BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 138/12

In the matter of :-

Seven Seven Company Ltd

Appellant

v/s

Municipal Council of Curepipe

Respondent

DETERMINATION

The present appeal is against a decision taken by the Council for having rejected an application made by the Appellant, a registered company, for a Building and Land Use Permit (BLUP) for the conversion of an existing building into a supermarket at ground floor and into a store at the first floor at Remono Street, Curepipe. The appeal was originally lodged before the Town and Country Planning Board but was subsequently referred to this Tribunal following the enactment of the Environment and Land Use Appeal Tribunal Act 2012.

The grounds for refusal given by the Executive Committee of the Council were set out in a letter dated 13th April 2012 as follows:

"1. The structural stability of the building is not fully guaranteed.

2. The report prepared by Mr. Sanjay Soborun, RPEM No. 994, Civil Engineer, has been based on observation only. No tests have been carried out to verify the integrity of the building and its structure.

3. No structural drawings of the existing building are available as per report.

4. The building has structural elements which are in timber.

5. The roof and walls of the building appear to be in corrugated iron sheets. No comprehensive details of the structural elements and their sizes have been provided.

6. No design calculations (wind load and structural analysis) have been carried out.

7. The building comprises of members which are in metal structures. In this case the fire resistance of the building has not been specified. It is to be noted that the supermarket will likely to attract a lot of people. In case of fire breakout this may represent a danger for people inside the building especially for those workers who may be at the first floor of the building. It is also known that elements like timber have little or practically no fire resistance.

8. No clear details have been provided for the first floor of the building.

9. Drainage layout plan with all details has also not been provided. There are so many shortcomings in the report as more fully described. The state of the building is such that it does not appear to be appropriate for containing a supermarket, the more so that the structural soundness of the building is not guaranteed by a chartered engineer."

Mr. Jaulim, representative of Seven Seven Co Ltd testified on behalf of the Appellant under solemn affirmation with respect to the six grounds of appeal lodged. Mr. Gooriah, Ag. Head Planner at the Council, testified on behalf of the Respondent. Both parties were legally represented. Ground 3 of the grounds of appeal as set out in the statement of case of the Appellant was dropped.

BACKGROUND

We have duly considered all the evidence placed before us as well as submissions of counsel. The starting point is, we believe, to make an assessment of the type of development proposal we are dealing with. The proposed development is an old one storeyed building which contains some commercial units on the ground floor. Its walls are predominantly made of stonemasonry but it also bears some timber, plywood and iron finishings. The building is bordered by the main road called Remono Street and two other roads which run parallel to each other, one of them being Cossigny Street. There exists a large open space at the rear of the building which serves as an open car park. The proposed development is only a few metres away from Sik Yuen Supermarket, Curepipe.

Under Ground 1

It is the contention of the Appellant that the decision of the respondent to refuse the BLUP is *ultra vires* in that it breaches **s.117 (12) (a) Local Government Act 2011**. This section essentially provides that where there is discrepancy between the views of the PBMC and those of the Executive Committee, the matter has to be referred to the Minister for a decision. The evidence shows that Respondent's letter dated 22nd November 2011 informed the Appellant that the application has been approved subject to conditions including clearance from TMRSU. The Appellant was later informed by a letter dated 13th April 2012

that the Executive committee had refused the BLUP. According to the Appellant, the views of the two committees being divergent and not referred to the Minister for a decision is in breach of **s 117(12) (a).** The Respondent contests that it acted *ultra vires* in that one of the conditions enumerated in the letter dated 22nd November 2011 is the submission of a structural assessment report. The engineer of the Respondent having examined the report submitted by the Appellant found it to be unfavorable. The Respondent therefore rejected the BLUP application pursuant to the report. The matter, according to the Respondent, did not have to be referred to the Minister.

The **Local Government Act 2003** sets out under **section 98 the Powers and functions of Permits and Licences Committee**. This committee subsequently became known as the Permits and Business Monitoring Committee following the enactment of the **Local Government Act 2011**. The relevant provision under the old Act is reproduced hereunder:

Section 98

"(5) Subject to section 105, the Committee shall _

(a) Examine, process and approve applications for permits and licences in accordance with the guidelines referred to in subsections (3) and (4);
and
(b) Issue under the authority of the Chief Executive _
(i) development permits under the Town and Country Planning Act;
(ii) permits under the Building Act; and
(iii) municipal licences and other permits or authorizations under this Act or regulations made thereunder."

Section 105 of the 2003 Act deals with examination of applications by the Permits and Licences Committee.

The Local Government Act 2011 came into force on the 15th December 2011. It appears that as the law stood at the time of application by the Appellant, it would have been considered by the then Permits and Licences Committee which had the power then to examine, process, approve and issue permits. The approval letter sent to the Appellant on 22nd November 2011 under the signature of the then acting Chief Executive was therefore in order. The Appellant had to revert to the Council with the information requested. When the Appellant received the refusal letter in April 2012, the powers of the 'new' PBMC were no longer the same as the Permits and Licences Committee. Under the **2011 Act**, the process changed. The PBMC could only submit its views but it was for the executive committee to take a decision whether to grant or refuse the permits subject to certain criteria being met. This is what the executive committee did. In the circumstances, we fail to see in what way the Council breached the law. This ground therefore fails.

Under Ground 2

Section 17 of the Building Act 1915 sets out the power of the Council with regard to the safety and ventilation of buildings put at the disposal of the public. It is the contention of the Appellant that the decision of the Respondent to refuse the BLUP is manifestly wrong in law as it is contrary to **section 17 of the 1915 Act**, which was in force at the time of the application. The section states that the Authority "may" cause the building or works therein to be inspected with respect to the safety and ventilation. It also states that the Authority "may" order the building to be closed while the conditions imposed are to be carried out. This section, in our view, is of a general application in as much as the section is not triggered solely upon an application for a BLUP to the Council. It does not compel the Council specifically to inspect the building for the purposes of the granting of a BLUP. It does not impose an obligation on the Council but infact gives it the power to exercise its discretion at any time it so wishes to inspect the building because of the use of the word "may".

This being said, we do understand the point being made to be that without inspection from the officers of the planning department how could the Council make an assessment on the safety of the building? We have it in evidence that the members of the Executive Committee did inspect the premises. They are however not the technical experts. Such expertise could have only come from the officers of the planning department or the engineer of the Council, none of whom visited the site. Now, the Council may argue that there is no legal obligation upon it to delegate its officers to inspect the site. While agreeably, the law imposes no such obligation, the Council could, on the other hand, have disposed of the matter through the report requested from the engineer of the Appellant. The Council had the power to request the Engineer's report to specifically shed light on the safety, sustainability and structural soundness of the building. The structural report was a preliminary step which they asked for and were entitled to ask for. But it is rather unfortunate that the Council was not clear as to what it required in the report. The Council bears the burden of providing guidance to public regarding an application for BLUP, a burden which in our view it failed to discharge through its own fault, for lack of clarity. The evidence shows that despite a request from the applicant the Council failed to provide clarity on the information requested in its letter dated 22nd November 2011, only doing so by way of a refusal letter on the 13th April 2012 once the engineer's report was submitted. It was only in this letter that the Respondent set out the information which the report lacked. We note that some of the reasons given for the refusal were drafted in rather vague terms. As per our analysis, the Council evidently needed more information. Its decision to refuse the application was consequently taken despite it not being in possession of the information which was actually requested in that same letter. The Council consequently failed to take an informed decision. This is principally due to its own fault for failing to request further information from the applicant of the BLUP.

Under Ground 4

It is the contention of the Appellant that it has been treated unfairly in that the processing and consideration of the application for BLUP was done by the PBMC, which consequently approved it whereas the final decision to reject the application was done by a differently constituted Executive Committee. The Respondent denies this and maintains that the application was rejected on the basis of the report from the Head of Works Department submitted at the meeting of the PBMC on the 24th February 2012.

The minutes of the meeting that took place on the 6th April 2012 before the Executive Committee was already in the file. Counsel referred to them.

At Page 3 of 13 of the minutes the final decision of the Executive Committee reads as follows: *"DECISION:- Le comité rejette la demande de Seven Seven Co Ltd.....'as per views' soumis pas le HWD a la réunion du PBMC du 28 février 2012..."* a close reading of the relevant paragraphs show that some discussions on the topic lead the Councillors to this decision. One Mr. Beetun informed the committee that the members of the Executive Committee had visited the site and noted that *"les views soumis par le HWD dans son rapport etaient corrects. Il ajoute aussi que le HWD avait parle de la structure du batiment et did avoir constater personellement que les bois se trouvant en haut ne sont pas en bon etat.....De ce fait, M. Beetun est d'avis que le PBMC, a sa reunion de 24 fevrier 2012, avait raison de ne pas recommender cette application."*

Therefore, it is clear that the official reason for the Executive Committee to reject the application of the Appellant was based on the unfavourable report of the HWD, who is infact Mr. Seebaluck, the Engineer of the Council.

This being said, we pause here to make an observation. The minutes of proceedings show that one of the Councillors, Mr. Akay suggested that in order to simplify matters for the public the HWD could inform the applicant of the shortcomings and offer guidance regarding the application. The then acting Chief Executive stated that the role of the PBMC is to approve or reject an application in the decision making process. We find this to be rather astounding that the Council believes that it is not its job to assist the public in making their applications. Firstly, as stated above, the law as it stood in February 2012 states at **section 117 (6) LGA 2011** that the PBMC ***shall process*** every application for an Outline Planning Permission or BLUP, having regard to the provisions of the Building Act, the Town and Country Planning Act and the Planning and Development Act and any guidelines issued under those Acts. From our reading of the law, the role of the PBMC is certainly not restricted to simply approving or rejecting an application.

Secondly, if the local authority does not inform and assist the applicants on how to make their applications then who will? All institutions set up under the law of this country have undoubted been set up for a purpose. Local authorities are vested with powers to process and issue BLUPs. They, as the decision-makers, having a better understanding on these issues and are best placed to offer guidance to the public on how to make their applications.

This would avoid frivolous applications, unnecessary costs and waste of precious time. We understand Councils have compiled some guidelines to assist in the application for BLUP, which we believe as a matter of common sense, was designed to ensure that applications submitted are complete. These guidelines are meant to define what constitutes a complete application, make this list clear to applicants, and require these items to be present at submission. It is therefore very much the duty of the Council to educate applicants so they understand the requirements. In this context, we totally agree with the position taken by Mr. Akay. This could have solved matters and prevented unnecessary expense and time. Otherwise it defeats the purpose of issuing guidelines, circulars, policy documents amongst others. There should be a mutual understanding between the Council and the public on the permit process so that the applicants can understand the "how" and "why" of the process. Councils should be able to guide applicants before and after submission of their application, engage into discussions as to constraints or design requirements of certain developments to state a few. Many problematic applications could thus be resolved without surprise or having to rework them late in the process.

Under Ground 5

It is the contention of the Appellant that the reasons given for refusal relate to technical matters whereas the Executive Committee which actually took the decision have no technical expertise nor did it seek the views of competent authorities. We believe that this issue has already been dealt with above. It seems unclear which other competent authorities the Appellant is referring to. The reasons given by the Respondent to refuse the application are based upon the views of their engineer and a perusal of the refusal letter indeed indicates that mainly for technical reasons relating primarily to the engineer's report and the structural aspect of the building that the application has been rejected. The minutes of the meeting of the Executive Committee show that Mr Seebaluck, engineer and Head of Work Department was present when the Executive Committee took the decision to base itself on the views of the HWD to reject the application. No one can be better placed than an engineer to assess the soundness of the report of another engineer. Whether the Respondent's engineer met the standard expected of a reasonable professional in assessing the application in the present case is a different matter. Conversely, what we found was that the evidence of the Appellant's Engineer to be rather lean in content. His observations were mostly visual and he even admitted that he was given a short period of time to examine the premises and prepare the report. He had no drawings to work on nor did he make any of his own. His report lacked significant information regarding the sustainability of the building. He could not provide to the Tribunal any measurements nor calculations. He could not enlighten us on the exact thickness of the plywood used for the upstairs floor. As far as this Tribunal is concerned one of the key elements in this case is the sustainability of the building since it is an old building. Will the building in lite be able to sustain the type of

activity being proposed? We have it in evidence that parts of the building were damaged and hence it demanded renovation. From our site visit, we noted that some rather extensive renovation works had indeed been carried out including walls that had been replaced, the flooring on the mezzanine reinforced and some of the openings redone. The representative of the Appellant informed us that the 'new' walls were made of plywood and iron sheet. Infact as per the report of Mr. Soborun this constitutes 40% of the building's wall framing.

The whole issue of sustainability of the development and consequently safety rested upon the evidence of the expert, the engineer. The Tribunal needs to be convinced that proper tests have been carried out and calculations have been done by the expert to show that the premises including the building have been tested, not just visually but also scientifically to ensure that it is structurally stable and safe to be able to sustain the kind of challenges envisaged by the proposed development. It was expected that these would also be in the contents of the report of the Appellant's engineer which would then be crosschecked by the Respondent's engineer. Unfortunately Mr. Soborun failed to convince us that he had exercised due diligence in the preparation of his report which we found to be far from being thorough. He gave evidence that the building was well shielded by other concrete buildings around. But the fact remained that 40% of the building's framing wall on the first floor mentioned in his report had not stood the test of time. He also stated that tests can be carried out but were not because *visually* he was satisfied that the building was sound. Yet, he agreed in cross examination that he could not guarantee that the building was safe and sound to accommodate members of the public. His stand on whether the beams needed anti termites treatment ~~to the beams~~ seemed contradictory. He spoke of fire exits in case of a fire breakout but it was only in the course of the site visit that the Tribunal noted that in fact there are no fire exits upstairs and that there is only one staircase to service the building.

Although we are not experts in this field, we have difficulty in understanding some recommendations made by Mr. Soborun in his report. At Page 13, we quote "The first floor imposed loads shall be limited to uniformly distributed loads of 2.4 kilo Newtons per metre square or 240 kg per metre height up to a maximum height of 2 metres." On the face of it, we are of the view that this does not appear to be a practical solution. For reminders, we are looking at a space with plywood flooring to be used as a store for a supermarket. How would the workers stacking goods in the store know at which point the load may not uniformly balanced so that there is no more than 2.4 KN of weight per metre square of floor or 240 Kg per metre height? The implementation of such measures appears to be unrealistic, to say the least.

The Tribunal was in no way anymore impressed by the evidence of the Respondent's engineer who gave the impression that he went on a fishing expedition to look for shortcomings in the report of Mr Soborun. As a professional assessing whether a building can gain planning acceptance or not, one would have expected the civil engineer to at least

visit the site to have a visual appreciation of the structural elements of the building. Consequently, this Tribunal has remained in the dark on what we considered to be the main issue, that is, the sustainability and structural soundness of the building which in our opinion rested solely on the evidence of the engineers. The Respondent filed a set of guidelines for evaluation for the construction of buildings called the British Standards which allegedly have to be followed when assessing a building. These are of no assistance to the Tribunal which has no technical knowhow on structural engineering. Besides, Mr. Soborun was of the view that some sections of the British Standards were not applicable in the assessment of an existing building, they were applicable for the designing of new buildings. While we understand the point that the Appellant seems to be making that it sought clarification following the Respondent's refusal which fell on deaf ears, it does not change the fact that the evidence before us is insufficient for this Tribunal to come to an informed decision on the structural soundness and the safety of such an old building. In the absence of such crucial evidence, we are not ready to surmise on such technical issues which we consider of utmost importance on the facts of the present case.

UNDER GROUND 6

We believe that most of the points raised under this ground have been dealt with above and we shall therefore restrict ourselves to the points which have not been previously addressed. The contention of the Appellant is that the reasons for refusing the BLUP are oppressive, unreasonable, arbitrary, unfair, unwarranted, unjustified and highly prejudicial for several reasons. One of the reasons put forward by the Appellant is that the Respondent granted a BLUP in October 2010 for the same building. The BLUP was then for the "extension of existing commercial building at ground floor for a store and renovation and re-roofing of existing first floor". The simple answer to that is that it was a different application for a wholly different purpose. There are bound to be different requirements for a building that will be used as a store and one that will be used as a supermarket with a dynamic flow of human traffic. The Council therefore cannot bind itself. Infact if we are to follow this argument of the Appellant's, it would be tantamount to the Council feterring its discretion in that it would be rubber stamping its previous decision hence be bound by the previous application. This cannot be. Each application has to be looked at on its own merits and the Council has to look at each application afresh.

This being said, the Tribunal of the view that the untimely grounds of refusal led the Council to take an uninformed decision. The Respondent was clearly wrong not to substantiate the reasons for refusal and to reject the application in one and the same letter. In so doing it failed to give the applicant an opportunity to provide that information or carryout the necessary improvements or tests/further works. It was well within its capacity to and it should have provided the "views of the HWD" to the Appellant at the outset when they were available or at the time when its representative sought clarification on the report. This

would not only have saved time and avoided unnecessary expense but would have allowed the Appellant to focus on the issues and concerns of the Council. Incidentally, this Tribunal failed to understand why the witnesses for the Council could not explain what the Council meant by "comprehensive details". While we do understand that in simple English language the term "comprehensive" means "complete", the witnesses for the Council could not explain so called "comprehensive details on the structural elements". If this is not within the knowledge of the Council then it is not reasonable to expect the Appellant to know what the Council expects from it.

The Council raised the point that since Remono Street runs through the town centre of Curepipe where traffic is already saturated, the location may not be proper for this development. We do not believe that there is much substance to this point. The subject site is not exactly situated in the town centre. Besides its location is such that it is served by three roads. One of the less important roads is a one way while the traffic on other road is regulated by traffic lights. From our visual appreciation of the site the width of the roads seemed adequate for the type of traffic likely to be generated and the space available for car park was more than sufficient.

After considering all the evidence before us, we are satisfied that the location is apt for such a business enterprise. On the other hand, we believe that sufficient evidence especially from the engineers was not presented before this Tribunal for us to reach an informed decision as to the structural soundness and sustainability of the building *in lite*. The proposed development, being a supermarket where the public will have access day in day out, we need to be satisfied without a shadow of doubt that safety is guaranteed. The public interest tips the balance here. We believe that the Council was wrong to have refused the BLUP in the same letter in which it gave the Appellant the views of the HWD, without allowing the Appellant another chance to satisfy those requirements. By way of guidance this Tribunal strongly advises Councils to henceforth give the opportunity to applicants to satisfy the requirements imposed by the Council before rejecting their application.

This being said, we are not ready to remit this case back to the Council for reconsideration since the Appellant's case also lacked crucial evidence. The case of the Appellant rested mainly on the evidence of its engineer. We are not ready to grant the BLUP on the basis of the report of Mr.Soborun which lacked essential information. However we direct the Council to provide all necessary guidance and any clarification sought, should the Appellant wish to make a fresh application.

For all the reasons set out above, the appeal is dismissed. No order as to cost. Determination delivered on 23rd September 2015 by

Mrs. J. RAMFUL	**Me. V. Reggi**	**Mr. S. Karupudayyan**
Vice Chairperson	**Assessor**	**Assessor**