BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 630/14

In the matter of:

MR. & MRS. ABDOOL RAJACK MOHAMED IQBAL JAUFEERALLY

Appellants

v.

CITY COUNCIL OF PORT LOUIS

Respondent

DETERMINATION

The Appellants applied to the City Council of Port Louis for a Building and Land Use Permit (BLUP) for the construction at ground, first and second floors to be used as dormitory at Strudwick Street, Camp Benoit, Petite Rivière. The Respondent has refused to grant the permit and informed the Appellant by letter dated 26th February 2014 of the decision, stating the reasons for the refusal as follows:

1. The proposed dormitory would not be a conducive activity to the adjacent residential owners.
2. Objection has been received against the development.
3. The access to the site is private to the residential owners.

The Appellants have, by a notice of appeal deposited on the 21 March 2014, appealed against the decision of the City Council, which was notified to them on the 5 March 2014, as stated in th eir notice. The grounds of appeal are the following:

1. The City Council of Port Louis has committed a breach of the law, section 117(7) of the Local Government Act 2011 regarding the delay for the examination and approval of the building plan and consequently, section 117(11) of the above Act should apply.

2. The City Council has exceeded its powers in deciding that the proposed dormitory would not be conducive to the adjacent owners. The law does not allow the City Council to make such a statement.
3. The decision is vague and does not give any particulars of the objection. The Appellant was not given the opportunity to put questions to the objectors.
4. The City Council failed to take into consideration that the Appellant as owner has also a right of way on the main road as per location plan submitted to the Council. Such right of way without restriction appears in the Appellant's title deed.

Evidence adduced for the purposes of the hearing of the appeal came from Appellant No.2, Mrs. B.S. Jaufeerally, on behalf of the Appellants and the head planner of the City Council on behalf of the Respondent. We have considered the respective versions of the parties and shall deal with them within the grounds of appeal as formulated in the notice of appeal.

I: The first ground : Breach of the law in relation to the issue of delay

Two provisions of the Local Government Act (hereinafter referred to as LGA) are to be considered under this ground:

Section 117 sub- section (7) of the LGA 2011 which 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, (a) issue to the applicant an OPP or BLUP.....(b) notify to the applicant that the application has not been approved and give reasons thereof, and

Section 117 subsection 11 (a) which provides that where an applicant has not been issued with a BLUP or has not been notified that his BLUP has not been approved ....within 2 working days of the expiry of the due date, the application shall, on payment of the fee .....be deemed to have been approved...and the acknowledgement receipt together with the receipt acknowledging payment of the fee, shall be the BLUP.

From the statement of case of the Appellant, the material dates that are relied upon are firstly, the 3 January 2014 when all the information requested by the City Council had been submitted, secondly, the 5th February 2014 when the Appellants were convened to appear before the Permits and Business Monitoring Committee (hereinafter referred to as PBMC) for a hearing, and the 5th March 2014 when the refusal letter was issued.

On the other hand, the Head Planner of the City Council, Mr. Santokee, laid emphasis on the request for additional information by the City Council (by lettersdated 30 September 2013 and 26 December 2013 (Annexes 1 and 3 of the Respondent's statement of defence). Following submission of the further information requested, the

application was ultimately considered by the City Council on the 26 February 2014. It is the position of the Respondent that the 'effective date' was not given to the present application, therefore, the triggering date for the 'prescription' period could not occur. As such, it was on the 26 February 2014that the PBMC ultimately considered the application and the decision was communicated to the Appellants on the 5 March 2014, within fourteen days.

In order to ascertain whether the above procedure followed by the Council is compliant with the law, we have to refer to the definition of 'effective date' as provided by section 2 of the LGA 2011, which is as follows: *"**effective date**" in relation to an application made under Sub-Part F of Part VIII of the Act **means the date by which all the information, particulars and documents specified in the application form are submitted**".*

It is not disputed by the Appellants that there have been several requests for further documents made by the Respondent, the last one being the letter dates 26 December 2013, Annex 3. Amended plans were submitted on the 3 January 2014 followed by a hearing on the 26 February 2014. There is no evidence before this Tribunal to establish that all the parameters were present for the 'effective date' to be 3 January or 26 February 2014 when the hearing was held. The Appellant confirmed that at the hearing the committee heard their version as well as that of the objectors.

Should the 'effective date' be 3 January2014 as suggested by the Appellants, the 14 days delay would have lapsed prior to the refusal letter. However, the mere expiry of the 14 days does not suffice for the permit to be deemed to be granted. A further condition is contained in section 117(11) (a) which is the requirement that payment of the prescribed fees be effected within two days after the expiry of the due date. The Appellant cannot rest content by saying that the 14 days have lapsed and the permit would de facto be deemed to be granted. There is no evidence on record to show that any such payment, or attempt for payment, of the fees has been made. As such, section 117(11) cannot apply. For this reason, the first ground of appeal has no basis and fails.

II. <u>The second ground and third grounds: The law does not allow the Council to make a statement to the effect that the dormitory is not conducive to a residential area and the decision is vague and does not give any particulars of the objection. The Appellant was not given the opportunity to put questions to the objectors.</u>

Firstly, the Appellants stated that they were allowed to express their views at length during the hearing, where the objectors were present and equally expressed their concerns. The hearing was the proper forum for expressing their respective concerns and nothing on record suggests that they were not allowed to do so. On this score, the

ground that they had not been given the opportunity to put questions to the objectors is not substantiated.

Secondly, the City Council, in assessing the planning merits of the proposed development is duty bound to look at the planning instruments and proceed with an '*in concreto*' assessment. We are of the view that by considering the objections raised by the neighbours and by assessing the impact of implanting a dormitory intended to accommodate no less than seventy-five persons in a two storey building on a plot of land of 12 perches in a residential area, the City Council rightly took into account the characteristic of the neighbourhood and the concerns expressed by the inhabitants. There is nothing unlawful if, after such an assessment, the City Council rejected the application on the ground that such a development was 'not conducive' to a residential area. The Council was in a position to state that the proposed development does not meet the planning standards. We do not find how the Council could have exceeded its powers by stating that this proposed development is not a conducive activity to the adjacent residential owners.

The decision is in fact compliant with the policies. The Outline Planning Scheme in policy UDS 1(Development within settlement boundaries) recommends inter alia that proposed development should not inhibit the comprehensive development nor should it adversely affect the local amenity of existing sensitive uses such as housing, schools and health facilities and also should not exceed the capacity of existing utility infrastructure networks. From table 4.1 of the Outline Scheme, the Predominant Land Use and the Permitted Secondary Developments that are allowed in different categories are listed. In the category of Predominant Industrial use (including warehousing), the policy provides that *'No other use / activity apart from those that are ancillary to the predominant use, including dormitories and watchman's quarters, is allowed'.*

Therefore, dormitories are listed as secondary use within industrial development sites. They are not compatible with residential uses although, in effect, they represent places where workers from an industrial site reside. In this respect the decision of the Respondent is not flawed and the use of the term 'conducive' is not unwarranted and, more importantly, not unlawful. The second and third grounds of appeal are therefore not upheld.

III: The fourth ground: The City Council failed to take into consideration that the Appellant as owner has also a right of way on the main road as per location plan submitted to the Council. Such right of way without restriction appears in the Appellant's title deed.

There is no dispute that the Appellant has a right of way on the main road. We are of the view that the Respondent did not err in its decision that the right of way is a private one. The right of way is a right of use that is given to the owners of the property. Of course this would be used by any person who lives in the property or visits same. However, we construe the third ground of refusal as being based more on planning considerations than proprietary rights. It is in relation to the negative impact of the extensive use of the right of way that the activities caused by the ancillary use to an industrial activity are likely to cause. The decision of the Respondent does not in any way impact on the right of way as derived by the Appellants from their title deed. We therefore find that there is no merit in the fourth ground of appeal.

Based on the above, we find no reason to interfere with the Respondent's decision to reject the application for BLUP.

The appeal is accordingly set aside.

Determination delivered by:

Mrs. Vedalini Bhadain, Chairperson .....

Mrs. Ayesha Jeewa, Assessor .....

Mr. M. A. Busawon, Assessor .....

Date: 8th June 2017

Environment and Land Use Appeal Tribunal