BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1978/20

In the matter of :-

Yatindranath Hans Dwarka

Appellant

v/s

Municipal Council of Vacoas-Phoenix

Respondent

In the presence of:

The Economic Development Board

Co-respondent

DETERMINATION

1. This is an appeal against the decision of the Respondent ["the Council"] for having refused the Appellant the granting of a Building and Land Use Permit ["BLUP"] for an extension at ground and first floors and re-roofing of an existing residential building at Nalletamby Road, Phoenix.

2. The grounds of refusal of the Council were communicated to the Appellant electronically on the 2nd October 2020, as per Doc J as follows:
"1. Site plan has not been amended showing :- (a) All proposed development with setbacks from road and side boundaries; (b) Outline of all overhangs (same not to encroach onto adjoining property); (c) Site dimensions as per title deeds;2. Layout plans have not been amended showing :- (a) Clearly all existing features and proposed development; (b) Cross sectional and longitudinal section line (section plans to be submitted accordingly); (c) All i-beams of right hand side and rear of property as built on site; 3. Consent from adjoining property owners along with their identity card have

not been submitted authorizing construction at less than 2.0m (since building exceeds 7.5m);4. All plans with title blocks duly filled in have not been submitted; 5. A registered surveyor's report has not been submitted to justify limits of property and to justify that no encroachment has been done onto adjoining property; 6. Construction has already started without having obtained a Building and Land Use Permits; and 7. A 6m setback has not been observed from a classified road. "

I. GROUNDS OF APPEAL

3. The grounds of appeal as per the notice of appeal are reproduced hereunder:

"1. Appellant is advised and verily believes that the Council's rejection of Appellant's application is null and void in as much as the BLUP is, by law, deemed to have been approved on Friday 25 September 2020, which is 14 working days as from Tuesday 8 September 2020, which has been wrongly taken by the Council on its online system to be the effective date when the effective should have been Monday 31 August 2020 date on which the required clarifications were uploaded.

2. The rejection of the application is null and void in as much as such rejection is well out of time, beyond the 25 September 2020.

3. For the same reason, the Council's 'Compliance Notice' dated 1 October 2020 purportedly sent by registered post and delivered on 05 October 2020 is well out of time, beyond the 25 September 2020.

4. In accordance with the ruling of the Environment and Land Use Appeal Tribunal as upheld on appeal in the case of Municipal Council of Vacoas-Phoenix v AKM Rana Co LTd 2016 SCJ 150,

a. Appellant gave notice of payment of the relevant fee on Thursday 15 October 2020 without prejudice of his other avenues for legal recourse;

b. Appellant effected such payment on Friday 16 October 2020 as notified to the Council;

c. The Council accepted such payment."

II. CHRONOLOGY OF EVENTS

4. In order to better understand the grounds of appeal, a chronology of relevant events leading up to the present appeal is set out below:

- On 25th July 2020, the Appellant made an application for BLUP via the National Electronic Licensing System (NELS);
- On 4th August 2020, the Appellant was informed that additional information /documents were required by the Council to be submitted by 1st September 2020;
- On 31st August 2020, the Appellant uploaded some documents on the NELS platform;
- On 8th September 2020, the Respondent responded by providing the Appellant with an effective date.
- On 2nd October 2020, the Respondent notified the Appellant that his BLUP was rejected and a compliance notice was issued also issued to the Appellant for development without a BLUP.
- On 16th October 2020, the Appellant made a bank transfer of Rs 6250. to the Respondent representing the BLUP fee for which the Respondent has not issued any receipt.

5. The case for the Appellant, in essence, is that the refusal of the Council for the granting of the BLUP is null and void since the decision of the Council was communicated outside the time frame provided by statute. The Appellant produced several documents before the Tribunal, marked Docs M, M1, M2, N and N1, which purported to be the documents that were missing from his original application and which he had, as per his testimony, uploaded on the NELS platform on the 31st August 2020, within the time frame provided to him by the Council. The Appellant was also cross-examined as regards the documents that were missing in his application. He explained that the title deed, the site plans, the layout plans showing existing and proposed features, the cross-sectional features, the i-beams, the plans with title blocks, the survey plans from his surveyor were all provided as per the abovementioned marked set of documents. He also testified that as regards the consent of the adjoining neighbours, those were not uploaded on the platform but that he had physically handed those documents to

the Chief Executive of the Council on the 23rd September 2020. According to him, he had provided all relevant documents and information requested by the Respondent.

6. The case for the Respondent is the refusal was fair, reasonable and justified. The witness for the Respondent, Mr. Cundasamy, Head of the Planning Department of the Council, stated that the Appellant did not upload all the documents/information requested and that once documents have been uploaded on one occasion the Council is unable to the request for more documents to be uploaded thereafter. This appears to be due to a technical limitation of the NELS platform. Mr. Cundasamy explained that the e-system will even accept blank pages as documents uploaded and that an "effective date" is thus automatically generated by the electronic system. He agreed however, in cross-examination that the effective date having been given on the 8th September 2020, the due date which is 14 working days later, was the 25th September 2020 and that beyond that day the Council was not entitled to reject the application. We have duly considered the evidence on record and the submissions of both counsel. No evidence was adduced by the co-respondent nor any submission made.

7. Grounds 1 and 2 of the grounds of appeal address the same issue and will therefore be dealt with together. Ground 3 of the grounds of appeal relates to the issuance of a "comply notice" issued under s.127A of the Local Government Act and it is therefore not within the purview of the jurisdiction of this Tribunal to decide on the issue. It is therefore set aside. Ground 4 of the grounds of appeal is an averment and does not amount to a ground of appeal in law. It is therefore set aside.

III. Under Grounds 1 and 2

8. It is the contention of the Appellant that the Council's rejection of Appellant's application is null and void since the rejection is well out of timeframe and the BLUP is deemed to have been approved on Friday 25 September 2020, which is 14 working days as from Tuesday 8 September 2020, which has been wrongly takenby the Council on its online system to be the effective date when in fact the effective should have been Monday 31 August 2020 date on which the required clarification, was uploaded.

9. The crux of the matter is whether the refusal is invalid for being out of time. To be able to determine this, the computation of the days as provided by law must be done in relation to the "effective date". The definition of "effective date" under **Section 2 of the LGA** *"in relation to an application under Sub-part F of Part VIII, means the date by which all the information, particulars and documents specified in the application form are submitted."*[stress is ours] The case of the Appellant is that the effective date is the 31st August 2020 when all the required documents were uploaded on the system whereas the stand of the Council is that the effective date is the 8th September 2020, after the Council had re-assessed the application on the 7th September 2020 whereby it was noted that the Appellant had failed to submit the particulars requested.

10. We believe that the words of the law are clear, that is, an effective date is given when all the information requested have been submitted. The burden is on the Council, the one who after checking the application in its totality requested the missing information and is also the recipient of the information requested, to decide whether all the relevant information was given to its full satisfaction given it is the Council which is the decision-making body. In the present case, the Appellant was given an effective date, which was the 8th September 2020, as evidenced by Doc F, document emanating from the Respondent after the Council reassessed the application on the 7th September 2020, as clearly borne out in the Statement of Defence. We are not minded to take the effective date as the 31st August 2020, as submitted by the Appellant, due to the real possibility of a failure by an applicant to upload a complete set of documents. We would therefore accept the effective date as being the 8th September 2020, by which the Council would have verified that all the information, particulars and documents specified in the application form had been submitted for it to take an informed decision on the application.

11. We pause here to make an observation on a matter which is of concern. We have addressed our minds to the evidence of Mr. Cundasamy that where an applicant has to upload documents or information on the NELS platform for a second time, after the additional documents had been uploaded following a first request, the system automatically gives an effective date to the application, even if the application is not

complete. We believe that is a lapse in the e-licensing system which has to be resolved at the level of the Council. The Council cannot close its eyes to or rely on a process which is not in accordance with the law. If we are to go by the explanation of the head planner of the Council, it would appear that even if blank sheets of paper are uploaded on the NELS platform, the system will not distinguish them as empty sheets but will infact automatically generate and provide an effective date. This clearly defeats the purpose of generating an effective date since all the information may not be provided for the Council to decide on the merits of the application and would therefore not align with the definition of "effective date" provided in the law. The applicant cannot be taxed for a defect in the e-licensing system. It is for the Council to resolve the issue the more so as it has repercussions. It is therefore strongly advisable for the Council to look into resolving this issue with utmost promptness as it is likely to result in a very unsatisfactory state of affairs.

12. In the present case, as stated in paragraph 5 above, the Appellant filed a series of documents, Docs M, M1, M2, N and N1, for our appreciation as to the information he had at hand to satisfy the Council on the missing information. Whether all the required documents and information had been submitted by the applicant, now appellant, to the Respondent is debatable since the Council maintains that the Appellant did not provide them with all the relevant information.

13. Having come to the conclusion that the effective date is the 8th September 2020, we now turn to the relevant provision of the law. The present application is for a BLUP with respect to a residential building and hence was made under **s.117(7) of the LGA**.

Section 117(7) LGA provides

"(7) With the exception of an application under subsection (8) and subject to subsection (9), the Permits and Business Monitoring Committee shall, within 14 working days of the effective date of receipt of the application –

(a) approve the application where it is satisfied –

(i) that the application is in accordance with the Acts and the guidelines referred to in subsection (6);

and (ii) in the case of an application for a Building and Land Use Permit relating to a scheduled undertaking, that there is, in relation to that undertaking, an approved preliminary environmental report or EIA licence under the Environment Protection Act; or (b) notify the applicant in writing that the application has not been approved and give the reasons thereof." [stress is ours]

From our reading of this part of the law, within 14 working days of the effective date the Permits and Business Monitoring Committee (the **'PBMC'**) must imperatively have taken a decision to either issue the BLUP or notify the applicant of the rejection of his application, as the case may be, that the application has not been approved and give the reasons thereof. The word "shall" must be read in the imperative in this context as per the provisions of the **s.5(4)(a) Interpretation and General Clauses Act**.

14. In the case of **AKM Rana Co. Ltd v Municipal Council of Vacoas-Phoenix [Elat 163/12]**, the Tribunal in its interpretation of s.117(7) of the LGA concluded that the word "shall" must be read in the imperative and also observed *"We are further comforted that this interpretation of **Section 117(7)** is correct as the Legislator cannot then be said to have legislated in vain in imposing a time limit. A contrary interpretation would have led to the inescapable conclusion that the 14 working days limit can simply be discarded by the mere fact that the Executive Committee has decided to sit outside of the time limit. This plainly cannot be the case. The Legislator has in fact expressly provided for when the time limit shall not actually apply. Section 117(13) provides that the time limit shall not apply to an application for an Outline Planning Permission or a BLUP referred to in Sections 117(4)(b), 117(9) and 117(12). This appeal does not, however, concern an application referred to in these latter sections. We believe that our reading of **section 117 (7)** is the correct one and is consistent with the spirit of the Business Facilitation Act and with, in our view, the intention of the legislator viz to expedite applications for development permits."* We are further comforted in our approach in that the Legislator has provided a default position under **S. 117(11) of the LGA**, which we will now address.

15. Section 117 (11) 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. (b) Paragraph (a) shall not apply to an application for an Outline Planning Permission or a Building and Land Use Permit referred to in subsections 4(b), (9) or (12)." [the underlining is ours] The legal implication of this section, *prima facie,* if we are to follow its literal meaning, is that the Council is precluded from deciding the matter beyond the time frame. Although this is not, in our opinion, conducive to sound planning principles, this section does provide for a default position where the Council has failed to notify its decision to the applicant as regards the next step available to the latter.

16. In the case of **AKM Rana** *supra,* the Tribunal considered this issue which we find apposite at this point to reproduce hereunder

"At Page 391 Administrative Law, 3rd Edition 1994, By P.P Craig *it is stated 'A public body endowed with discretionary powers is not entitled to adopt a policy or rule which allows it to dispose of a case without any consideration of the merits of the individual applicant who is before it: R v/s London County Council exparte Corrie (1918) 1KB 68' The above is quoted to show that we have infact addressed our minds to administrative law principles that a public body is endowed with discretionary powers when it comes to it dealing with merits of an application before it. We hasten to add, however, that this is not a case where the Council itself has adopted a policy or rule that has fettered its own discretion, but one where there is an express provision of the law that purports to deal with the consequence of the failure by a Council to act as stipulated within the time limit. This is, therefore, in our view, a question of statutory interpretation, which is one well within the remit of this Tribunal.*

*On a literal meaning of the words used, **Section 117(11)** will apply irrespective of whether the Council has in fact approved the application in question or not. On this reasoning, **Section 117(7)**, where it is applicable, will allow an applicant to walk away with his BLUP after payment of the relevant fee even where the Council has not in fact approved the application and indeed regardless of the actual merit or validity of the application.*

***Section 117(11)** is, in our view, unambiguous and there cannot be any departure from the literal meaning of **Section 117(11)**, unless of course this interpretation leads to a manifest absurdity. However, we do not consider this to be the case here. As stated earlier, the absurdity must, however, appear as such to the Legislator, and not necessarily to the Tribunal interpreting the statute - vide **Jeetun** (Supra).*

*In perhaps the rare scenario where an application that is evidently flawed is deemed to be approved because of a gross procedural oversight of the Council, there will still be other courses of action that the Council and indeed other interested persons, in particular the neighbours of such an applicant, can envisage to prevent the construction being envisaged to go ahead. While the general position in the first instance would have been for the applicant to satisfy the Council that its application is valid, in situations where **Section 117(11)** will apply, it will then fall onto the Council or other interested persons to demonstrate that the construction envisaged is flawed or in breach of guidelines and laws. We consider that this is what the Legislator must have envisaged as it ensures that the competing imperatives of good administration and business facilitation that saw the inclusion of the time limit in the first place can still be reconciled with those of proper planning and environmental protection.*

*It follows that the consequence of a failure by a Council to act as stipulated within the time limit will see the application be deemed to be approved upon payment of the relevant fee. We are minded to note here that the law does not provide Councils with the discretion to refuse payment in a situation where **Section 117(11)** applies."*

17. We find the above extract from a ruling of this Tribunal to be of sound reasoning and applicable in the present case and we therefore find no reason to depart from this reasoning. Where the law expressly states in clear and unequivocal terms that a failure to notify an applicant that his application has not been approved under **s. 117 (7)**

within 2 working days of the expiry of the due date, will mean that the application is deemed to have been approved by the Council on payment of the prescribed fee, we are thus bound by the wording of the law as this is the intention of the legislator. A computation of 14 working days from the 8th September 2020 takes us to the 25th September 2020. By this date, nor by the 29th September 2020 had any refusal been communicated to the Appellant until the 2nd October 2020. Save and except that the Tribunal cannot make any declaration that the refusal is null and void, we find that the rejection of the Council is time barred under **s.117(11) LGA** and that since the law does not provide for any discretion to the Council to refuse payment under **s.117(11),** the Appellant, having paid the relevant fee under **s.117(10),** should be granted a BLUP. The grounds of appeal 1 and 2 are therefore allowed. Nothing however precludes the Council from imposing conditions in respect of the development.

18. Having reached the above conclusion, we do not deem it necessary to look into the planning merits of the case, save and except that a perusal of the documents produced by the Appellant as being documents that he had uploaded on the NERLS such as the title deed containing details of the survey plan, the PIN and NIC, the engineering designs of the existing and proposed development containing title blocks and i-beams, marked as Doc M,M1,M2 and N respectively appear to satisfy the information and documents requested for the Council to come to an informed decision on the planning merits of the case. The case for the Council is that some of the documents requested were missing. It is the duty of the Council to ensure that the system set up is a foolproof one whereby the Council will be able to discharge its functions within the parameters of the law.

19. We have considered the submissions of learned Counsel appearing for the Respondent as regards the appeal not meeting the jurisdiction of this Tribunal. We are unable to agree with the Respondent's stand on this issue. The fact of the matter is that an application for a BLUP has been made by the Appellant under **s.117(7) of the LGA**, for which a refusal letter was sent to him by the Council eliciting the various grounds upon which the Council based itself to reject the application. It is on the basis of the refusal letter from the Council that the Appellant lodged his case before this

Tribunal under **s.117(14) of the LGA**. The Appellant has invoked a point in law in support of his case, in the same way as a Respondent would normally raise a point in law to challenge the validity of an appeal. In any event, the Council has put up a defence to the Appellant's Statement of Case setting out the Council's stand that the appeal be set aside since its refusal to grant the BLUP was "fair, reasonable and justified". As stated in our ruling dated 15th November 2021 at paragraph 8, what we read from the Statement of Defence, the position of the Respondent does not accord with the averments made by the Appellant as regards the BLUP being deemed to have been granted where the Council is maintaining that it has refused the application. The Tribunal had ruled that it has jurisdiction to hear this matter and we find no merit in these submissions.

20. For all the reasons set out above, we allow the appeal. No order as to costs.

Determination delivered on 8th February 2022 by

Mrs. J. RAMFUL-JHOWRY	**Mr. MOOTHOOSAMY**	**Mr. MANNA**
Vice Chairperson	**Member**	**Member**