BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2105/22

In the matter of:

Seechurn Rajvansh Kumar

Appellant

v.

District Council of Pamplemousses

Respondent

Determination

The appeal, lodged on the 26th May 2022, is against the decision of the Respondent dated 6th May 2022 for having declined to grant an application for Building and Land Use Permit (BLUP) for the construction of a ground and first floor building to be used as mechanical workshop at ground floor and residential purposes at first floor to operate at Khoyratty.
Three grounds of refusal were initially put forward by the Respondent, two of which were dropped by the Respondent at the hearing. The sole ground of refusal is now that *'the subject site is located within a predominantly residential area and proposed development could be a source of environment and traffic nuisance to its neighbourhood'*.

The Appellant has listed fifteen grounds of appeal (grounds (a) to (o)) in his notice of appeal, three of which ((m), (n), and (0)) having been dropped on the hearing date.

Ground (a) is that 'the Appellant feels aggrieved by the decision of the Respondent in as much as the required time frame to determine a Building and Land Use application has not been respected'. In his statement of case, the Appellant expatiated this ground by referring to the provisions of section 117 (7) of the Local Government Act that the decision of the Respondent ought to have been communicated within 14 days of the effective date.

The other eleven grounds relate to the physical location of the proposed project, its proposed amenities to deal with any potential nuisance and the failure by the Respondent to take into account all these material considerations in its assessment, as well as the absence of any objection from anyone living in the neighbourhood. These will be considered together (as it has been in the statement of case for the Appellant) for the purpose of assessing the Respondent's decision.

The Respondent's statement of defence has set out the chronology of the decision-making process before the Council and the grounds which led to the decision to refuse the application. These were reiterated in the course of the hearing.

We shall firstly consider the ground of refusal relating to the failure by the Respondent to consider the application within the prescribed delay.

1. <u>The issue of delay:</u>

The contention of the Appellant is that the Respondent failed to act in accordance with section 117 (7) of the Local Government Act by not notifying the Appellant of its decision within the delay of 14 working days from the effective date of receipt of the application. As such, the application was deemed to be approved. It came out that the Appellant did proceed to effect payment for the permit after this delay, but the Respondent refused such payment. The decision of the Respondent was communicated to the Appellant on the 6th May 2022, more than seventeen working days form the effective date which was 13th April 2022.

The evidence adduced by the representative of the Respondent is to the effect that the effective date, being on the 13th April 2022 (which is not disputed), the decision with regards to the application was not taken within the 14 (working) days' time frame because the Council called for a hearing. It convened the objectors and the Appellant before taking a decision.
The chronology of the application, as per his evidence, is that the application for BLUP was made on the 4th March 2022 and clarifications were requested by the Council. The Appellant failed to submit same and a reminder was sent on the 1st April 2022, he was given an additional two weeks' time for the clarifications to be provided. Amendments were submitted on the 13th April 2022. In the meantime, objections were received from two objectors, which is why the Council decided to conduct a hearing on the 29th April 2022 (on the 14th working day after the effective date). The computer-generated application form produced as Document B shows the submission date of the application form for the BLUP as being 24th February 2022 and the effective date given is 13th April 2022. The rejection notification as per Document B is the 6th May 2022.

The issue is whether the failure to communicate the decision of the Council within 14 working days of the effective date is ground enough for the Tribunal to conclude that a BLUP must be issued.
The Council was still acting on the objections received and had fixed a hearing on that very day before reaching a decision. In our view, the decision process was still ongoing and it would not be rational to rely only on a computation of days for the decision to be communicated. Section 2 of the Local Government Act defines "effective date" as "the date by which all the information, particulars and documents specified in the application form are submitted".
We are not in presence of information on the specific date on which the objections were received. Those objections are also details that need to be considered for the Council to reach the decision. In our view, the Council rightly called for a hearing. The outcome of the hearing was not foreseeable at that time. Yet, as an authority, the objections received have rightly been considered. It is our view that even if section 117 (7) of the Local Government Act is couched in mandatory terms, the Council having extended its decision making beyond the

statutory time limit should not be fatal. This is even more significant because there were other planning grounds on which the application was rejected.

The issue of mandatory statutory delays has been lengthily considered in the judgment of the Supreme Court in the case of **Dr. A.P.M. Ng Kuet Leong v. The Medical Council of Mauritius, 2019 SCJ 1**. We reproduce below the observations of their Lordships in this matter which relates to the issue of a decision of the Medical Council of Mauritius which, as per section 17(6) of the Medical Council Act, "shall to be communicated not later than 14 days from the date of the decision". It had been submitted by the Appellant that failure to communicate the decision within the mandatory time limit of 14 days would make the decision illegal and it should be quashed.

The Supreme Court stated the following:

> *"The Courts, not only in the United Kingdom but in other common law countries as well, have adopted a more flexible approach in determining the consequences of a failure to comply with a statutory requirement even when such requirement is couched in a mandatory or imperative language. In* ***Wang v. Commissioner of Inland Revenue [1994] 1 WLR 1286****, in an appeal from Hong Kong, the Privy Council concluded that there was no breach of a time limit which had been prescribed in an imperative language by the statute".*
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> Reference is also made to the Privy Council decision in Wang (supra) which applied the dictum of Lord Hailsham in **London and Clydeside Estates Ltd. v Aberdeen District Council [1980] 1 WLR 182** at p.190:
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> *"When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events."*
>
> The Supreme Court made reference to the observations made by the Privy Council in the case of **Charles v Judicial Legal Service Commission [2003] 1LRC 422** in an appeal from Trinidad and Tobago (at page 6 of the judgment):
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> *"...If a complaint is made about the non-fulfilment of a time limit the giving of relief will usually be discretionary. This discretionary element to which Lord Hailsham referred [in the London & Clydeside case] underlines the fact that problems arising from breach of time limits and other procedural flaws are not generally susceptible of rigid classification or black and white a priori rules. With this in mind their Lordships note that in the present case the delays were in good faith, they were not lengthy and they were entirely understandable...."*

The Supreme Court concluded in the case of Ng Kuet Leong (supra) that "the decision of the medical Council to impose a severe reprimand cannot be invalidated for non-compliance with the time limit prescribed under section 17(6) of the Act which only deals with the communication of the decision".

The situation is slightly different under the Local Government Act, where the legislator has made provision for the consequence of not complying with the delay within which the local authority must act.

While section 117 (7) of the Local Government Act 2011 (as amended), provides that *"the Permits and Business Monitoring Committee shall within 14 working days of the effective date*

of receipt of the application and after approval of the Executive Committee approve the application.....or notify the applicant in writing that the application has not been approved.....", Section 117 (11) further provides that "*where an applicant has not been issued with a BLUP or has not been notified that his application has not been approved.....the application shall, on payment of the fee ...be deemed to have been approved..*".

We endorse the position of the Court in the case of Ng Kuet Leong (supra) and find that despite the delay of 14 working days having been overstepped, it is not fatal, the more so that the evidence on record shows that the Council has been following the application right from the submission of the application, as per the chronology shown in Document A. The fact that objections were received caused the hearing to be called for. This is not a case where the Respondent has shown unjustifiable delay in the processing of the application. We are also of the view that it could not have been the intention of the legislator to cause local authorities to take decisions without giving full consideration to planning aspects. This is of utmost relevance here being given that there were objections based on planning parameters.

On the other hand, should the matter be a concluded one, being given that the BLUP is deemed to be approved, then there is no basis for the present appeal. The refusal on the part of the Respondent to accept payment from the applicant would be a matter that is not within our jurisdiction.
In view of the above considerations, the first ground of appeal fails.

2. <u>The planning considerations:</u>

The issue of the location not being appropriate, as encompassed in the remaining eleven grounds of appeal will be considered together.

The planning instruments that are applicable here are:

1. The Design Guidance for Industrial Development contained in the Planning Policy Guidance No.1 ("PPG 1") provides as follows:

   "2.13: Small Industrial Workshops and Home Working
   Small scale enterprises that are carried out in the home without modification of the dwelling may in some locations be acceptable, but stringent criteria are necessary to ensure that surrounding residential amenity is not compromised.
   Industrial uses such as panel beating and spray painting, manufacture of furniture and <u>vehicle repairs are not normally acceptable uses within residential areas</u> due to dust, noise, fumes, vibration and other environmental effects....
   Examples of <u>potentially acceptable small scale enterprises include .....minor car/mechanical bicycle repairs....</u>" (underlining is ours)

2. **Policy ID 2 of the Pamplemousses-Riviere du Rempart Outline Planning Scheme** (the proposal for the development being located in Khoyratty in the Pamplemousses district) provides for the operation of <u>small factories and light industries</u> within residential areas provided that those industries do not cause nuisance to nearby

residential and other sensitive uses by reason of smoke, fumes, dust, noise, excessive vehicular movements and loading issues. Other criteria to be considered are:

(a) Premises are of a suitable size and design to accommodate the additional activity and all its ancillary requirements such as parking, loading area and adequate setbacks from neighbouring properties,

(b) No neighbour objections within a radius of 50 metres,

(c) No adverse impact on residential occupiers in the area or character of the neighbourhood....

(d) Sufficient parking space within the curtilage of the property to accommodate any staff or visitors,

(e) Safe access from roadway

(f) .....

(g) The operator of the small-scale enterprise should reside on the property.

The evidence adduced by the representative of the Appellant points to an activity that will be a modern vehicle servicing enterprise using the latest technologies, which, in our view, is not a small-scale home-based enterprise that is contemplated by the above two policy instruments. The potential environmental nuisance that can emanate from a 'classical' car servicing operator are described as being inexistent being given the new technology that is proposed to be used. The Appellant has described the project as being a 'mechanical workshop' rather than an 'industrial' entity that would not be compatible with sensitive uses such as residential areas. The Appellant proposes to use the first floor of the building as residence. As per the representative of the Appellant, the proposal will not create any pollution to the neighbourhood and will not be incompatible with the development in that residential area.

The Respondent, on the other hand, being the local authority, is duty bound to act within the parameters of the planning policies.
It has been submitted on behalf of the Appellant that the use of clusters in the description of activities may result in 'misdescriptions' of projects. In the present business venture, the description given by the Appellant, namely that there will be no waiting of vehicles as they work on appointments, that there will be soundproof installations, that there will be no use of electrical machines, the proposal has been assessed under the industrial cluster. It is our view that the description of the proposal fits in the concept of 'light industry and general industry' as per section 2 (1) of the eleventh schedule to the Local Government Act 2011.

The Respondent has relied heavily on the objections received against the proposal. We note with concern that none of the objectors was present at the hearing (one being abroad and the other one being simply absent). The Respondent has nonetheless taken those objections on board in making its decision. Its representative who deposed before the Tribunal, has explained that despite their absence, the Respondent has acted in accordance with the provisions of the above-mentioned PPG and provisions of the Outline Planning Scheme.
In addition, the presence of a hardware shop which operates in the area (referred to by the Appellant in examination in chief to back up his application) is amply explained in the statement of defence of the Respondent, and the presence of a 'morcellement' nearby is not, *per se*, a justification to grant the Appellant's application. The application is required to be

examined on its own merits and in the context of existing planning parameters (as set out above).
Despite the ground of traffic nuisance raised by the Respondent, not much emphasis was put on this aspect save for the Appellant stating that this should not be an issue because of the presence of an existing morcellement which already gave rise to traffic along that road. The presence of existing traffic (if any) is by no means a justification for any type of intensification.

We are not in presence of evidence if the mitigating measures, namely the soundproofing and other measures that have transpired in the course of the hearing before this Tribunal had been put before the Permits and Business Monitoring Committee (PBMC). We can surmise that they were not, being given the absence of the objectors. It has not been put before us if the Appellant had had the possibility of communicating the above measures to the PBMC. It is our view that such mitigating measures are matters that ought to be put before the Respondent authority for it to take an enlightened decision and to consider a mechanism of control for compliance, if needed.

As matters stand, the evidence on record shows that the Respondent's decision is in compliance with the planning norms as contained in the Design Guidance on Industrial Development, section 2.13, as contained in the Planning Policy Guidance 1 (PPG 1) and Policy ID 2 of the Outline Planning Scheme issued under the Planning and Development Act 2004. We find no basis to interfere with the decision taken. The above eleven grounds of appeal are not upheld.

The appeal is accordingly set aside.

Determination delivered on 20 February 2024 by:

Mrs. V. Phoolchund-Bhadain, Chairperson .....

Mr. R. Acheemootoo, Member .....

Mr. S. Busgeeth, Member .....

For Appellant: Mr. A. Rawat together with Mr. J. P. Dewkurrun, of Counsel.

For Respondent: Mr. Y. Bujun together with Mr. R. Ramanjooloo, of Counsel, instructed by Attorney Ms. D. Ghose-Radhakeessoon.