

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

**ELAT 1345/17**

**In the matter of :-**

**LOUL CO LTD**

**Appellant**

v/s

**The Municipal Council of Vacoas/Phoenix**

**Respondent**

**IPO**

1. Gopal Bhooshan
2. Ranjit Chundoo
3. Yousouf Bolaky
4. A. Usman Kaseem
5. Mahmed Yousouf Boodhee
6. Mahmed Shariff Noormamode
7. Prarimdranath Sooklall
8. Reaz Jumratee
9. Sunkursing Ramphul
10. Irchad Rojoa
11. Naziihah Sham
12. Jumsah Aubeeluck Lucas
13. Vikash S. Gopaul
14. Sheywin Ruttun
15. Mehroon Khedun
16. Ram Sanmatee

**Co-respondents**

**DETERMINATION**

1. The present appeal is against a decision taken by the Council for having refused the application for a Building and Land Use Permit ["BLUP"] to the Appellant for the conversion of an existing residential building at first floor to be used as dormitory at Lot 96, Morcellement Highlands, Highlands. The Appellant was informed of the decision of the Council by way of a letter dated 23<sup>rd</sup> December 2016. The reasons for refusal set out in the letter are as follows:

"1. THE SITE FORMS PART OF AN APPROVED MORCELLEMENT OUT OF WHICH THE SUBJECT SITE WAS DESIGNATED FOR RESIDENTIAL PURPOSES. THE MINISTRY OF ENVIRONMENT, SUSTAINABLE DEVELOPMENT, DISASTER AND BEACH MANAGEMENT ISSUED AN EIA LICENCE (ENV/12/1238) FOR THE SAID MORCELLEMENT AND ALLOWING CHANGE OF USES WITHIN THE MORCELLEMENT WILL DEPART FROM THE CONDITION OF THE EIA.

2. STRONG OBJECTION HAVE BEEN RECEIVED AGAINST THE PROPOSED DEVELOPMENT."

2. The Appellant was duly represented by its Director, Mr. Nassroollah Hytoolakhan Lal Mohamed. The Appellant, the Respondent and the Co-respondents were all legally represented. The case for the Appellant in essence rests on the fact that the building will be used for residential purposes despite the fact that the application is for dormitory and that it will be used for housing only 4 housemates who are Bangladeshi nationals. These workers will be employed by the Appellant to work at a Bakery in Phoenix and that no commercial activity will be carried out on the premises. The Co-respondents are objecting mainly on the basis that the morcellement is a residential one as per their title deed and that there will be nuisance. We have duly considered the evidence before us as well as the submissions of counsel.

3. The Appellant lodged 5 grounds of appeal with its Notice of Appeal which are reproduced hereunder in italics:

1. *The Respondent erred by concluding that the granting of a licence for a dormitory would amount to a change of use within the morcellement which would consequently depart from the conditions of the EIA licence granted by the Ministry of Environment.*
2. *The Respondent erred in finding that a dormitory did not fall within the ambit of residential purposes.*
3. *The Respondent failed to take into consideration that no commercial activities would be carried out at the said premises.*

4. *The Applicant contends that the Respondent failed to give valid reasons as to why the BLUP was refused.*
5. *The Applicant contends that the Respondent acted arbitrarily and unreasonably in rejecting the application.*

## **I. CONTEXT ANALYSIS**

4. The subject site is located within a residential morcellement, at Morcellement Highlands, Highlands. There is evidence on record, Doc Q, which is the title deed of the Co-respondent no. 1, to show that the lots are residential but also there are clear designated lots which are meant for religious activities and commercial activities. The title deed produced by the Appellant's representative of the lot 96, on the other hand, does not clearly stipulate if it is a residential lot or not. This being said, there is no dispute that Morcellement Highlands is a predominantly residential area.

## **II. THE ISSUES**

5. The question that has to be determined is whether the activity that is being proposed by the Appellant can gain planning acceptance in a residential area. For any development in a country where there are planning policies in place the issue is whether the development proposed complies with the relevant planning instruments. It is important to make an assessment of the development in its context, the impact of the development on its surrounding environment and its compatibility. Besides, it is known that the key objectives of the planning instruments whilst acknowledging the socio-economic development of the citizens, is also to respect, preserve and enhance the quality of life especially in residential areas and to ensure compatibility of development that would allow the residents to have a peaceful enjoyment of their property and not infringe the privacy of the residents. In the present case, the BLUP applied for is in respect of a dormitory for 4 Bangladeshi workers to reside. The representative of the Appellant stated that he is required to provide free accommodation for these workers without charging any rent.

### Under Grounds 1, 2 and 3

6. Since grounds of appeal 1,2 and 3 are related, they are being considered together. It is the contention of the Appellant that Respondent wrongly concluded that the granting of a BLUP for a dormitory within the morcellement would amount to a change of use therein, which would consequently depart from the conditions of the EIA licence granted in relation to the morcellement, and that the Respondent should have found that a dormitory was essentially meant for residential purposes and that no commercial activities would be carried out at the said premises.
7. The representative of the Council, Mrs. Juwaheer, produced evidence, Doc M, guidelines emanating from the Ministry of Local Government and Outer Islands making reference to BLUP for dormitories in a letter dated 1<sup>st</sup> October 2019 addressed to the Chief Executive of the Council wherein a distinction was made between what constitutes a residential building as opposed to a dormitory. According to the guidelines of the Ministry *"A residential building may be described as a house to accommodate a family (normally low density) whereas a dormitory is a building used to house large number of persons (usually foreign workers)."* The letter also stipulates *"...conversion of an existing building into a dormitory may be considered as the making of a material change in the use of a building (in line with the definition of "development works" in the Local Government Act). This will warrant a fresh application for BLUP for dormitory after the obtention of a Lodging and Accommodation Permit."*
8. The Council nor the Tribunal can disregard the guidelines issued by the Ministry, the more so as they specifically address the issue at hand. The guidelines from the Ministry made it clear that a BLUP is required for a dormitory as according to the Ministry there is a change in use from residential. The Appellant applied for a BLUP for dormitory. The Council could not have overlooked the guidelines of its parent Ministry. Counsel for the Appellant referred to a Determination by this Tribunal in 2017 in the case of **RT Knits v/s The City Council of Port Louis [ELAT 547/13]** where the Tribunal had at length considered the classification of dormitory, which was unclassified, and came to the conclusion that it could only be classified as a "residential" development on the

facts of that case since it could not be categorized as an “economic activity”. The Tribunal observed at paragraph 11 *“While offering dormitory facilities would normally be considered an economic activity which could be similar to residential care homes (which is listed in the **Twelfth Schedule of the 2011 Act**), on the facts of this case, the dormitory cannot be considered an economic activity. It is being used as a private residence to house foreign workers who are engaged to perform industrial activities. Since the dormitory can only house workers, here off-site workers, employed by RT Knits Ltd, the appellant and the lessee of the building, the latter is not receiving money in exchange for offering lodging facilities to the migrant workers. RT Knits is the lessee who is providing lodging facilities to its workers in performance of its contractual obligations towards its factory workers and presumably its legal obligations to provide accommodation.”*

9. The facts of the present case are similar to the abovementioned one. Despite the evidence of Council’s representative, the Tribunal is still of the view that a dormitory is more in line with a residential development. It cannot be classified as a commercial development since it is not an “economic activity” in that the Appellant does not derive any income from providing the accommodation to its workers. But this being said, we do not believe that the Council was wrong to have considered the BLUP of the dormitory as being different from a conventional residential family home. The guidelines from the Ministry of Local Government were issued to the Council in 2019, where a dormitory is considered different from a residential building. The Council was bound by the guidelines and was entitled not to consider the proposed development as a typical residential development as in the conventional family home, and consider the objections of the people living in the neighbourhood and how they may be impacted by the proposed development. The nature of the development involves some human traffic with people coming in and out of the Appellant’s premises at any point in the day and night in a residential neighbourhood in view of their working hours. The comfort, security and adaptability of strangers in the existing environment are all issues of consideration for the Council. In the case of *RT Knits supra*, after due consideration the Tribunal found that in that case since there was a material change in the use of the building, the Council was justified to have requested a BLUP.

10. When deciding whether to grant a BLUP, inevitably the Council has to consider the title deed of the owner of the property and the title deed, is usually guided by *La Loi des Parties*. In this case the parties to the '*contrat de vente*' are the promoter of the morcellement and the buyers, that is, the *co-proprétaires*- whose rights are safeguarded under the law of contract. The Council, being the local authority, is not a party to the contract. Yet, in view of the wide powers vested in it by law, it has a supervisory and regulatory jurisdiction over all development whether private or public. The Council thus decides on applications using planning law principles. In the present case, there have been many objections received against the proposed development. In our view, since they are objections by the *co-proprétaires* in the Morcellement Highlands, the issue had to be considered by the Council since one of the parties to the contract is invoking his right under his title deed. The Council is under a duty to consider this not as a private interest but in the interest of those who will be impacted upon by the development.
11. As well as a consideration of the adjoining landowner's contractual rights, wider questions of planning and the public interest must be taken into account by the Council, which it did, by considering the objections of the local inhabitants of the morcellement. The objectors have raised several objections, namely nuisance, unsocial behaviour, depreciation of property value amongst others. Nuisance can take several forms and in planning the impact that such nuisance can have on the other inhabitants is a very relevant factor. While it can be appreciated that the Appellant intends to only house 4 Bangladeshi workers in a two- bedroom house having all the necessary amenities as a standard family of 4 persons, the nature of the lodging, that is to house workers, may in some circumstances have a negative impact on the neighbourhood. The Co-respondent no. 1, who was representing all Co-respondents, explained that the inhabitants of the morcellement have had some bad experiences with housemates of the dormitory of CMT. They suffered nuisances in several forms such as noise pollution, briyani parties being held, social gatherings, public display of affection, all constituting nuisance and causing inconvenience to the neighbourhood. He also expressed fear for their safety and cited as example his daughter's bedroom being in line with the proposed dormitory.

12. While the contribution of migrant workers for our local economy needs to be appreciated and there is a need to work with rather than against human habits, having unpleasant noise pollution after working hours, unsocial behaviour or even having long lines of clothes hung up to dry over balconies, may impact the character of Morcellement Highlands. In fact, one of the conditions found in the title deed of Co-respondent no.1 provides at condition no. 10 "The road reserves shall be properly landscaped and embellished with ornamental plants". The objectors, in the course of the hearing before the Council, also explained that most of the inhabitants have professional backgrounds. These are indicative of the socio-economic standard of the locals as well as the standard expected by them. Any factor that may bring about an imbalance in the quality of life of these inhabitants can be disruptive to the local residents as well as the foreign workers, this on a broader spectrum be detrimental to the residential character of the small community in a morcellement where the inhabitants have an expectation to live in peaceful enjoyment of their property. While the amenity of the area may not change, the character of the site is sure to change with the presence of persons who are not "homemakers" who will have no attachment to the neighbourhood moreso if the worker turnover of the Appellant is fluid or high. This would not be compatible with the character of a residential morcellement. This can already be sensed from the vehemence in the objections of the inhabitants of the morcellement. When taken as a whole and in its context, we are of the view that the Council was right to have considered the objections of the co-respondents in the face of the conditions of the title deed. These grounds of appeal therefore fail.

#### **Under Grounds 4 and 5**

13. It is the contention of the Appellant that the Respondent failed to give valid reasons as to why the BLUP was refused and acted arbitrarily and unreasonably in rejecting the application. The evidence on record shows that the matter went before the Council twice and on both occasions strong objections from the inhabitants of Morcellement Highlands were received and these are clearly set out in the grounds of

refusal as well as the minutes before the PBMC of the Council on the 21<sup>st</sup> December 2016.

14. As per settled principles in planning policies, where there is a proposed development within a residential area, any objections received from neighbours living in the vicinity, especially a 50 metre radius, needs to be considered by the Council. The Co-respondent no.1 lives opposite the subject site. The fifteen other objectors are all residents of the morcellement. Therefore, providing as reason that objections have been received against the proposed development is a valid reason under the planning policy guidance. The Council has given due consideration to these objections in the course of the hearing and has rejected the application for BLUP. This is evidenced by the minutes of proceedings before the PBMC as well as the letter sent by the Council to the co-respondent no.1, Doc T, stating that following their objections the BLUP has not been granted. These grounds of appeal therefore fail.
  
15. It is the contention of the Appellant that the BLUP was refused on the mere apprehension of the objectors and without any evidence supporting the fact that the proposed development will be a "source of nuisance". We do not subscribe to this view in as much as planning is always for the future and allows for some degree of speculation provided it is not unduly unreasonable. The Council is vested with powers to regulate and control development by setting planning frameworks and guidelines. The Ministry responsible for Local Government in its wisdom has decided to set out guidelines to regulate the development of dormitories in an attempt to treat all such applications with uniformity. The Council cannot be oblivious to such framework. Good planning decisions do not mean taking decisions to allow a development, that may be foreseeably incompatible with the surrounding, and thereafter cancelling the BLUP. This will set a bad precedent and lack of confidence in the authorities. Besides, there can be no concrete evidence of any wrong happening until the development is done and operating. The Tribunal finds no merits in such arguments. Having come to the conclusion that the proposed development will be incompatible with the current character of the morcellement, we reject the proposal for a conditional BLUP being granted in this case.



16. For all the reasons set out above, we find that the Council was right in its decision. The appeal is set aside. No order as to costs.

Determination delivered on 23<sup>rd</sup> December 2020 by

**Mrs. J. RAMFUL**

**Vice Chairperson**

**Mrs. P. Rawooteea**

**Member**

**Mr. R. Monaf**

**Member**