BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1534/17

In the matter of :-

Bibi Bilkiss Khodadin

Appellant

v/s

District Council of Flacq

Respondent

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 the ground floor an existing buildingto be used as dealer in readymade goods, at Market Road, Central Flacq. The appellant was informed of the decision of the Council by way of a letter dated 1st December 2017. The reasons for refusal set out in the letter are as follows:

"1. SUBJECT BUILDING EMANATES FROM A BLP REF RESI/0406/2010 WHICH HAS BEEN PUT UP CONTRARY TO APPROVED DRAWINGS.

2. FIRST AND SECOND FLOORS HAVE BEEN PUT UP WITHOUT A BUILDING AND LAND USE PERMIT AND WITHOUT OBSERVING STATUTORY SETBACKS.

3. THE BUILDING IS STILL UNDER CONSTRUCTION AND NO COMPLAINCE CERTIFICATE HAS BEEN ISSUED BY THE COUNCIL PRIOR TO CONVERSION.

4. THE BUILDING HAS ZERO SETBACK FROM LHS NEIGHBOUR AND NO CONSENT HAS BEEN SUBMITTED. "

I. APPELLANT'S CASE

2. Both the appellant and the respondent were legally represented. We have duly considered the evidence before us as well as submissions of both counsel. The main bone of contention of the Appellant in this case is that she had previously lodged a case before this Tribunal in 2012 and on the basis of certain conditions to be fulfilled by her the Council had stated at the sitting of the 5th September 2017 that it was ready to grant a BLUP to the Appellant. The Appellant, having agreed to the stand of the Council, withdrew her case before this Tribunal. One of the conditions was that the Appellant was to submit a fresh application, which she did and in December 2017, her application was rejected again on the same grounds as they had been previously rejected by the Council in 2012. The Appellant, feeling aggrieved again by the decision of the Council, lodged the present appeal before the Tribunal.

3. The appellant raised 2 grounds of appeal as per her notice of appeal, namely:

"(a) The refusal constitutes an abuse of authority in as much as on the 5/9/2017 in case 141/12, the Respondent undertook from ELAT to grant the Appellant the permit to convert the same building provided that Appellant complies with certain conditions, which Appellant did. Appellant subsequently withdrew their Appeal.
(b) All the reasons for refusal stated by the Respondent in their letter dated 01 Dec 2017 were known to the Respondent before they undertook to grant the permit on the 05th of Sept 2017."

The Appellant testified as per these grounds and explained the circumstances under which she withdrew her appeal before the Tribunal in September 2017. She stated in cross-examination that prejudice has been caused to her because had the Council not given the undertaking in the previous case in 2017, she would not have withdrawn her appeal and would not have had to start all over again. She stated that at no point did the Council mention to her at the time that she withdrew her previous appeal that the consent of the neighbour, Mr. Ramgoolam, was still needed.

II. RESPONDENT'S CASE

4. The case of the Respondent is in essence that albeit there had been a particular stand taken by the Council in 2017, the present appeal is against a decision of the Council on the basis of the "new" application made. The consent to the proposed development has not been obtained from one of the neighbours, one Mr. Ramgoolam, which is required. His property and that of the Appellant are less than 3 feet apart, the required setback not having been observed by the Appellant.

III. GROUNDS OF APPEAL

5. We have gone through the record and the grounds of appeal of the Appellant. The case for the Appellant throughout is that she is aggrieved by the manner in which the Council proceeded in re-assessing her second application and the fact that the Council did not honour the undertaking it gave before the Tribunal in the course of the previous proceedings in 2017. While we can simply acknowledge from the record that it appears that the Council had stated that a BLUP could be granted to the Appellant subject to certain conditions being observed by the latter, this Tribunal cannot embark on an exercise of review of an administrative body. That is a matter of judicial review before another forum. The Appellant's case is one of "abuse of authority" by the Council. This Tribunal is not mandated under the law to assess whether the Council acted *ultra vires*.

6. The jurisdiction of this Tribunal set out under **section 4 of the Environment and Land Use Appeal Tribunal Act 2012** which is partly reproduced hereunder:

"**4. Jurisdiction of Tribunal**

(1) The Tribunal shall—

(a) hear and determine appeals—

(i) under section 54 of the Environment Protection Act;

(ii) from a decision of a Municipal City Council, Municipal Town Council or District Council under section 117 (14) of the Local Government Act;..."

7. A reading of the above section shows that the jurisdiction of this Tribunal is to make a finding on the ***decision*** of the local authority in relation to the BLUP. In other words it is this Tribunal's duty to decide whether the proposed development is worthy of having a BLUP or not. The wording of the first ground of appeal seeks in essence to challenge the legality of the decision of the Council which, as we understand the appellant to be saying, was made on a basis that it was wrong in that it made an abuse of its powers and authority. The simple question that this Tribunal needs addressing, therefore, is whether it has jurisdiction to hear issues pertaining to the legality of a decision taken by the decision-making entity.

8. This Tribunal decides on the merits of an appeal. There is a distinction to be made between deciding a case on its merits and reviewing the way in which a process was carried out. When hearing an appeal, the Tribunal's role is to determine the correctness of the findings as opposed to the legality. A review on the other hand looks at whether due process was followed or whether the decision making body had the power to decide in the first place. In the present instance, what we understand the Appellant to be saying under her second ground of appeal is that it is on the basis that the Council has undertaken in an earlier appeal to grant the BLUP to the Appellant subject to certain conditions being abided by that the Appellant withdrew her appeal and the Council subsequently refused her appeal on the same planning considerations and this, according to the Appellant, was unfair and has caused her prejudice.

9. It may well be that this ground is a valid point but the issue is whether this Tribunal has the jurisdiction to adjudicate upon it. We do not believe that it does. The power vested in the local authorities are to assess application on their planning merits. The Council's position in relation to the appeal before us is that there is a legal requirement for a setback of 3 feet to be observed between neighbours. We perfectly understand this to be a planning requirement for have a setback between neighbours due to the risk of fire, in case of such circumstances, the setback will act as a firebreak. This is the underlying reason for having setbacks. Now unless this is waived by consent of neighbours, the local authority cannot derogate from this requirement.

10. Since the power exercised by the Council is conferred by law, this Tribunal is not mandated to review those powers or the jurisdiction of the Council even if the claim is that its decision was flawed that is it was based on the same grounds as the previous appeal or that it ought to have informed the Appellant before she withdrew her previous appeal, that the consent of the neighbour was still a live issue. ***Administrative Law, 7th Edition, Wade And Forsyth*** –
"It is inherent in all discretionary power that it includes the power to decide freely, whether rightly or wrongly, without liability to correction, within the area of discretion allowed by the law."

11. The jurisdiction of this Tribunal, as an appellate body, is to look at the decision of the Council and decide on the basis of what was placed before it, whether the conclusion reached was correct. If not, then this Tribunal would make the correct assessment.

IV. GROUNDS OF REFUSAL

12. The grounds of refusal as per the letter dated 1st December 2017 are all based on the planning assessment criteria. The first three grounds relate to the erection of the building itself which has not been done according to planning norms. But the 4th ground of refusal relates to the consent of the neighbours, which is important for the proposed development to be acceptable. This is the main ground which, we have understood the Respondent to be pressing on, understandably since it involves the rights of 3rd parties.

13. Therefore, on the planning merits of the case, we believe, as stated above, that the consent of all the neighbours should have been obtained and the Council was right in its assessment on this issue as the neighbours are free to choose whether they are agreeable to the setback allowed by law not being respected at their risk. The Council was also fully entitled to re-assess the planning merits of the application and if it was of the view that the issues of non-compliance with planning norms are those that are set out in the refusal letter, then it cannot be taxed for having done so. The local authority is mandated to assess the planning merits of

every development proposal that comes before it. If the Appellant felt aggrieved by the manner in which the Council acted, then her recourse would be elsewhere, not before this Tribunal.

14. For all the reasons set out above, the appeal is set aside. No order as to costs.

Determination delivered on 2nd March 2020 by