

IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

IN THE MATTER OF:

Cause Number: ELAT 90/12

ENK MARKET LTD.

Appellant

v.

MUNICIPAL COUNCIL OF PORT LOUIS

Respondent

DETERMINATION

The present appeal is against the decision of the City Council (then known as the Municipal Council) of Port Louis, dated 25 February 2011, which rejected the application for a Building and Land Use Permit (BLUP). The BLUP is in respect of the erecting of an advertising screen in steel on top of an existing four storey building situated along Farquhar Street Port-Louis. The basis of the decision of the Council is that "*the height of the subject building whereon the advertising panel is being proposed is above the prescribed height as contained in the Planning Policy Guidance (PPG) for the Appravasi Ghat World Heritage Site (AGWHS)*".

The grounds of appeal as per the Statement of Case of the Appellant in a nutshell the following:

1. That the PPG in question has been applied to the application of the Appellant with retrospective effect in as much as the effective date of the PPG is June 2011 and the application of the Appellant is dated February 2011. At the time of the application there was no such guidance that was in force.
2. The Respondent has assimilated the installation of the advertising screen with the construction of a building.

3. The decision of the Council is not in order being given that the Technical Committee as provided by section 117 (4)(b) of the Local Government Act had not been involved in the decision making process.

The position of the Appellant:

The representative of the Appellant deposed as follows: Following an application to place an advertising panel of dimension 9 metres large and 2 metres high, he had met with a refusal from the Respondent. The advertising panel, which had been imported from China, is presently placed on top of a three storey building. Technicians from China came to Mauritius to install the panel in December 2010 and the installation was done between 7 December and 12 December 2010. He explained that given the size of the panel, it was difficult to store it and had been placed directly on the roof of the building. The technicians place and tested the panel and trained them on how to operate it. This was a precondition for the guarantee of the panel from the seller.

The Council had refused the application on the ground that it was not compliant with the PPG for the Appravasi Ghat World Heritage Site. The Appellant's stand is that although the building falls in the 'Buffer Zone' as described by the PPG, this cannot be applied to his application, which dates prior to the PPG coming into force.

The Appellant furthermore explained that the period during which he had acted in breach, i.e. for placing the panel without a BLUP, this was for a short period and was meant for testing/ demonstration purposes. He maintained that the advertising panel was not operational since then.

The position of the Respondent:

The Head of the Planning Department of the City Council deposed and explained that the decision of the Council is guided by the 'Draft PPG' under preparation which provided for a Buffer Zone as part of the 'World Heritage Property'. The Council could not depart from the policies contained in the 'Draft PPG'.

Emphasis was laid by the Respondent on the fact that the Appellant had installed the panel without obtention of a BLUP, and had thus acted in breach of Municipal Regulations.

We have given due consideration to the evidence adduced by the parties and their respective submissions.

Can the PPG be applied with retrospective effect?

It is on record that the PPG for the Appravasi Ghat World Heritage Site (PPG 6) has become operational in June 2011. It is not disputed that the application of the Appellant was submitted in February 2011. The position of the Respondent, as per the evidence of the Head of the Planning Department of the Council, is that the Council had to take into account the policies contained therein being given that there had been a 'draft PPG' that was in circulation. His view is that the Municipal Council, as well as other local authorities, was bound by the policies contained therein.

This brings us to question the authoritative force of a 'draft PPG' which is under circulation. It has been submitted on behalf of the Appellant that the governing instruments in the area of planning are the Outline Scheme and the Planning Policy Guidance. In the case of the Outline Planning Scheme, there is express provision in law for the Local Authorities to take into account the draft Outline Scheme. As opposed to this, in the case of new PPG, no such provision has been made.

We take on board the concern expressed on behalf of the Respondent that there is imperatively a need not to depart from the policies that are contained in an instrument which has been circulated, and which is subject matter of discussions by all stake holders (as per the letter from the Ministry of Arts and Culture dated 1 September 2010 and produced as Document G).

We observe '*en passant*', that we do not find anything sinister the fact that the said letter emanated from the Ministry of Arts and Culture instead of the Ministry of Housing and Lands, this being an inter-ministerial project which is of national interest.

However, we must also consider the fact that the draft PPG has the effect of creating buffer zones which impacted directly on the activities found in those zones. In this respect we find that predictability and certainty is required by all stake holders in the face of such important change.

The policy maker may be aware of the future changes that are forthcoming with the new PPG and it may wish to take decisions accordingly. This is not the case for third parties, who may rightly claim that they are not aware of the status of the area unless and until there is a formal and publicized communication of same. This only came with the coming into force of the PPG in June 2011.

We are alive to the fact that the existence of the Buffer Zones was known since the enactment of the 'Appravasi Ghat Trust Fund Act 2001', where Part B of the First Schedule to the Act lists down the "coordinates of the Buffer Zone".

This provision delimited the extent and exact location and coordinates of the respective zones. This was amended by Act 11 of 2011 which again set out the "coordinates of the Aapravasi Ghat and the Buffer zones" in the First Schedule. However, the policies governing activities in those zones were known only when the PPG became effective when the Aapravasi Ghat Trust Fund (Amendment) Act 2011 was proclaimed on the 10th June 2011.

For the reasons mentioned above, we find that it is not legally correct to apply the provisions of the PPG to an application that dates prior to the coming into force of the PPG.

We also note that the Appellant had installed and started operating the advertising panels before obtaining its BLUP. Not only it was acting in breach of existing regulations but it had started its operations at its own risks. We find that any such breach is to be dealt with by the appropriate jurisdiction. Furthermore, the expenses incurred by the Appellant as explained by the representative of the Appellant are matters that have no bearing on the present decision.

The issue of view corridors:

As regards the second ground of appeal regarding the assimilation of the advertising screen with a construction, in its Statement of case, the Appellant submitted that the proposed light advertising structure of 9.00 metres long and 2.00 metres high will not have any adverse effect on view corridors and viewsapes as proposed in the PPG on the Aapravasi Ghat World Heritage Site (AGWHS). It is noted that the PPG has not given any detail on the type and size of advertising posters that can be allowed. There is no provision, 'per se', that expressly forbids advertising posters. The exceptions provided are those that protect key view corridors and landmarks. No evidence on this aspect has been adduced to establish if the advertising panel in issue here breaches any of these aspects. Similarly, no evidence has been adduced on the issue of the Technical Committee having been absent in the decision making process.

Given our stand on the inappropriateness of the decision to apply the PPG to an application retrospectively, there is no need for us to address these two grounds of appeal.

We must however make some comments which are here:

We are alive to the concern of the Respondent that it could be a wrong signal to the UNESCO, the supreme authority that approves the 'World Heritage' status, to approve any application that can potentially breach the policies contained in the AGWHS.

Yet, this Tribunal cannot support a decision taken by the Council that is against the basic principle that legal instruments do not apply retrospectively.

This stand finds support in the Supreme Court Judgment of **Nuckcheddy A G & Ors. V Town and Country Planning Board & Ors. 2012 SCJ 152.**

For all the above reasons, we allow the appeal.

We feel, however, duty bound to highlight **Section 9 of PPG 6** entitled "**Urban Heritage Area- Buffer Zone of the Aapravasi Ghat World Heritage Property**" which provides at paragraph 9.2.1.11(g) that: "*Historic advertising boards and signs with cultural significance must be retained. Existing advertising boards that detract from heritage value as determined may be removed or replaced as decided by the MCPL*". The respective parties may consider their activities on one hand, and their decisions, on the other, in the light of these provisions of the PPG which are now in force.

Delivered on 16th February 2015 by:

V. Bhadain
Chairperson

P. Thandarayan
Member

M. A. Busawon
Member