

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

**Cause No.: ELAT 1008/15**

**In the matter of:**

**MR. ANDREW TSE EN HAU**

**Appellant**

**v.**

**BLACK RIVER DISTRICT COUNCIL**

**Respondent**

**DETERMINATION**

The present appeal comes to this Tribunal because the Respondent, being the authority that issues Building and Land Use Permits (BLUPs), has refused to grant a BLUP to the Appellant who had applied for a conversion of an existing residential building into a Tourist Residence (1Unit). The sole ground of refusal is that "As per the PPG on Le Morne Cultural Landscape the site should remain strictly residential". It has been the contention of the Appellant that the activity that he proposes is akin to a residential status as it will cater for sleeping and living facilities to tourists for a specified period and against payment.

The position of the Respondent differs and as stated in the Respondent's statement of defence: "*Tourist residence cannot be compared with a residential building: by nature of activities and period of stay by the residents. The nature of activities within a Tourist residence that is the length of stay by the residents, their movements in and out of the building, the time at which their movements occur cannot be compared to a residential building where a resident is staying permanently. A Tourist residence falls in the commercial cluster as defined in the Eleventh Schedule of the Local Government Act 2011. Services are being provided within the building and for these services a trade fee has to be paid and consequently a Tourist residence is considered as a business enterprise and a commercial activity*".

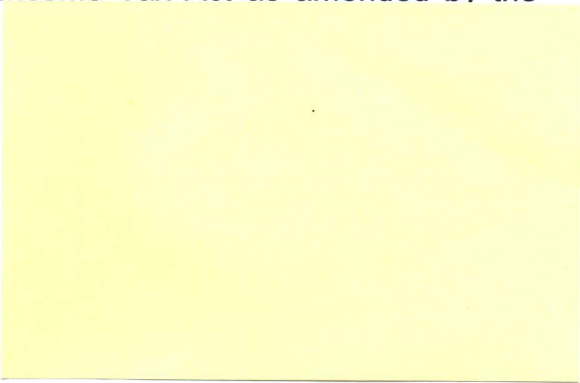
In addition to the issue of the definition of what is a residential development, the response of the Council is based on the PPG on Le Morne Cultural Landscape, and relied on the specific provision that "*The 'morcellement' should remain strictly residential and no sub-division of plots will be allowed*". It has come out in evidence that the Respondent relied on a correspondence from the Le Morne Heritage Trust Fund (Document C) and requested the Appellant to comply to the conditions contained therein, namely that "*all applications within the Le Morne Cultural Landscape and its vicinity obtain a no objection from the said institution with conditions that apply*".

The Appellant has refused to seek clearance from this Trust Fund on the ground that no such clearance is required. The Appellant's case is essentially that he is seeking to rent his residential premises to tourists, as such, it is not a commercial activity that changes the nature of his premises from residential to commercial. Counsel for the Appellant has argued that the Income Tax Act describes a Tourist Residence as a residential activity and thus, there is no need to obtain any clearance from the Trust Fund.

After considering the evidence adduced by the Appellant and the representative of the Respondent, we make the following observations:

1. It is our view that the fact that the proposed activity, as described by the Appellant, is one where tourists would sleep only, does not make it a residential activity. The Appellant has averred at paragraphs 3.3 and 3.6 that "*A Tourist residence is essentially a private house that offers sleeping accommodation to tourists...The purpose of a Tourist residence, which is to offer sleeping accommodation to tourists, does not in any manner whatsoever infringe or alter the nature and characteristics of the premises, which remain strictly residential*". What the Appellant has omitted to say is that the renting out of the premises will be done for a fee. He conceded in cross-examination that tourists will pay rent for staying in the premises. This "*per se*" characterizes the commercial nature of the activity. It has been submitted that the Local Government Act does not define the word "residence" nor the word "tourist residence" and the only definition of "tourist residence" is that contained in the Tourism Authority Act as follows: "*Tourist residence means any premises, other than a hotel or guest house, which offers sleeping accommodation to tourists, with or without meals, for a fee*". It is clear to us that the exchange of this service for monetary gain renders the activity a commercial one.

We agree with the stand of the Respondent that the definition that the Appellant relies upon, namely that contained in the Income Tax Act as amended by the





Finance Act 2007, is applicable in the context of tax levied and cannot be extended to the issue of permits to be delivered by the relevant authority.

2. The Regulation made by the Respondent under the Local Government Act 2011 (Government Notice 23 of 2015), referred to by the Appellant, indeed exempts the activity of Tourist Residence from the payment of Trade Fees. We cannot but observe that this exemption is only an exercise by the Respondent of its powers, and the decision to exempt the fees is a matter of policy. The Council is the sole authority to grant a BLUP. The non- imposition of the trade fee does not reduce in, any way, the powers and jurisdiction of the Council in the granting of the BLUP. Now, the Appellant is required by the provisions of the Tourism Authority Act to obtain a BLUP to operate its business. The Council maintains that it is bound by the planning instruments that govern its jurisdiction, in this particular case, the Planning Policy Guidance 2 on Le Morne Cultural Landscape. The Design Guidance for the Le Morne Cultural Landscape, reads as follows:

*“Paragraph 2: Design Guidance*

*The objective is to define a set of performance criteria and design standards that are applicable to supportive development for use by individual site owners, developers, Non-governmental organizations and for assisting Government and the Local Authority when processing development applications....*

*Paragraph 2.4 How to use the Planning Policy Guidance*

*The Design Guidance for Le Morne prescribes rules which should be adhered to as per the Design Sheets. Furthermore, all development responses will have to be assessed by the relevant agencies, and also by the National Heritage Fund and the Le Morne Heritage Trust Fund. Proposed development will need a positive recommendation from these two bodies prior to a Building and Land Use permit being issued.”*

The above condition of the PPG sets out, in no unclear terms, that any developer requiring a BLUP should obtain a prior recommendation from the Trust Fund. The Appellant treads under the impression that the only procedures that he needs to follow are those contained in the Tourism Act and that the Local Government Act dispenses him of paying trade fees, and there is no need to comply with such provision. This is an incorrect approach. The Legislator has deemed fit to maintain the need for a BLUP even if the applicant needs to obtain the required authorization to run a Tourist residence from the Tourism Authority. The rationale would be that any such activity amounts to land use, for which the sole authority to deliver it is the Local authority. The Council cannot be faulted for

applying the planning norm as provided for by the above-mentioned PPG, namely that of obtaining a recommendation of the Le Morne Heritage Trust Fund.

The Appellant attempted to stress on the absence of any distinction between a residence and a Tourist residence and refused to seek the clearance from the Le Morne Heritage Trust Fund. As stated above, there is a distinction in as much as the proposed use is a commercial one by virtue of the fee that is paid for the service rendered. Be that as it may, the process before the Tourism Authority would be incomplete in the absence of a BLUP. The BLUP can only be issued if there is compliance with the PPG. This is the state of the law, which the Appellant needs to comply with.

We note from the evidence of the representative of the Respondent that there seems to be a review of policy whereby some developments have been approved, and that, should the recommendation be obtained, the BLUP could be favorably considered. Nonetheless the Appellant maintained that he does not need to have such a recommendation.

In view of all the above, we find no reason to interfere with the Council's decision, the grounds of appeal are not being upheld. The appeal is accordingly dismissed.

Delivered on 6th February 2020 by:

**Mrs. Vedalini Phoolchund-Bhadain, Chairperson**

**Miss Roovisha Seetohul, Member**

**Mr. Pravin Manna, Member**