

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2017/21

In the matter of:

Emtel Limited

Appellant

v/s

The Municipal Council of Beau Bassin Rose Hill

Respondent

In the presence of:

The Information and Communication Technologies Authority

Co-Respondent

DETERMINATION

1. The present appeal is against a decision of the Municipal Council of BeauBassin/Rose Hill [“The Council”] for having rejected an application made by the Appellant for a Building and Land Use Permit [“BLUP”] for an extension at the second floor of a two storeyed building to accommodate a technical room to support the installation of three (6 metres-high) telecommunication structures (an engineering operation on land) at 56 A, Corps de Garde Avenue, Trefles, Rose Hill. This was the third application made by Appellant that was rejected by the Respondent. The reasons for refusal as set out on the National E-Licensing Platform on the 1st March 2021 are:

- (a) The proposed “development works” is likely to have adverse impacts on the Health & Safety of people and is visually incompatible with its residential setting. As such, it would be contrary to policies UDS 1 of the Outline Planning Scheme for Beau Bassin-Rose Hill.

(b) Objections from property owners/occupiers of the area have been received against your proposed “development works”.

2. The Grounds of Appeal as set out in the Notice of Appeal are as follows:

“(a) Ground A: The Respondent erred when it found out that the Development Works will allegedly have adverse impacts on health & safety of people;

(b) Ground B: The Respondent erred when it found out that the Development Works are visually incompatible with its residential setting.

(c) Ground C: The Respondent has wrongly relied on alleged objections received when no objector attended the hearing to sustain their objections.”

3. All parties were legally represented. The Appellant was represented by one Mr. Woozeer, the Respondent was represented by Mr. Nawoor, Building Inspector. The Co-respondent was represented by an Engineer, Mrs. Nilofur Rohimbux but she was not called and Counsel appearing for both the Appellant and Respondent stated that they did not wish to elicit evidence from her. We note that the Appellant in its Statement of Case [‘SOC’] has made reference to previous similar applications which were rejected by the Council. We find that the previous applications with regards to this project and which have been rejected by the Council are of no bearing as regards the merits of the application at hand. We have duly considered all the evidence before us as well as submissions of Counsel.

I. Under Ground of Appeal (A)

4. It is the contention of the Appellant under this ground that the Respondent was wrong to have found that the development works will allegedly have an adverse impact on the health and safety of people. The Appellant’s case in essence is that it wants to provide a state -of-the-art service to its customers and hence the chosen location, where people live. Furthermore, there is no associated risk to public health and safety with the establishment of the proposed base station and antenna being given that the

Co-respondent issued an authorization for the setting up of the base station at the corner of Corps de Garde and Panchoo Avenues, Stanley, Rose Hill, coupled with the fact that the guide issued by the ICTA, Annex K to the SOC, re-iterates the views of the WHO which provides that there is no substantiated evidence that living near a mobile telephone antenna causes adverse health effects. In support of its argument that the setting up of such a structure within a residential area does not compromise the health and safety of those living in the vicinity, it also used the conclusion of the WHO, Annex L to the SOC, that *“there is no convincing scientific evidence that the weak RF signals from base stations and wireless networks cause adverse health effects.”*

5. The Respondent has adopted the precautionary approach and has done so essentially to protect the health and safety of people including objectors who live around the site. The “Precautionary Approach” is set out in **Planning Policy Guidance 7 [‘PPG 7’]** and even if there is minimal risk, the Respondent’s case is that this approach is to be adopted. The representative of the Respondent, Mr. Nawoor, Building Inspector, explained under the first ground that the proposed development was in a fully residential area. The antenna is 6 metres high and is incompatible with the surrounding as there were no such buildings of similar height in the area.

6. The introductory paragraph in the **PPG7** sets out the importance given by the Government for a modern telecommunications system for economic and social benefits and provides “However there have been concerns as to the siting, appearance and health issues relating to telecommunications installations. It is understood that a precautionary approach will be applied to the deployment of radio telecommunication equipment as far as possible.” Furthermore, one of the objectives of the **PPG** set out therein is “to ensure that the location and siting of telecommunication facilities are selected in a manner which minimizes the effects on residents, lessens visual impact, respects natural and human heritage features and sensitive land uses to the greatest extent possible; to encourage consultation by telecommunication service providers with the local authorities early in the permitting process as practical and feasible...”

7. The subject site is located within a predominantly residential area as per the Development Management Map of the **Outline Planning Scheme of the Municipal Council of Beau Bassin/ Rose Hill ['OPS']**. While the representative of the Appellant stated that there is no community sensitive location around the base station, we find that this evidence is not quite accurate. Annex 1 to the Statement of Defence ['SOD'] gives a clear indication of the subject site being well within a community sensitive location with road networks, as is expected in a residential area and the subject site itself comprises of a building which is partly residential and partly commercial as per the evidence of Mr. Nawoor. In the given context the type of infrastructure being proposed is the type demonstrated in Annex N of the SOC, that is, a base station consisting of a roof made in concrete resting on 4 concrete columns as explained by Mr. Woozeer, and the antenna will be three poles of 6 metres in height on top of that roof. Evidence was adduced that having such a structure mounted on a one-storeyed building will bring the building to a resultant height equivalent to a building with ground plus four floors. Obviously, having the antennas at such a height is so that there is maximum network coverage when operational. It is no secret that these antennas emit Electromagnetic Waves ['EMF']. The WHO has concluded that there is *no substantial evidence* that living near a mobile telephone antenna can cause adverse health effects. No substantial evidence does not mean that we can conclude there is no such risk. The fact remains that the possibility of those living in the vicinity are likely to be exposed to the EMF emanating from the operational antennas more than those who do not live near them. The Council considered that the fact that there is a risk, even if it were to be minimal, it would rather tread on the side of caution and take the precautionary approach in line with the provision of the **PPG 7**.
8. In favour of its case that the EMF emitted by such telecommunication antennas do not affect the health and safety of the inhabitants in the surrounding, the Appellant submitted the case of **Dilmohamed v/s Emtel Ltd IPO The City Council of Port Louis [213] SCJ 333**, an application for injunctive relief to stop the construction of a De Minimis antenna by Emtel near the residence of the Applicant. We believe that this case can be distinguished from the application at hand on several aspects.

9. The abovementioned case dealt with a De Minimis type of antenna which is not only substantially different to the slim line monopole we are dealing with, having has three 6 metre-poles but also the former does not require a BLUP in view of its small size. In that case, the Learned Judge in Chambers considered the affidavit evidence of ICTA where detailed explanations were given about the nature of “inherently compliant” stations and that the green light was only given after calculations were made in accordance with the relevant recommendations for such development and after being satisfied that the EMF emissions would comply with the ICNIRP [International Commission on Non-Ionizing Radiation Protection] reference level. In the present instance, the Appellant chose not to elicit any evidence from the officer of ICTA to clarify if ever any tests were carried out to ensure the EMF emissions were safe for those living in the vicinity and what were those tests and their conformity with the required standards. Additionally, the Ministry of Health provided further evidence that supported the Learned Judge’s conclusion that the application before him could not be granted in those circumstances.
10. The Appellant has been issued with a Public Land Mobile Network Licence and a Public Switched Telephone Network Licence, as per the SOD. The licence given by the ICTA is with regards to the telecommunication tower but it is the prerogative of the Respondent to issue the BLUP as regards whether the tower can be set up on the locus bearing in mind all the relevant factors and the relevant planning instruments. The Council’s case is that in the exercise of its statutory duties while assessing the planning merits of the present application it decided to adopt the precautionary approach as per the guidance to ensure, in the wake of the Covid-19 pandemic, all appropriate measures were taken for the health and safety of the inhabitants living around the subject site. While it is not unreasonable to have a telecommunication antenna in a residential area for better network coverage, there is a need to place it where the exposure to EMF is well mitigated.
11. In fact, with regard to site location, the **PPG 7** provides “Distance from community sensitive locations should be maximized to comply with the exclusion

area...surrounding antenna and along lines of radiation propagation.” It also provides as regards setback, that if a new tower/antenna is proposed to be located close to sensitive locations, a detailed rationale for the necessity of the proposed location must be provided to the relevant authority and consultation held with the public through a formal consultation process. No such evidence was forthcoming from the Appellant as regards why the antenna had to be placed at that particular site which is highly residential as opposed to a place with less residential buildings and whether the Appellant had provided the Council with all this information to its satisfaction. We believe that the Council was perfectly entitled to do this balancing exercise of weighing up the need to have a better telecommunication network coverage for Emtel in the region against the risk of having daily exposure to radiation in view of the fact that it is a highly residential area, even if there is no “substantial evidence” to that effect.

12. As regards security and safety the **PPG7** provides a list of safety and security measures precisely to maintain the safety of people who are in close proximity to such towers. Amongst the factors are that towers/antennas are an attraction for lightning discharge and so an area on the ground is required for proper electrical energy discharge; safety zones should be determined based on setback requirements from surrounding property lines as concerns exist in respect to the possibility of towers collapsing. The latter seems to be in line with one of the concerns expressed by the Council when Mr. Nawoor stated that with changing climatic conditions, the wind can damage the antenna which in turn might compromise the health and safety of the inhabitants in the vicinity. An objection was raised to the effect that no mention was made in the SOD regarding climatic conditions which was overruled by the Tribunal. The Council was entitled to substantiate its ground regarding the concerns to health and safety of the public by applying the provisions of the relevant **PPG** as it did in this case and using the example of winds that can damage the antenna as a matter of common sense, can only mean that it can affect the safety of people if it collapses. We are therefore of the view that the Council was right in its stand.

13. It is apposite to note that the ICTA has on 24 March 2023 issued a publication, which is in the public domain, on the **Deployment of Radiocommunication Infrastructure Technical and Administrative Standard for Electromagnetic Field (EMF) Safety (EMF Safety Standard)**. Therein two distinct sections have been inserted, one on the application of the Precautionary Approach to the infrastructure design and the other on the application of the Precautionary Approach to the site operation. This supports the view that even ICTA recognizes the precautionary approach in view of the risks involved with the setting up of these towers including the emission of EMF. It is noted that at paragraph 4.5 of the lease agreement found at Annex P of the SOC makes mention that the Lessee, that is the Appellant, is at liberty to share the Pole and Equipment infrastructure erected in the premises with other Telecommunication Service Providers/Operators. There was no evidence adduced as to whether in such a scenario, this could have an incidence on the amount of EMF emissions by the antenna. This does tilt the balance in favour of the precautionary approach adopted by the Council. This ground therefore fails.

II. Under Ground of Appeal (B)

14. Under this ground of appeal which seeks to challenge the second limb to the first ground of refusal, it is the contention of the Appellant that the Respondent was wrong to have concluded that the proposed development will be visually incompatible with its residential setting. Given the type and height of the structure being proposed, a picture of which is to be found in Annex N of the SOC, we do not agree with the proposition that this type of structure “naturally blends with the surrounding” as was sought to convince us by this witness. The Council’s representative explained that the buildings in the surrounding area are mostly ground plus one floor. A structure comprising of poles perched on the roof of a one-storeyed building, thereby reaching a towering height equivalent to a four-storeyed structure, would undoubtedly stand out conspicuously amidst the surrounding architectural tapestry. Moreover, erecting such a towering edifice on the designated site would not be permissible according to **Policy TB1** and **Policy TB2** of the **OPS**.

15. In view of the fact that the development proposal is meant to be in a residential area surrounded by houses, putting up such a high structure will not only have a visual impact but also may adversely affect the health and safety as concluded above. We are of the view that the Council was correct in its application of **Policy UDS1** of the **OPS** and its conclusion that the proposed development would not be in compliance of the policy. The **Policy UDS1**, which regulates Development within Settlement Boundaries, provides that applications for development should normally be permitted within settlement boundaries subject to the provisions of **Policy UDS2** (which does not allow development of agricultural and environmentally sensitive areas within settlement boundaries) and an exception to the policy is where the development adversely affect the local amenity of existing sensitive uses such as housing, schools and health facilities. This ground also fails.

III. Under Ground of Appeal (C)

16. It is the contention of the Appellant that the Respondent was wrong to have relied on the written objections since no objector turned up for the hearing to sustain the objections. The case of the Appellant is that with the objections not being sustained and its antenna being in compliance with all the statutory norms and requirements, the decision of the Respondent was wrong. Mr. Nawoor explained that objections were received from neighbours at a time when the application was still being processed. Hence the Council convened a Hearing for the Appellant and the objectors. The objectors were absent so the Council considered the written objections produced and marked as **Doc A**. The Council took into account the explanations of the Appellant at the Hearing and the content of the letter from the objector, one Mrs. Jeenah, who is a neighbour, to reject the application.

17. A BLUP is required for the proposed development and in fact Mr. Nawoor stated that this structure, that is the antennas and base station is considered to be a “building” as per the definition under the **Local Government Act 2011** since it is a permanent structure. We agree. Notification was done and objections were received. The Council

had the prerogative to either convene a meeting or not to do so and had it chosen not to do so, it was still duty bound to consider the merits of the objections raised since that is the very purpose of having the notification procedure. The objectors not attending the hearing does not render nugatory their objections. The Council was fully entitled to consider these objections after ascertaining whether the objector live in the area, which it did. The Council, in line with adopting the precautionary approach, was entitled to consider and accept if it was of the view that there was substance in the objections. In this case we find that there was. Mrs. Jeenah, the objector, who expressed concerns that her television would not work and at page 18 of the guide issued by the ICTA, Annex K of the SOC, there is in fact a whole page on the recommendations of the ICTA “to avoid potential interference of mobile telephone base stations with television reception”. This ground therefore fails.

18. For all the reasons set out above, we find that the Council cannot be said to have erred in its decision. The appeal is therefore set aside. No order as to cost.

Determination delivered on 6th November 2023 by

Mrs. J. RAMFUL JHOWRY
Vice Chairperson

Mr. S. MOOTHOSAMY
Member

Mr. S. BUSGEETH
Member