

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2079/22

In the matter of:-

Shelby Investment Ltd.

Appellant

v/s

Municipal Council of Curepipe

Respondent

DETERMINATION

1. This is an appeal against the decision of the Respondent [“the Council”] for having rejected the application of the Appellant for the construction of a reinforced concrete building of lower ground, ground and first floors to be used for residential purposes including a watchman cabin and boundary wall of 1.8 m height at Thevenau Avenue, Floreal. The sole ground for refusal communicated to the Appellant vide the National E-Licensing System is:

“The subject site is found adjacent to the plot of land belonging the Embassy of the United States of America. As per circular letter, Ref MLG/POL/BLP/5 from Ministry of Local Government and Disaster Risk Management, application for Building and Land Use Permit within a radius of 200 m from sensitive locations (diplomatic missions) has to be kept in abeyance.”

2. The grounds of appeal as per the Appellant’s notice of appeal are as follow:

“

(a) The decision of the Respondent to reject the Appellant's application bearing reference BLP1-MCC-2021-863 is wrong in law and/or unreasonable.

- (b) The Application bearing reference BLP1-MCC-2021-863 ought to have been approved by the Respondent as the proposed development by the Appellant complies with all relevant Law, Regulations and Planning Policy Guidance (PPG).*
- (c) The Respondent was wrong to rely on the Circular Letter, Ref MLG/POL/BLP/5 from the Ministry of Local Government and Disaster Risk Management to reject the Application because that Circular Letter does not have the same effect in law as an Act of Parliament, a Regulation by Minister or a Planning Policy Guidance.*
- (d) The decision of the Respondent to reject the Appellant's application BLP1-MCC-2021-86 violates the Appellant's Constitutional Rights under Section 8 of the Constitution."*

3. Both parties were legally represented. The Appellant was represented by its Director, Mr. Jean Michel Stephane How Hong, and the project manager, Mr. Mungur, deponed on behalf of the Appellant. Mr. Cundasamy, Head of the Planning Department, deponed on behalf of the Respondent. We have duly considered the evidence on record as well as submissions of both Counsel.

I. CONTEXT ANALYSIS AND BACKGROUND

4. The subject site is located at Thevenau Avenue in Floreal and it is admitted that the site is adjacent to the US Embassy, hence within a 200 metre-buffer zone of the Embassy. The area is a highly residential one and the development proposal is for the construction of a residential building with a watchman's cabin and a boundary wall. From an extract of a google map of the location, Doc B, produced by the Appellant, the presence of a few buildings is noted around the subject site and the US Embassy and this was confirmed by the Appellant's representative. It is undisputed by the representative of the Respondent that the application at hand is a meritorious one based on planning principles and with no objections having been received against it from any neighbours, including the US embassy. The sole ground upon which the Council affirms that it had rejected the application is on the basis of a directive issued to all local authorities *vide* a letter dated 9th November 2021 emanating from their parent ministry, the Ministry of Local Government and Disaster Risk Management.

5. A relevant extract of the abovementioned letter is reproduced hereunder:

“Government is giving active consideration to enforcing security measures around sensitive locations, including Diplomatic Missions, Tourist and Heritage sites. To this effect, the Ministry of Housing and Land use Planning would come up with appropriate guidelines in due course.

Accordingly, Local Authorities are, for the time being, requested to keep in abeyance all applications for Building and Land Use Permits within a radius of 200 metres from sensitive locations, as specified hereunder:-

- i. Diplomatic Missions as per the list at **Appendix**...”*

It is apposite to note that an Appendix was also produced with the letter where the residential address of the Head of Mission, of the Embassy of the USA has been provided as “3, Theveneau Avenue, Floreal”.

II. GROUNDS OF APPEAL AND PLANNING MERITS

6. The grounds of appeal will all be dealt with together since they are all related save for the 4th ground of appeal which does not fall within the purview of this Tribunal for want of jurisdiction. It is accordingly dismissed. It is the contention of the Appellant under the remaining 3 grounds of appeal that the decision of the Respondent was wrong being given that the application was compliant with all the laws, including planning policies and that the Respondent’s reliance on the letter issued by the Ministry does not have the force of law.
7. From the averments contained in the pleadings, documents produced and the oral evidence, we find no evidence that suggests to the contrary that the application for BLUP at hand is one which is meritorious on planning principles for the development proposal, which a residential one including its amenities such as watchman’s cabin and boundary wall, being given that the area in question is a highly residential one. The application seems, in our view, compliant with the planning policies and all adjoining properties are residential ones. This is not disputed by the Respondent.

8. The Council, in assessing an application, has to do so on its planning merits in accordance with the prevailing planning instruments and laws. There is currently no specific provision under the Outline Planning Scheme of Curepipe that empowers the Municipal Council of Curepipe to either reject an application for a BLUP on the basis that the proposed development is within a buffer of 200 metres from a diplomatic mission's building nor one that empowers the Council to reject it pending the implementation of such a policy. It is undisputed that as at now there exists no policy that regulates the siting of buildings found next to or within a certain buffer of diplomatic premises. There can thus be no question of compliance or otherwise with a non-existent policy.

9. The Council produced the letter, Ref MLG/POL/BLP/5 from Ministry of Local Government and Disaster Risk Management, as evidence that pursuant to it, the Council had to adopt the policy set by its parent ministry to keep such applications in abeyance but that since the NELS does not allow for an application to be left undetermined, the Council had to reject it. According to the Council's representative, such a request from the parent ministry could not be disregarded. Having considered the tenor of the circular from the Ministry of Local Government and Disaster Risk Management, and the stand of the Council, we believe that the instructions from the parent ministry to the Council was clear as regards how to manage such cases that relate to applications found in the buffer of buildings of diplomatic missions which is to keep in abeyance all applications for BLUP within a radius of 200 from sensitive locations, Diplomatic Missions amongst others, because the Government is considering enforcing security measures around such places hence the MHL will come up with appropriate guidelines in due course. These are not instructions issued to local authorities on a planning assessment of applications but rather on case management, which is a policy matter, within the competence of the parent ministry and this brings the present case outside the realm of the competence of this Tribunal, as set out under **section 4 of the Environment and Land Use Appeal Tribunal Act 2012**, that the Tribunal shall hear and determine appeals from a decision of a Council under **section 117(14) of the Local Government Act 2011**.

10. Furthermore, since we are not dealing with a situation of an assessment on planning merits but rather a broad policy directive pertaining to how to specifically manage such applications pending the coming into force of appropriate guidelines, it does not fall within the purview of the Council's power to assess applications under **section 117 of the Local Government Act**. Hence the Council is not fettering its discretion as regards how to assess the present applications on planning principles. The Council has assessed the application and has found it to be in compliance with all planning instruments but by virtue of the instructions received *vide* the letter from its parent ministry, Doc D, the Council is being precluded from executing its functions of issuing BLUPs. This does not fall within the jurisdiction of this Tribunal to determine the issue at hand as it is a challenge on the mechanism adopted by the Council in seeking to comply with a circular issued by its parent ministry on guidance as to its case management. If at all, this may be challengeable before another forum but not before this Tribunal. Had the real issue of contest been related to any planning theory or policy with regard to an application for BLUP the Tribunal would have had jurisdiction to look into it but here it is beyond the question of planning approval for the proposed development. It is a question of Government's prerogative or otherwise to make and adopt policies for enforcement of security measures around what has been termed as "sensitive locations". While the Tribunal recognizes that the Appellant's case seems to be meritorious on planning grounds, on the facts of this case, we are looking at the legality of a local authority's actions of complying with instructions of its parent ministry. This is a matter beyond the consideration of this Tribunal.

11. This Tribunal also notes that the Council invited the Appellant to appeal its decision before this Tribunal, as per its refusal letter, Doc C. As pointed out, the Council cannot give jurisdiction where none exists. It is implicit in this conclusion that we have formed the view that it is not within the jurisdiction of this Tribunal to adjudicate on the issue at hand because the basis of a rejection by the Council is not under **section 117 of LGA** but rather on the case management directive from the Council's parent ministry.

12. For all the reasons set out above, the appeal is set aside. No order as to costs.

Determination delivered on 15th July 2022 by

Mrs. J. RAMFUL-JHOWRY

Mr. P. MANNA

Mr. S. BUSGEETH

Vice Chairperson

Member

Member