that he was willing to provide the consent of his wife if the Council so needed. The Council should have verified this before eliciting it as ground of refusal.

14. For all the reasons set out above, we find that the decision of the Council was correct. The appeal is set aside. No order as to costs.

Determination delivered on 3rd May 2021 by

Mrs. J. RAMFUL	**Mr. R. ACHEEMOOTOO**	**Mr. R. SEETOHUL**
Vice Chairperson	**Member**	**Member**