BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1628/18

In the matter of :-

Fraisier de Curepipe Ltd.

Appellant

v/s

The Municipal Council of Curepipe

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having refused the application for a Building and Land Use Permit ["BLUP"] to the Appellant for the conversion of part of an existing building at ground flour to be used as cold room at Dr Edwards Street, Curepipe. The Appellant was informed of the decision of the Council by way of a letter dated 14 May 2018. The reasons for refusal set out in the letter are as follows:

   "1. The proposed activity serving an existing store and warehouse (without permit) is incompatible with the neighbourhood.

   2.The proposed activity will add up/result to nuisance detrimental to the immediate property owners (objectors) in terms of acceptable noise emanation, inappropriate waste water disposal and traffic disruption due to lack of parking space/loading/ unloading bay and present on-street parking."

2. Both the Appellant and the Respondent were legally represented. The Appellant was represented by Mr. Anand Kumar Ramsahye. The Respondent was represented by the Head of the Planning Department, Mr. Cundasamy and the Council called as supporting witness, an objector who lives in the vicinity of the subject site, one Mrs. Pudmini Devi Ramsahye. We have duly considered the evidence before us as well as submissions of both counsel. We opine that a lot of evidence has been adduced on collateral issues which are not directly related to the application, which is one of conversion of an existing building into a cold room. Such evidence is not relevant for our purposes. The grounds of appeal do not all relate to the grounds of refusal. We will therefore first consider the grounds of refusal then consider the grounds of appeal.

(I) GROUNDS OF REFUSAL

(a) 1st Ground of refusal: The proposed activity serving an existing store and warehouse (without permit) is incompatible with the neighbourhood.

3. We believe, before addressing ourselves to the grounds of appeal, we should first look into the merits of the present application. According to the version of the Appellant's representative, the business has been operating since 2006 under the trade name of Frasier de Curepipe Ltee, distributing fruits and vegetables across the island, especially to hotels and supermarkets. It is not disputed that the area where the Appellant is carrying out its business, at Dr Edward Street, Curepipe, is a residential area and in fact the proposed development is to be done within the house of Mr. Ramsahye, at Dr. Edwards Street, Curepipe, which is currently also being used as a store for his stock and his compound also serves as parking area for some 8 delivery vans/lorries which he owns. The subject site falls within settlement boundary. This is, in planning terms, an area where residential development is favoured. We are alive to the fact that the appeal before us is one regarding an application for an existing structure to be converted in 2 cold rooms. The Appellant's reason for applying to have the cold rooms is so that the vegetables and fruits can be stored for a longer period. It is the case of the Appellant that it holds a valid permit for General Merchandise which allows for distribution of fruits and vegetables.

4. The application made by the Appellant of a non-residential nature, which is of an industrial nature as according to Mr. Cundasamy, store and warehouse fall within the industrial cluster. In this case, the application is for a development which is additional (cold store) to the existing business (store) for which the applicant does not appear to hold a permit. There is no evidence on record to even suggest that the Appellant had a valid BLUP for part of the house of Mr. Ramsahye which was being used as a store or warehouse prior to delivery of stock. Mr. Ramsahye testified on the nature of his business and with photographs he explained how lorries are loaded with vegetables and fruits for delivery as well as the place and manner in which unloading is done. He stated that the store was 3000sq.m in size. The version of Mr. Cundasamy is that the Appellant only ever had a trade licence for General Merchandise. He explained that this not a BLUP to operate on the premises where he has been operating all these years. He clarified to the Tribunal that this type of licence is more of a transportation business as distributor whereby one has to deliver goods but the license does not cover storage. He also stated that the application for cold storage requires a separate trade licence.

5. The Appellant has a trade licence for General Merchandise. A trade licence is as the name suggests, a licence for a company or an individual to carry out a particular trade/business. A BLUP on the other hand is a permit to construct on and/or to use a particular site/locus to carry out that trade/business. They are clearly distinct. The Appellant had no valid BLUP to store vegetables and fruits on his premises. The Appellant's representative explained that the use of the cold room would be to keep the fruits and vegetables fresh for a longer period until delivery is done.

6. Mr. Ramsahye explained that his business involves delivery of fruits and vegetables island wide and he has some 8 delivery lorries. That gives an indication of the extent of storage of fruits and vegetables that is being done. Leaving aside the fact that the building in question also serves as residential building, an assessment by the Council for permissibility of usage cold rooms must be considered together with the existing storage activity for which no BLUP is held.

7. Being given the fact that the area is a residential one found within settlement boundary of the Outline Planning Scheme, the applicable policy is **Policy ID2 of the Outline Planning Scheme of Curepipe** relating to developments permitted in residential areas and reproduced below:

"ID2

Small Scale Enterprises and Home Working

Proposals to operate or extend office/business uses or small scale enterprises from residential properties should only be permitted if the use is ancillary to the principal use as residential. Criteria should include:

(i) ***Premises are of a suitable size and design to accommodate the additional activity and all its ancillary requirements such as parking, loading area and adequate setbacks from neighbouring properties.***

(ii) No neighbours' objections within a radius of 50 metres.

(iii) ***no serious adverse impact on residential occupiers in the area or the character of the neighbourhood particularly in regard to noise, smoke, fumes, smells, dust nor excessive vehicle movements or loading and unloading of goods and products;***

(iv) Sufficient parking space within the curtilage of the property available to accommodate any staff or visitors;

(v) Safe access from the roadway.

Storage of materials should be able to be contained within the cartilage of the property. The operator of the office/business use or small scale enterprise should reside at the premises...

...Industrial uses such as panel beating and spray painting, manufacture of furniture and vehicle repairs are not normally acceptable uses within residential areas due to dust, noise, fumes, vibration and other adverse environmental effects. Examples of potentially acceptable small scale enterprises include cooking of sweets and food preparation, sewing and small scale clothing manufacture, repairs to electrical goods, minor car/mechanical and bicycle repairs, artists repairs, artists studios, offices such as book keeping, administration, professional

services etc.....For both the use of home as office or other small scale enterprise the key consideration is whether the overall character of the dwelling and surrounding amenity will change as a result of the proposed use. If the answer to any of the following questions is 'yes' then the proposed enterprise, by reason of its nature or scale is likely to be unacceptable:

- *Will the home no longer be used mainly as a private residence?*
- *Will the enterprise result in a marked rise in traffic or people calling?*
- *Will the enterprise involve any activities unusual in a residential area?*
- *Will the enterprise disturb your neighbours at reasonable hours or create other forms of nuisance such as noise, dust, fumes or smell?"*

8. Being given the very fact that there have been objections from contiguous neighbours against the proposed development that shows that the activity is not acceptable. The nature of the objections relates mainly to the nuisance associated with noise, increased vehicular movement having an impact on the daily lives of those who reside in the neighbourhood of the subject site. Typically, the area is a residential one and it is deemed paramount that residential uses be protected from commercial and industrial uses. Planning guidance is meant to control any land use which offends the character of the area, the moreso if it is a commercial land use which does not benefit the surrounding neighbourhood. Some commercial uses which do not inherently conflict with residential uses may be allowed provided both land uses are mutually beneficial such as having a shop. Mr. Cundasamy testified that the proposed development is already in place and operating without a BLUP and that the application was only brought before the Council following complaints from objectors. In addition to the complaints received, having a store or a cold room in a residential area cannot be taken to benefit the local community, the moreso as there is no evidence that the Appellant distributes to the community but rather to supermarkets and hotels. We believe, when all considered, the Council's decision to refuse the application on the first ground was well taken.

(b) 2nd Ground of refusal: The proposed activity will add up/result to nuisance detrimental to the immediate property owners (objectors) in terms of acceptable noise emanation, inappropriate waste water disposal and traffic disruption due to lack of parking space/loading/ unloading bay and present on-street parking.

9. We have addressed our minds to the version of Mr. Ramsahye in that he has been operating this business of distribution for around fifteen to twenty years and it would seem that he had just taken it for granted that his house could be used as a store for the fruits and vegetables and for delivery to hotels and supermarkets. It is clear from the **Policy ID2** that for a development to gain planning acceptance within a residential area, the type of activity being carried out must be conducive to the character and amenity of a residential area such that it is not disruptive to the neighbourhood. There were initially objections from contiguous neighbours, that is, the brother and sister-in-law of Mr. Ramsahye as well as one Mr. Teeluck. They all complained of noise associated with the activities on the premises of Mr. Ramsahye. It appears that the objections of the latter have already been addressed but those of the other Ramsahyes are still alive. The complaints of the Ramsahyes relate mostly to noise nuisance due to compressors (cold storage activity) and unwanted human and vehicular traffic which also cause disruption especially when some of the lorries load or unload on the common access road and inadequate waste water disposal.

10. As per his testimony, Mr. Ramsahye has some 15 workers working with him in the business as well as his 3 sons. Although these would most likely be lorry drivers involved in the actual distribution, having over a dozen "outsiders" on a daily basis in the area where other people reside can not only be disruptive to the other residents but also have an element of insecurity and be a source of noise nuisance, the moreso as there is a constant flow of traffic in and out of his premises. Mr. Ramsahye has 8 delivery lorries and they operate every day. We note the disparity in his version as regards the hours of operation. He testified that the lorries leave in the morning and come back by 2pm but when confronted with the statement of case of the Appellant wherein it is averred that the lorries leave and come back by midday, he then stated

that the vehicles come back by 3pm in case of traffic jam and when it was put to him that at a previous sitting he had stated that the vehicles may return at 4pm, he agreed. To a question put by the Tribunal the Appellant's representative agreed that his vehicles may return at any time between 11am and 4pm. This type of activity whereby vehicles are driving in and out of a residential area spanning over hours with no fixed time for closure can be disruptive to the neighbourhood. Mr. Ramsahye also stated that deliveries are done every day except on Sundays and on public holidays. It was put to him that he also stated that if there is an urgent delivery to the hotel then that may be done even at 10pm at night which he denied. It would seem that even on weekends, there is no respite from all the activities that take place on the premises of Mr. Ramsahye.

11. Mr. Ramsahye agreed that the number of vehicles in a residential locality is a lot but argued that since he has the required parking area, it does not cause any obstruction. The parking slots for his delivery vehicles are in 2 different locations having different accesses within his premises. One parking area is capable of accommodating some 8 vehicles according to him but that it serves as parking for 6 lorries and that he also has his personal parking slot where the loading and unloading of lorries are done one at a time. When put to him in cross-examination that there is a lot of activity going on in a residential area causing disruption, he did not deny it but his reply was that he has been operating this business since a very long time between 15-20 years. He also agreed that the cold room uses compressors but disagreed that the compressors would be emitting noise outside the building. At Annex E of the statement of case of the Appellant is a Noise Level Test Report prepared by an electrical engineer by the name of K. Callicharan. The report states that there are 2 electric compressors located outside the building and the type of business is set out as Store Room with the noise level at the boundary being 58 DB. The test was done on 13th January 2016. No weight can be attached to such evidence. The evidence was unclear as regards whether the compressors inspected were in relation to the cold rooms, whether the cold rooms were operational in 2016 when the inspection was done by the engineer. The application for BLUP was only made in 2018. The maker of the report was not called before the Tribunal as a witness so that the contents of the report could be tested.

We are also unaware of the circumstances and manner in which the measurements were done, the number of readings taken to minimize errors, the calibration of his apparatus, amongst others.

12. Mr. Ramsahye agreed that his workers are in and out of the premises while they are working. Counsel may well argue that the width of the road is big enough to create a buffer for the noise not to affect the objectors. We do not believe that the width of the road matters here. Having non-residents loitering about the vicinity of one's premises on a daily basis with all the noise associated with their talking, and the vehicular movement can be very disruptive for those living in the neighbourhood. By virtue of the fact that the nature of the business activities of the Appellant is such that a rather high volume of truck movement is required everyday with lorries having to wait for their turn to be loaded and offloaded. The development on such a scale, not in terms of surface area but in terms of what in entails regarding its operations, cannot be categorized as **"Small Scale enterprise and home working"** that is allowed within a residential area within the **Policy ID2** *supra*.

13. The Council also invoked policies under **the Design Guidance Commercial Development at paragraph 3.2.3, new commercial developments should be built around existing clusters of commercial activities.** We do not believe that the application of this is totally apt since it deals with commercial activities whereas Mr. Cundasamy clearly stated that the activity of having store or warehouse is to be considered as falling within the industrial cluster. The storage of fruits and vegetables cannot be classified as a commercial activity as such. **The Council also cited paragraph 4.5.2 on Industrial Development on Existing Sites, Estates and Zones. Policy ID1 of the OPS of Curepipe is reproduced hereunder:**

ID 1: Industrial Development on Existing Sites, Estates and Zones

There should be a general presumption in favour of applications for new industries or expansion of existing facilities, including factories which require large sites and generate high volumes of vehicle and truck movements within existing industrial estates and sites. In seeking such sites, new industries can make use of existing

transport and utility infrastructure, particularly water, sewerage and electricity networks.

New proposals should not create any bad neighbour impact on residential occupiers in the area, or the character of the neighbourhood particularly in regard to noise, smoke, fumes, smells, dust, fire risk and disposal of toxic material within a radius of 50 metres.

Within existing industrial estates and zones where transport and utility infrastructure is available but where limited industrial development has materialised or is in prospect, applications for alternative developments should be encouraged provided that such developments would not prejudice the on-going or future operations of existing industries.

Applications for Small and Medium Enterprises (SMEs) and small scale workshops that are unsuitable in residential areas should seek sites in SME zones and Small Scale Business Industrial Workshop zones.

14. The above policy is with regards to industrial development on sites where there are existing industrial developments. We do not believe that this policy is apt here since we are dealing with a residential area. However, it is worthy of note that even in such areas there is a requirement not to have bad neighbour impact on residential occupiers living in the vicinity and that there should not be an impact on the character of the neighbourhood. The photographs produced on behalf of the Appellant, more especially docs D4, D8, D9 and D10 show the close proximity of the premises where the Appellant operated to the other houses. Undeniably, having vehicles coming in and out of the subject site to deliver stock on the premises of the Appellant and subsequently having delivery vehicles of the Appellant driving out and in of the premises would impact the residential character of the area. A residential area is not meant to have the kind of hustle and bustle as those of an industrial area where the sound of lorry engines adds to the character of the zone. The presence of over a dozen workers, not only walking in the area but talking or even banging their crates, as stated by Mrs. Ramsahye, while loading and unloading the vehicles are factors that cannot be overlooked. These are highly plausible especially with the nature of the business of the Appellant and would not only have an impact on the character of the residential

neighbourhood but also on the amenity. There is also no fixed time for the lorries to drive in and out. Upon the admission of the representative of the Appellant, the lorries could be back anytime between 11am to 4pm but then he also testified that if there are urgent deliveries then he does do it, suggesting that there are no fixed time when they actually stop their activities. It is the prerogative of the Council to maintain control over such physical developments and over the operations of such activities. A BLUP runs with the land whereas a trade licence runs with the individual applicant. Since no BLUP for store has ever been issued in this case, the Council rightly pointed out it has never assessed the planning merits of having a store on the premises.

(II) GROUNDS OF APPEAL

The grounds of appeal are reproduced hereunder and where the issues overlap the grounds will be dealt with together.

*"**Preliminary Points in Law***

1. The Respondent along with the Executive Committee have breached the fundamental provisions of the law and have committed procedural impropriety as follows: -

*a) The Committee has in breach of **section 117(6B), (7) and (8) of the Local Government Act 2002(hereafter LGA)** asked the appellant to attend a Hearing/meeting outside the time limit prescribed by the law held on the 3rd May 2018;*

b) The Respondent unlawfully refused to communicate the grounds of objection of the objectors with regard to the said Building and Land Use Permit (hereafter BLUP) application to the Appellant before the Hearing breaching the latter's constitutional right to a fair hearing. The alleged refusal reasons are therefore rendered null, void and baseless and cannot stand at all.

c) *The Respondent has utterly failed to notify the Appellant in writing that the application has not been approved within the prescribed delay provided in* ***section 117(8) of the LGA*** *and therefore acted unlawfully.*

d) *The Respondent has failed to consider that the Appellant's application for the said BLUP fell under an enterprise registered under the Small and Medium Enterprises which falls under the exception of* ***section 117(8) of the LGA*** *having a shorter prescribed time limit to notify the Appellant in writing.*

e) *By virtue of* ***section 117(11) (a) of the LGA*** *the Appellant has* ***as a right*** *been granted the said BLUP and the application shall be deemed to have been approved by the Respondent for failure of not issuing or notifying the Appellant within 2 working days of the expiry of the due date.*

On the Merits

1. Because the Executive Committee was wrong in law to have rejected the application for the Building and Land Use Permit for conversion of part of an existing lower ground into two cold rooms on the grounds set out in its ***refusal letter dated 14th May 2018 posted on the 31st May 2018****. Appellant will rely on the following grounds:*

a) *The Respondent through its Committee unlawfully refused to communicate the grounds of objection of the objectors with regard to the said Building and Land Use Permit (hereafter BLUP) application to the Appellant on the day of the said Hearing before the Hearing breaching the latter's constitutional right to a fair hearing. The alleged refusal reasons are therefore rendered null, void and baseless and cannot stand at all.*

b) *The Committee refused the said BLUP application on very generic reasons without considering the Appellant's specific case reasonably in all fairness and justice following the abovementioned procedural impropriety couched with the Appellant's breach of right to a fair hearing. Each factor if any, affecting the*

said application should have been considered and evaluated subjectively by the Committee.

c) *Because the Committee failed to exercise its discretionary power as per the provisions of* ***section 117(10)(a)*** *of the* ***Local Government Act 2011*** *to impose such conditions as the Respondent might have deemed appropriate. The Respondent failed to act judiciously when the latter failed to impose relevant conditions with regard to the second refusal reason as per the abovementioned letter.*

d) *The Committee failed to take into account the guidelines issued under the* ***Planning and Development Act 2004*** *and breached* ***sections 117(3) and (6) of the Local Government Act 2011.*** *The Committee failed to have regard to* ***"material considerations"*** *as per the provisions of* ***sections 30(5) and (6)*** *of the* ***Planning and Development Act 2004*** *while assessing the application since it is bound by law to refer to any guidelines issued under the said Act in as much as:*

   i. *The nature of the activity would only have a positive effect on the residential amenities since it deals with distribution of food items and vegetables to the local market;*

   ii. *The decision of the Committee is in direct contradiction with the general policy of the Government in promoting SMEs.*

   iii. *The Committee failed to have regard that the application of the two cold rooms is in relation to the existing business of the appellant with an existing trading license of distributing fruits and vegetables in hotels around the island creating employment.*

   iv. *The proposed development is not a "bad neighbourhood development" which will only add up to the economy,*

employment as well as the social development of the area and throughout Mauritius;

v. *The proposed activity is in a well suited site for the proposed development and is in the public interest falling under the small and medium family enterprise.*

e) *The refusal on the ground that the proposed activity is incompatible within its neighbourhood cannot stand since there can be imposition of conditions as may be deemed appropriate by the Respondent as provided by* ***section 117(10)(a) of the Local Government Act 2011*** *and the Respondent failed to do so in all fairness and reasonably.*

f) *The Executive Committee utterly failed to consider that the proposed activity is under the small scale enterprise and thereby failed to apply the relevant and applicable policy guidelines* ***(PPG)*** *under the* ***Municipal Outline Planning Scheme of Curepipe*** *by virtue of the provisions of the* ***Town and Country Planning Act 1954*** *and* ***Planning Development Act****. The Respondent failed to apply the guidelines of the said* ***PPG*** *for the proposed activity which is in favour of such small and medium enterprise development.*

g) *The refusal on the ground that the proposed activity will add up/result to nuisances is wrong because firstly, it is not based on any evidence and secondly conditions can be imposed in order to minimize same.*

h) *The second refusal reason has no legs to stand being given the Respondent failed in their duty to ascertain the existence and reasonableness of the nuisances mentioned with regard to the noise emanation and required parking space as well as a loading and unloading bay.*

i) *The second refusal reason is wrong and unlawful being given the Respondent failed to consider that the Appellant has a waste water disposal outlet. The*

Respondent has therefore acted unlawfully without considering all the pertinent facts of this particular application."

(a) Objections in law

15. Under Ground 1 (a) the provisions of the **Local Government Act 2002** as set out in the Appellant's grounds of appeal are not applicable. It is the **Local Government Act 2011** which was the law applicable at the material time. Under grounds 1 (a) and (d) it is the contention of the Appellant that the Respondent has breached **section 117(6B), (7) and (8)** of the **Local Government Act 2002,** which we shall consider to mean the **Local Government Act 2011,** and committed a procedural impropriety by providing the Appellant with a hearing beyond the statutory time frame and failed to consider that the business falls under SME. Section 117(6B) provides "In the course of the processing of an application under subsection (6), the Permits and Business Monitoring Committee may request the applicant to attend a meeting of the Committee, within the time limit referred to in subsection (7) or (8), as the case may be, for the purpose of giving such clarification or explanation relating to the application as the Committee may determine." The time frame provided under the two abovementioned subsections is within 14 working days of the effective date of receipt of the application. For enterprises registered under the **Small and Medium Enterprise Act 2017**, the time frame is within 3 days.

16. The jurisdiction of this Tribunal as set out under **section 4 (1) of the Environment and Land Use Appeal Tribunal 2012** provides for the Tribunal to hear and determine appeals from a decision of the Municipal City Council under **sections 117(14) and 120C (4)(d) of the Local Government Act 2011 ["LGA"].** Section **117(14) of the LGA** provides that any person aggrieved by a decision of a Municipal City Council under subsections **(7)(b), (8)(b) or (12)** may appeal to the Tribunal. It would therefore be beyond the jurisdiction of this Tribunal to decide on a procedural impropriety as regards a breach of **s.117(6B) of the LGA**. In any event, from our reading of **subsection 6B** the Permits and Business Monitoring Committee ["PBMC"] has a discretion to offer a hearing to

the Appellant. Since it is a discretionary power and not a mandatory one, the time frame provided under **subsections 7 and 8** cannot be taken to be mandatory. We believe that the burden rested at all material times on the Appellant to make a full disclosure to the Respondent that it is registered under the SME scheme. No plausible explanation was given by the representative of the Appellant as to why this was not disclosed to the Respondent. Mr. Ramsahye simply stated that the Council did not ask so he didn't give it. The Council cannot be held responsible for the laches in the Appellant's application. It was submitted by the Council that the scale of the business of the Appellant cannot be said to a Small and Medium Enterprise. We will not surmise on how whether the Appellant was granted an SME certificate whether on the basis that its trade licence which simply making mention "Distributor of General Merchandise" or otherwise. What is of importance is that the Council would have had to make an assessment of the development proposal as a whole taking on board the operations of the store which has been functioning without a BLUP for all these years. This ground therefore fails.

17. Under ground 1(b), it is the contention of the Appellant that the Constitutional rights to fair hearing of the Appellant company were breached since the grounds of objections of the objectors were not provided to the Appellant before the Hearing at the Council. It is beyond the jurisdiction of this Tribunal to adjudicate on issues of constitutionality. If the Appellant was aggrieved that its constitutional rights were breached then its recourse would have to be before Supreme Court. In the present case the Tribunal can appreciate from the evidence on record that not only was the Appellant convened for a hearing, but the son of Mr. Ramsahye and his counsel both had the opportunity to attend, make representations before the Council and they were heard.

18. Under grounds 1(c) and (e), it is the contention of the Appellant that the Respondent failed to notify the Appellant in writing that the application has not been approved within the prescribed time frame provided in **section 117(8) of the LGA** and that by virtue of section **117(11) (a) of the LGA** the application shall be deemed to have been approved by the Respondent for failure of not issuing or notifying the Appellant within

2 working days of the expiry of the due date. For the purposes of the subject-matter of this Determination, **Section 117 (8) of the Local Government Act 2011** [hereinafter referred as the "LGA"] is partly reproduced herewith:

"(8) Subject to subsection (9), where an application for an Outline Planning Scheme or Building and Land Use Permit is made by a microenterprise or small enterprise registered under the Small and Medium Enterprises Act 2017, the Permits and Business Monitoring Committee shall, within 3 working days of the effective date of receipt of the application-

(a) approve the application where it is satisfied...

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

Our reading of the law is that within 3 **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), and, where applicable, on payment of the penalty fee referred to in section 127A(5)(a), 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.]

19. The burden is clearly on the Council to notify the applicant of the refusal within a prescribed time and the legislator had a clear intention of providing a default position where if the Council failed to notify applicants that their application had been rejected and giving the reasons for the rejection, the applicant could show up at the Council within 2 working days of the expiry of the expiry of the due date and pay the relevant fee and the acknowledgement receipt would be the BLUP. There is no evidence on record which suggests that there was any attempt by the Appellant to have the fee paid within the 2 working days after the expiry of the due date. The Appellant chose instead to come before the Tribunal instead where the matter has to be judged on its planning merits. These grounds therefore fail.

(b) <u>On the Merits</u>

20. Grounds 1 (a) and (b) have already been dealt with under ground 1 (b) on the objection in law. This Tribunal has no jurisdiction to adjudicate on matters of constitutionality which is a matter exclusively for the Supreme Court. Furthermore, ground 1 (b) seeks to question the manner in which the Council acted in not having "considered and evaluated subjectively" the application. This is a ground for judicial review, beyond the jurisdiction of this Tribunal. These grounds therefore fail. It was also submitted on the Appellant's behalf that Mr. Cundasamy's evidence was to be treated as mere ipse dixit on the issue that Mr. Ramsahye did not fill out the part regarding SMEs in his application for BLUP since the application form was not produced. We reject this argument. Mr. Ramsahye himself agreed that he had not informed the Council that the Appellant was registered under the SMEDA Act and he also agreed that the Council had no means of knowing this.

21. Under grounds 1 (c), (e) and (g), the Appellant's contention is that the Council failed to consider the imposition of conditions with regard to the second ground of refusal. The imposition of conditions is a discretion that vests with the Council. The purpose of imposing such conditions would be so that the Council can maintain control over the operations of the activity even over a period of time. In **<u>Newbury District Council</u>**

V Secretary of State for the Environment [1981] AC 578, the test for validity of a condition was laid out. The first criterion for a condition to be valid is if has a planning purpose. The point we seek to make is that it is totally up to the Council to make a reasonable assessment on the basis of the application before it as to whether the proposed development can be allowed to proceed and any nuisance be mitigated with the imposition of conditions, should the context justify that the imposition of such condition will achieve the purpose of mitigating the nuisance in the long-term, without causing any disruption to the existing character and amenity of the area. It is of the view that the imposition of condition will not serve any purpose in view of the fact having the proposed development in itself will be disruptive to area, then it cannot be challenged unless this decision was so unreasonable that no reasonable Council would have come to such a conclusion.

22. In the present case the Council has refused the proposed activity as a whole and justified its stand on account of it being incompatible with residential neighbourhood and detrimental in terms nuisance. The prerogative vests with the Council and the reasoning is not unreasonable on the application of planning principles to the existing context. There is on record evidence to substantiate the grounds raised by the Council not only from the testimony of Mr. Cundasamy and the objector, the sister-in-law of Mr. Ramsahye but also real evidence showing the long queue of lorries in the residential area. The evidence of Mr. Ramsahye himself as regards the erratic times that his trucks drive and out of the neighbourhood which we believe, would be disruptive to a residents in the vicinity. One should not lose focus of the fact that the area is a residential one, as per the OPS. Mr. Cundasamy was very clear on certain saliant points, that is, that Mr. Ramsahaye does not hold any permit for neither cold room, nor store and warehouse and that the fee he had been paying is only in respect of the SMEDA certificate is for "Distribution of General Merchandise" and the trade fee is attached to the vehicle as a vehicle of distribution. He also stated that the Council would not require a BLUP for food delivery in a vehicle. The activity of distribution, as we understand it from his explanations, has nothing to do with storage because one can take merchandise from one place and have it delivered in shops but that the activity that is proposed and being done by the Appellant would actually

qualify as a store and warehouse for which no BLUP has ever been issued. He confirmed to the Tribunal that Mr. Ramsahye only has a residential BLUP and prior to this application no application for conversion to commercial use has been done. We therefore find that there was no ground for the Council to impose any condition when it was of the view that the activity would be incompatible with the residential use. This ground therefore fails.

23. Under grounds 1 (d) (i) to (v) it is in essence the contention of the Appellant that the Committee of the Council failed to take on board material considerations in assessing the application in that the nature of the activity of the Appellant would have a positive effect on the residential amenity since it involved in the distribution of food and vegetables to the local market and hotels, that the 2 cold rooms to be used which are the subject matter of the application are in relation to an already existing business of the Appellant of food distribution for which it has a trade licence and creates employment which will be beneficial to the economy, that the proposed development will not have any bad neighbour impact as regards nuisance and that the activity is well suited under **policy ID2** and is in the public interest.

24. We believe we had already dealt with some of these issues in the above paragraphs and we will therefore simply state that our reasoning remains the same. The Council took on board the fact that the subject site is located in a residential area having the character and amenity of one. It also took on board the fact that there were and still are objections by neighbours living in the vicinity following a site visit It considered the planning policies and the fact that the area is within settlement boundary. It also considered the fact that the Appellant has never had a BLUP for the store that it has been operating on residential premises and that Appellant has wrongly been justifying its activities on the basis of a trade licence for distribution of merchandise. The Council also took onboard the fact that the Appellant had already been operating the cold rooms without a BLUP and had there not been objections the development, there would have been no application for a BLUP by the Appellant. We believe that there is ample evidence on record to show that the Council took on board all material considerations.

25. As regards the case of the Appellant, on the other hand, we fail to see in what way the business of the Appellant has brought about any "positive effect" on the residential amenity when the representative of the Appellant himself admitted that the Appellant's fruits and vegetables are not sold on the premises or to those living in the locality. The Appellant's lorries distribute them to supermarkets, restaurants and hotels albeit a couple of supermarkets and restaurants do fall in the region of Curepipe and Floreal. This is a far cry from what is categorized as serving the local community in planning terms, which really depicts the area where the activity is being carried out and people in the neighbourhood can normally walk to the development site and benefit from the development in some way.

26. The fact that the Appellant has a trade licence for distribution of merchandise does not in anyway entitle it to have a store or cold rooms for that matter. Mr. Cundasamy explained how the two are distinct issues and that distribution only involves transportation via vehicles and does not require a BLUP for store or cold room. That is why, as he explained, whether having a certificate under SMEDA Act or no certificate, would be irrelevant to the Council in its assessment. We have understood him to mean that what matters is that the activity of the Appellant should be compatible and acceptable in the residential neighbourhood, which in this case was not according to the Council.

27. While we do appreciate that Mr. Ramsahye and his sons have been operating this family business for a long time and that this is the source of their livelihood, this does not in any way absolve the Appellant from the requirement of having a BLUP for the store. The spirit of the **Business Facilitation Act 2006** is to facilitate business provided that the correct channels have been followed and the Council has had the opportunity to assess the planning merits of the development, which is a key element absent in this present case. The house of Mr. Ramsahye was clearly being used as store. Photographs were produced by him to show the where the loading and unloading were done and the drains of the store for sewage. The usage is basically that of storage but for longer terms so that the fruits and vegetables stay fresh for a longer term. The

fact remains that the original storage activity was not granted planning acceptance. The application is for cold rooms and these do not, in our view, contribute to the economy. As regards the impact on the residential neighbourhood and application of **policy ID2 of the OPS**, this has been dealt with above. These grounds therefore also fail.

28. It is the contention of the Appellant under ground 1 (h) that the Respondent failed to apply the relevant planning guidelines which should have led it to come to a favourable conclusion in respect of the development which is a small and medium enterprise. The Appellant seems to be harbouring under the misapprehension that the development being an SME should therefore receive approval as categorization as an SME is synonymous with 'home working' under **policy ID2 of the OPS**. We do not accept this contention as the categorisations whilst having some overlap, are distinct and not synonymous. The setting up and operation of cold room which in essence is storage facility having its own requirements for its machinery, falls within the Industrial cluster, and therefore needs a BLUP since there is a part-change in the activity from residential to industrial.

29. Mr. Ramsahye explained it was a family business. We understand the pressures of a business connected to tourism and food and beverage. The scale of the activity with 15 workers and 8 delivery lorries and storage room of 3000 sq.m are all factors to be taken on board and raises doubts as to whether this can be considered a small-scale enterprise or homeworking activity as per **Policy ID2** bearing in mind that the scale of operations of the Appellant is island wide. The kind of activity that the Appellant engages in involves a daily show of lorries turning up and crates being loaded and disembarked. The objector explained the nuisance caused by the piling of crates and the noise made by the workers talking and how the vehicles are often washed on the streets. The Appellant's case is that the lorries have a parking area and that loading and unloading is done within the confines of the premises of Mr. Ramsahye. Even if this is the case, it does not preclude these daily activities of the Appellant from being a source of constant nuisance to the objector and this could not be disproved by the Appellant. The vehicular and human traffic generated in a residential area can

reasonably cause annoyance and disturbance especially if their lorries drive in anytime between 11am to 4pm on weekdays and on weekends and public holidays albeit for reduced hours.

30. The Appellant argued there is bad blood between him and the objectors. This does not affect our finding. We believe Mrs. Ramsahye was a witness of truth. Her version was, for the most part, consistent. The Tribunal had a clearer picture, through her testimony, of the kind of daily annoyance being faced by some residents in the vicinity who could not enjoy the peace and quiet of their homes even on weekends as confirmed by witnesses as well as the photographs. One must not lose focus of the fact that primarily the area is a residential one and that should be conserved but there are exceptions to the rule when some types of activity may be permitted. In the present case the Council found that the application does not fall within those exceptions and hence cannot be granted and also provided reasons supported by evidence, which we believe were credible. This ground also therefore fails.

31. Under grounds (h) and (i), the operation and usage of the 2 cold rooms may not in themselves cause issues. Infact we agree that there is no evidence on record to show that having the cold rooms would in any way cause or add to existing issues of "inappropriate waste water disposal and traffic disruption due to lack of parking space/loading/ unloading bay and present on-street parking". This being said we understand that having the cold rooms will favour the existing activities which are being carried out on the premises hence perpetuate the nuisance being caused to the neighbours.

32. The Appellant 's contention is that the refusal letter sent by the Council is dated 14th May 2018 where as it was posted on 31st May 2018 as evidenced by Annex B1 and B2 of the Statement of Case. The evidence is not clear in as much as the writing on the photocopies seem faint and the original envelope has not been produced. It will be risky to rely on this evidence.

33. For all the reasons set out above, we find that the Council came to the right decision. The appeal is set aside. No order as to costs.

Determination delivered on 3rd May 2021 by

Mrs. J. RAMFUL	**Mr. P. Manna**	**Mr. J. Aubeeluck**
Vice Chairperson	**Member**	**Member**