BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2037/21

In the matter of:-

TIMOL Hamud

Appellant

v/s

City Council of Port -Louis.

Respondent

DETERMINATION

1. This is an appeal against the decision of the Respondent ["the Council"] for having refused the granting of a Building and Land Use Permit ["BLUP"] for the construction of an additional second floor to an existing one-storeyed residential building at no.7, Swan Street, Port Louis. The Council's sole ground of refusal as posted on the National E-Licensing System ['NELS'] and received by the Appellant on the 14th July 2021 is that *"Written consent from immediate land owners together with copy of their NIC have still not been submitted for the proposed development at less than 2000mm from common boundary line."*

2. By way of background to the case, the Appellant applied for a BLUP for a ground + 2 floors in January 2012 which was granted, as per Doc A. The construction of the building proceeded but in phases. Due to a failure in compliance with the construction not being in line with the BLUP issued in 2012 to the Appellant, a notice was served on him and the first BLUP lapsed. In June 2016 in respect of the same property, another BLUP was granted for construction of a ground floor for residential purposes, as evidenced by Doc B and in December 2017, a further BLUP was granted for the addition of a first floor also for residential purposes, as evidenced by Doc C.

3. Both parties were legally represented. Mr. Santokee, Head of the Land Use and Planning Department of the Council deponed on behalf of the Respondent. The grounds of appeal are being reproduced hereunder. We have duly considered the evidence on record as well as submissions. Grounds of appeal 1,2,3,4 and 5 will dealt with together as they are interrelated and ground 6 will be dealt withs on its own.

I. GROUNDS OF APPEAL

1. *The decision rejecting the Appellant's application by the Respondent as notified by the latter is wrong in principle in as much as the legal basis of the consent requirement is not indicated.*
2. *The decision of the Respondent notified to the Appellant is shrouded in uncertainty in as much as the Appellant is left in the dark regarding the legal instrument under which the immediate owner's consent is required with regard to the specific 2000 mm requirement from common boundary line, the Appellant having to proceed by guesswork with his appeal.*
3. *The Respondent was wrong to ask for consent from immediate land owners for the proposed development at less than 2000 mm from the common boundary line.*
4. *The Respondent's decision is erroneous in as much as it has failed to take into consideration that, as per the Building Control Act, the required setback from the common boundary line is 900 mm and not 2000 mm.*
5. *The Respondent failed to make a proper assessment of the application in as much as it, the Respondent, had already issued the Appellant with an original permit regarding a development of the same nature on the same plot of land in 2012, as per approved plans respecting a setback of 900 mm from common boundary lines.*
6. *The Respondent failed to give sufficient consideration to the existing context of development in the City of Port Louis where there are innumerable examples of constructions at second floor at 900 mm from common boundary lines, including the Appellant's neighbours.*

(a) <u>Under Grounds 1,2,3,4 and 5</u>

4. It is the main contention of the Appellant under these grounds that the Respondent was wrong to impose a 2000mm setback from the common boundary line with the neighbours, unless the latter's consent had been obtained, as there is no legal basis for the requirement of such consent and there is no legal basis for the imposition of a setback of 2000mm since the law provides for a setback of 90cm, for which provision has been made by the Appellant, and that the Respondent has in the past granted a BLUP for Ground+2 floors for residential purposes to the Appellant.

5. The **Design Sheet** for **Individual Household Development** set out in **Planning Policy Guidance 1 ['PPG1'],** which is the applicable policy here since we are dealing with residential development, provides that for buildings with a minimum height of 7.5m there should be a setback of at least 2 metres from the side boundary as per the table which sets out the *"indicative building setbacks related to height"* at paragraph 3.2. The bottom of the same table also stipulates *"single storey buildings should generally be no less than 0.9m from the side boundary but account must be taken of the likelihood of extending to provide additional floors. If this is likely then increased setbacks indicated above should be provided."* In the present case, we are dealing with the construction, not of a single storey building, but of a second floor where the building height will amount to 9.27 metres as per the evidence. Hence, the corresponding setback to be left as per the PPG is 2 metres from the side boundary. The *raison-d'etre* of setbacks, as per the PPG, is that they serve *"to protect the amenity of adjoining properties, to provide spatial barriers against fire spread, to reserve utility and road corridors, and to assist in the establishment of street character"*. There are several factors provided in the Design Sheet which should be considered for any derogation to the indicative setbacks set out in the table found at paragraph 3.2 namely any existing alignment, the siting and scale of the building, the safety restrictions such as overhead power lines and other utilities, day light penetration, natural ventilation, privacy protection and noise, overhanging roofs and light weight window canapes amongst others. No evidence has been adduced that would warrant any derogation on the basis of the above factors.

6. The Appellant's contention is that several buildings in the vicinity of the subject site, including the building found in front of his property when facing Volcy Pougnet Street, is a two storeyed building, thus indicating that the Respondent has allowed other buildings to be constructed without a setback of 2 metres as is being imposed in his case and therefore to justify a derogation from the application of the above-mentioned policy of the PPG 1. The head of the planning department of the Respondent explained that those buildings are found in the core zone of Port Louis and close to Dr. Jeetoo Hospital where buildings with up to even five storeys are allowed. Conversely, the Appellant's property is found in a residential area as per the **Outline Planning Scheme ['OPS']** where a maximum of 3 storeys are allowed according to his testimony, which was not successfully challenged. The fact of the matter is that the Appellant did not produce any copies of BLUPs granted to any of the owners of the buildings he referred to in the course of his deposition nor did he have any witnesses to substantiate his version that they are the lawful holders of BLUPs granted by the Council for buildings of two or more storeys. In addition, there is no evidence produced for our appreciation that these constructions are post 2004, to show that they were granted BLUPs with flexibility applied on the required setback despite the existence of the planning instruments, PPG and the OPS. In the absence of clear and conclusive evidence before us, we are not ready to surmise on these issues to conclude that the Council has not applied the policy fairly or it has done so with disparity and without legal basis.

7. After the coming into force of the OPS, there is a need to apply the policy as they are unless a derogation as provided within the policy is justified. The evidence on record shows no such need or justification for derogation. The **PPG1** provides that all setback from the side boundary must be 90 cm for one storeyed building, that is, Ground + 1 floor, and that means at ground floor also the requirement is 90 cm and the setback allowed on the first floor from the side boundary is also 90 cm. However, the setback allowed on the second floor from the side boundary where the height of the building is more than 7.5 metres, is 2 metres. Buildings that have been constructed prior to 2004 were allowed a derogation, as per the letter produced by the Respondent's witness emanating from its parent Ministry, the Ministry of Local Government dated

16th November 2015, on the basis that *"for buildings put up prior to November 2004, which have not provided for structurally accepting greater setbacks for upper floors, but which can structurally cater for vertical extension on the same alignment as the existing ground floor, the addition of first and second floors only on the same alignment as the existing ground floor may be allowed."* Some conditions have also been attached to these case scenarios as per the letter. In our view, although the extension of the second floor of the Appellant's building can be in alignment with the other buildings along Swan Street, there is a need for the Appellant to observe a setback of 2 metres on the second floor from the common side boundary line of the contiguous buildings.

8. As mentioned earlier, the setbacks have their importance in planning law, and it is important to act a spatial break in order protect adjacent properties in case of a fire. The Council's stand is that if the neighbours' consent to the derogation of the prescribed setback, the Respondent will grant the Appellant the BLUP. If a legally enforceable provision is in place to protect neighbouring properties, a waiver of such provision can only be given by persons who have the right to waive it, in other words the ones whose rights may be affected or prejudiced. In this case it is the neighbours, whose property may be affected, who need to waive the provision of the 2-metre setback so that they cannot claim to be prejudiced by the development in the future. **S. 10 (2) (c) of the Building Regulations 1919** to the **Building Act GN 210/1919**, as amended, provides for the derogation in the distance allowed between a building and a common boundary line where there is a distance of 1.8m or more between the 2 adjoining buildings, *"the owner of the adjoining building has given his consent"* and the local authority has approved it. The Council was legally justified to seek such consent from the Appellant since the latter sought to observe a setback of only 90 cm from the common boundary line with the neighbours as opposed to the required 2-metre setback.

9. The Appellant's stand is that the Council previously granted him a BLUP for Ground+ 2 floors allowing him to observe a setback of only 90 cm from the boundary line. We do not read this in the BLUP dated 2012 produced and marked as Doc A. However, this

was not disputed by the Council. We are of the view that if that was the case, it was a wrong decision of the Council's which we do not condone and will not follow. The Council's decision in the present instance, motivated by the provisions of the PPG is a legally sound one. These grounds therefore fail.

(b) <u>Under Ground 6</u>

10. It is the contention of the Appellant under this ground that the Respondent failed to consider the context of the development where there are several examples of constructions in Port Louis comprising of buildings of 2 floors with less than 90cm setback from common boundary line, including the Appellant's neighbours. From the photographs of buildings and the plans of the locality produced by the Appellant in support of his case, marked set H and set J, we note that most buildings with 2 or more storeys are not exactly adjacent to each other with the exception of 3 pairs of buildings. Out of the 3 pairs, photos of 2 pairs have been produced and marked Doc J1 and J2 respectively. From these pictures, the exact distance between the buildings cannot be ascertained although it is the contention of the Appellant that these is no two-metre setback between them and it can be noted that the buildings have been constructed in vertical alignment with their respective ground floors. The issue was addressed earlier with regard to derogation allowed in cases of buildings that date back to prior 2004. No evidence has been adduced regarding how far the ground floors of these buildings date back to, including the Appellant's neighbour's property, therefore, we cannot surmise on the issue.

11. The Appellant produced a letter where he claims to have written to the Chief Executive of the Council dated June 2021 wherein mention is made of a person who has been granted a BLUP in 2019 at Arsenal Street, Port Louis for an extension for a second floor with a setback of less than 2 metres from the common boundary line. We are not able to act on the contents of this letter because there is no acknowledgement from the Council to demonstrate receipt of this letter and there is no conclusive evidence to assess the merits of its content. It would, in our view, be unsafe to act upon such flimsy evidence and we will not surmise on this issue. This ground also fails.

12. For all the reasons set out above, we find that the appeal is devoid of merit. The appeal is set aside. No order as to costs.

Determination delivered on 7th June 2022 by

Mrs. J. RAMFUL-JHOWRY	**Mr. S. MOOTHOOSAMY**	**Mr. I. SUFFEE**
Vice Chairperson	**Member**	**Member**