

**IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

**ELAT 1945/20**

**In the matter of:**

**Societe Phoenix Garden**

Represented by Hassamal Sunil Mohan

**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 an Outline Planning Permission (hereinafter referred to as an “OPP”) for the proposed construction of a building consisting of a basement, ground +5 floors to be used as parking, offices and 11 apartments at the corner of Hazareesingh Lane and Dr. Xavier Nalletamby Avenue, Phoenix. The grounds of refusal set out in a letter dated 19<sup>th</sup> March 2020 under the signature of the Chief Executive addressed to the Appellant are as follows:

“1. THE PROPOSED DEVELOPMENT IS FOUND WITHIN SETTLEMENT BOUNDARY AS PER OUTLINE SCHEME FOR TALL BUILDINGS, POLICY TB2, THERE SHOULD BE A PRESUMPTION AGAINST APPLICATION FOR TALL BUILDINGS OF MORE THAN GROUND+3 FLOORS IN A PREDOMINANTLY RESIDENTIAL ZONE.

2. THE EXISTING ROAD NETWORK CANNOT CATER FOR THIS TYPE OF DEVELOPMENT.
3. A TRAFFIC IMPACT ASSESSMENT HAS NOT BEEN SUBMITTED.
4. STRONG OBJECTIONS HAVE BEEN RECEIVED AGAINST THE PROPOSED DEVELOPMENT.”

2. The Appellant was represented by Mr. Sunil Mohan Hassamal and Mr. Cundasamy, the Head of the Planning Department of the Council deponed on behalf of the Respondent. Both parties were legally represented. Mr. Cundasamy informed the Tribunal that the Council would only sustain and substantiate the first ground of refusal and last 3 grounds contained in the letter of refusal were dropped. Consequently, the Appellant also dropped the corresponding grounds (f), (g) and (h) from their grounds of appeal, the remaining grounds being reproduced below:

*“(a) The Respondent is mala fide in that the Appellant verily believes that the decision purportedly dated 19<sup>th</sup> March 2020 has only been posted on or about 26<sup>th</sup> May 2020 and notified to the Appellant on 27<sup>th</sup> May 2020. The Appellant contends that the Respondent has failed to communicate its decision to the Appellant within the statutory delay as provided by the Local Government Act 2011.*

*(b) The proposed development by the Appellant respects all side and rear setbacks as per PPG, takes an ethos of sensitive design to both environment, local and neighbouring properties.*

*(c) The hearing of the 11<sup>th</sup> March 2020 that took place at the council room of the Respondent was unfair towards the Appellant in the way, manner and form in which it was conducted.*

*(d) One member of the Respondent’s panel at the hearing of the 11<sup>th</sup> March 2020 showed apparent bias against the proposed development by the Appellant.*

*(e) The decision of the Respondent is wrong in that it is based on a “presumption against application of tall buildings of more than ground + 3 floors in a predominantly residential zone.” The land in lite is not far from the major shopping complex of Jumbo Phoenix and Phoenix Central. There are already offices on Dr. Xavier Nellatamby Avenue and on Palmerstone road. In so far as heights are designed, the setbacks have been applied as per PPG Tall Buildings dated November 2004. With the construction of the nearby motorway and transport hubs the area’s character is invariably changing...”*

3. 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.

I. **CONTEXT ANALYSIS**

4. By way of context, the subject site is a plot of land of an area of 3919.94 sq.m situated at the corner of Hazareesingh Lane and Dr. Xavier Nalletamby Avenue, Phoenix. The proposed development is the construction of a building consisting of a basement, ground floor +5 floors, parking area, offices and 11 residential apartments. The subject site is situated opposite Mantra Shop along Dr. Nalletamby Avenue which is a one-way double lane road towards Vacoas while Hazareesingh Lane is a narrower road but allows for two way traffic. In fact, when he testified about the surrounding neighbourhood, the Head of the Planning Department of the Council explained that Dr. Nalletamby Avenue starts from the Jumbo roundabout and goes up till the traffic lights where the Anglican Church and the Masonic Building stand. Judicial notice can be taken of the fact that some road works are ongoing at the moment not far from the subject site in relation to the construction of the Metro Express.

II. **THE GROUNDS OF APPEAL**

5. Under the first ground, it is the contention of the Appellant that the Respondent acted in bad faith by failing to communicate to the former its refusal within the statutory time frame provided in the **Local Government Act 2011**. This Tribunal derives its jurisdiction from the **Environment and Land Use Appeal Tribunal Act 2012** ["ELUAT"]. Under **s. 4 (1) (a) (ii)** of the Act the Tribunal shall hear and determine appeals from a decision of a Municipal City Council, Municipal Town Council or District Council under **sections 117(14) and 120C (4)(d) of the Local Government Act 2011**. This means assessing the decision of the Council and consequently, giving a Determination. The Tribunal has no jurisdiction to make any assessment of *male fides* in the decision-making process, which is a ground for judicial review before another forum.

6. Judicial notice can be taken of the fact that on the 19<sup>th</sup> March 2020, the Prime Minister announced that Mauritius would be in “sanitary” lockdown for two weeks as from 6.00am the following day, that is 20<sup>th</sup> March 2020. The **Covid-19 (Miscellaneous Provisions) Act 2020** was enacted shortly after the lockdown which made provision for extension of time for a panoply of legislation. **Section 39 of the Interpretation and General Clauses Act (“IGCA”)** was amended to add s.39A which provides for Extension of time during COVID-19 period and it is provided under subsection “(7) Where, under an enactment, a time is imposed to serve a notice or any other document and the time expires, or falls wholly or partly, during – (a) the COVID-19 period; or (b) a period of 30 days after the COVID-19 period lapses, the notice or document may, notwithstanding the time imposed, be served not later than such period as may be prescribed by regulations under that enactment”. The COVID-19 period has been defined under the 2020 Act as to mean the period starting on 23 March 2020 and ending on 1 June 2020 or ending on such later date as the Prime Minister may prescribe by regulations. The point we seek to make here is that wherever a time limit has been imposed under an Act of Parliament, the 2020 Act has frozen the time line for the period which amounts to the “COVID-19 period”. In the present case the decision of the Council was taken and a letter dated 19<sup>th</sup> March 2020 just before the sanitary lockdown was prepared but could not be communicated due to the lockdown as explained by Mr. Cundasamy, it explains the lag in the communication of the decision of the Council to the Appellant and the time line for the communication of such decision was frozen by the application of the 2020 Act. This ground therefore fails.
  
7. Under the second ground of appeal, ground (b) it is the contention of the Appellant that the proposed development respects all setbacks as per PPG and the design will be conducive to the environment and surrounding properties. This is a non-issue as far as the Respondent’s refusal is concerned. Issues pertaining to the design of the building blending with the environment and respecting the setback may be a plus point for the Appellant’s development but are not material issues for the purposes of this matter. This ground therefore fails.

8. Under the third ground, ground (c), the Appellant's contention is that the hearing afforded to the Appellant by the Council was "unfair in the way, manner and form in which it was conducted". As set out in paragraph 5 *supra*, the jurisdiction of this Tribunal is clearly set out in the law. This ground of appeal as couched seeks to challenge the manner in which the decision-making body proceeded with the hearing. This again, is a ground for judicial review of an administrative body's decision-making process which may be challenged before another forum. This ground is therefore set aside.
9. Under the fourth ground, ground (d), it is the contention of the Appellant that at the hearing before the Council one member showed apparent bias against the proposed development. Bias and apparent bias are grounds for challenging the impartiality of an administrative body by way of judicial review which is beyond the jurisdiction of this Tribunal. If the Tribunal is to adjudicate on this issue, it will be deemed to be acting *ultra vires*. This ground is set aside.
10. Under the fifth ground, ground (e) of the grounds of appeal, it is the Appellant's contention that the decision of the Respondent is wrong in that it is based on a "presumption against application of tall buildings of more than ground + 3 floors in a predominantly residential zone." The Appellant's case is that the property *in lite* is not far from Jumbo Phoenix, a major shopping complex, and Phoenix Central and that offices already exist on Dr. Xavier Nalletamby Avenue and on Palmerstone road. The Appellant's version is that the setbacks as regards height have been applied as per PPG for Tall Buildings and that with the construction of the nearby motorway and transport hubs the area's character is changing.
11. The proposed development is a mixed development, as per the Appellant's version, in that the proposed building will house a parking area of 63 slots in the basement, the ground, first, second, third and fourth floors will have offices while the fifth floor will consist of residential apartments. Parking space is adequate as the Appellant owns a plot of land along Palmerstone Road, Phoenix which can be used as parking area. The argument put forward by the Appellant for having a building of more than four floors

is that there are tall buildings of almost 17 storeys, comprising of residential and commercial units, in the vicinity of the “Jumbo” roundabout, that along Dr. Nalletamby Avenue there are buildings of ground +3 floors and that along Palmerstone road, there are commercial activities as well as in Morcellement Boucan which is close the site *in lite*.

12. This ground of appeal is in relation to the first ground of refusal by the Council. The Respondent has refused the OPP on the basis that the proposed development contravenes the Policy TB2 of the Outline Planning Scheme of Vacoas-Phoenix. Policy TB2 is reproduced hereunder in italics:

***TB 2: Tall Buildings in Residential Zones***

*There should be a presumption against applications for tall 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 buildings up to four floors (G+3) should be favourably considered in predominantly residential zones if the development is in compliance with the following requirements for:*

- *setbacks*
- *onsite/offsite sewage disposal and storm water drainage*
- *parking space and manoeuvring*
- *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 in PPG 1.*
- ii. The minimum plot size for high-rise residential/ apartments should be not less than 2110 sqm.*
- iii. Proposals 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 the same comprehensive Design Statement and TIA referred to under Policy TB 1.*

13. Mr. Cundasamy testified that a site visit had been made in this case and explained how the area was built up. The witness described the area as bearing predominantly low-density residential buildings, on both sides of Dr. Nalletamby Avenue, comprising of either ground or ground +1 floor with the exception of one apartment building which comprises of ground + 2 floors. He explained that prior to the existence of the OPS and its policies which came in 2015, the Council issued several permits for a number of buildings, for instance ground +4. To a question put to him by the Bench, the witness stated that the proposed development will be bulky for the skyline which we understand to mean that the building will be overbearing and dominate the skyline.
14. The **PPG 1 Design Guidance** defines a tall building as “any structure that breaks the skyline or is significantly taller than its surrounding built fabric.” **Policy TB1** offers some clarification as regards Tall buildings in that they “*introduce greater levels of use and activity to a site and therefore their impact on traffic and transport infrastructure (particularly highway capacity, parking and public transport) and existing activity and density patterns needs careful consideration. As a result of their height, they are highly visible and can therefore contribute to, or detract from, the quality, image and identity of their setting.*” The area is within settlement boundary which favours residential development and although it falls within the township of Phoenix, that area where the subject site lies cannot be described as a typical dense urban area with skyscrapers, towers or high-rise buildings. In fact, the Council’s representative has testified that the buildings surrounding the subject site are mostly residential with some 20 low- rise residential buildings. He explained that just after the subject site there is Impasse Tuyau and that along this lane and Hazareesing Lane there are low rise residential buildings on both sides of the road. The issue stems mostly from the height of the proposed building and its contextual relationship with the buildings in the surrounding neighbourhood. With the height of the building, comes also issues of concern such as overshadowing, overlooking, at times even adverse effects on telecommunications which is why such buildings need to meet the planning and design objectives depending on their context so that they enhance the surrounding rather than dominate the skyline. In this case we are given to understand that there were objections received from residents living in the locality, albeit that this is not a ground

that the Council is relying on, but the fact cannot be ignored by the Tribunal. The proposed development being in a residential zone, due consideration must be given to how the residential surrounding will be impacted by the proposed development. In a residential area one has to be able to have a peaceful enjoyment of one's property without being disturbed by constant flow of human and vehicular traffic. It is not just in terms of the floors but rather the amount of activity generated per square feet of area with the four floors of offices and 11 residential units. Despite Dr. Nalletamby road being one of the main arteries linking the stretch of Jumbo roundabout to Vacoas and St. Paul, the area surrounding the subject-site being predominantly residential has its own amenity and character. This is supported by the evidence of Mr. Cundasamy who explained that the application of **Policy TB2** is not in favour of the proposed development because the policy has been put in the Outline Scheme to protect the neighbourhood, to protect the existing residential buildings and residential morcellement comprising of ground, ground +1, and ground +2 floors.

15. Some insight can be obtained from **Policy TB1** of the OPS which provides that "Tall buildings are likely to be acceptable in areas where they provide a focus to medium and higher density mixed use development." Given the character and amenity of the area it is far from being of "medium and higher density mixed use". The representative of the Appellant testified that he believed with the development happening in the area due to the implementation of the Metro Express project, there will be a market for the development that the Appellant proposes to bring about in the area. As per the Head of Planning Department's version, less than 10% of land users are non-residential on the stretch of Dr. Nalletamby road from Hazareesingh Lane to the junction leading to St Paul and Vacoas, which is about 150 metres in length. According to the Policy TB2, there is a general presumption against tall building within low density, low rise residential areas. That is, there should be a presumption against applications for tall buildings of more than 4 floors as in predominantly residential zones where more than 90% of the existing housing is limited to 2 floors. This is the case here and we believe that the Council has adequately justified its stand as regards the height of the building not meeting the requirements of the applicable policy.

16. The Appellant's representative stated that he has an office space in a building along Dr. Nalletamby Road which is has ground + 3 floors. The Head planner testified that the Council has not issued permits for commercial buildings as such. They are all home based activities. In that whole area apart from these businesses or offices the rest are residential. The witness maintains that there are no high-rise residential buildings in that area as he went for a site visit. Even if there is a building of ground + 3 floors in the vicinity, it does not, in our view, offend **Policy TB2**.
  
17. The improvement of the road network in the vicinity was made a live issue and the position of the Appellant is that the enlargement of the roads would cater for a denser traffic flow. Under cross-examination Mr. Cundasamy agreed with Counsel for the Appellant that the area is undergoing a lot changes especially with regards to road network and the Metro Express but he also later stated that the road network does not change the character of the area and Morcellement Boucan and that Morcellement Hazareesingh Lane remains a residential morcellement. Although enlargement and reprofiling of Dr. Nalletamby road are to be done, he explained that the re-arrangement and alignment of road network is not to cater for higher vehicular flow. It is being done rather to counteract the Metro Express alignment which is encroaching and taking away part of Sivananda Avenue.
  
18. The Appellant's representative also questioned the fact that in the past, in 2007, the Council had granted another organization a building permit to construct a ground + 4-storeyed building along Dr. Nalletamby Avenue but that the latter was now refusing to grant planning permission for a building on an even bigger plot due to height restrictions. As explained above by the Council's representative, the policies under the OPS only came into existence in 2015. Prior to that the Council may have issued permits which would not be the case now. Mr. Cundasamy even stated that if the proposed development would have been ground +3 floor, the Council would have considered.
  
19. The four requirements provided under **Policy TB2** are not applicable in the present case as they apply only to buildings which are up to ground + 3 floors provided the

development is in compliance with the recommended setback on site or store sewage, disposal, store water drainage, parking space and manuring and landscaping.

20. According to Counsel for the Appellant, the presumption in **Policy TB2** should apply in favour of the development since the legal status of **TB2** is guidance and not an enactment in an Act of Parliament. We do not agree with this proposition. Planning instruments, by their very nature are not drafted in mandatory terms because planning is for the future. However, they are categorized as soft laws which should be respected unless there is strong justification to derogate from it. Policy frameworks should be understood and applied correctly: Beau Songe Development Limited v The United Basalt Products Limited and another [2018] UKPC 1.

21. 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 17<sup>th</sup> May 2021 by

**Mrs. J. RAMFUL**

**Mr. P. MANNA**

**Mr. R. SEEBOO**

**Vice Chairperson**

**Member**

**Member**