IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1662/18

In the matter of:

Lighthouse Education Ltd.

Appellant

v/s

District Council of Pamplemousses

Respondent

DETERMINATION

1. The present appeal is against the decision of the District Council ["the Council"] for having refused to grant the Appellant, represented by its Director, Mrs. Suzanna Dalais, a Building and Land Use Permit ('BLUP') for the construction of a store/ utility to an existing educational institution at Albert Lane, Calebasses. The grounds of refusal were communicated to the Appellant in a letter dated 11th July 2018, but delivered to the Appellant on 17th July 2018. The application for BLUP was refused on the following three grounds:

"1. The development has caused much social prejudice to the inhabitants of the area.

2. *The proposed development would be ancillary to the existing school and would not be acceptable.*
3. *There is a pending court case."*

2. Both parties were legally represented. The Appellant's representative, Mrs Dalais, deponed under oath and was cross-examined by Counsel appearing for the Respondent and the Council, represented by Mrs Busgeeth, head planner, testified in favour of the Council and was cross examined. We have duly considered the evidence placed before us as well as the submissions of Counsel.

I. CONTEXT ANALYSIS

3. By way of background to this case, the Appellant belongs to a charitable trust which runs a primary and secondary school comprising of over 300 students at the moment at Albert Lane, Calebasses. The school was meant to be built in phases and the whole development is part of a master plan which, according to the Appellant, was within the knowledge of the Respondent, since the latter approved the first two phases of the development by granting a BLUP for the construction of the building which currently serves as fully functional school for the students. It is not disputed that following the granting of two consecutive BLUPs the Council subsequently refused a third application made by the Appellant for further extension of the school, more specifically the addition of a block consisting of 12 classrooms and other related facilities, which it subsequently obtained by virtue of a determination by this Tribunal. The present application is for the construction of a store or utility room to be used for the purposes of the school. A case ispending before the Supreme Court lodged by the Respondent against the Appellant regarding a dispute over a cremation ground which was put to the use of the local community by the previous owners of the property *in lite* and currently found on the property of the Appellant, since the property has passed hands.

4. It appears from the testimony of Mrs Busgeeth that the Council's decision was based on "public outcry from inhabitants" when the cremation ground was no longer at their disposal. We believe the issue oflegal obligations of local authoritiesneeds addressing before the grounds of appeal.

II. THE LAWS AND PLANNING INSTRUMENTS

5. The Council assesses applications on the basis of the requirement for approval under local planning schemes. Such schemes are very much part of our system and enforced by through Acts of Parliament such as the **Town and Country Planning Act 1954 ["TCP Act"]** and the **Planning and Development Act 2004 ["PDA"]**. There are infact a number of pieces of legislation which exist in Mauritius which govern planning and development and there are 'soft laws' which provide a planning framework that control how approvals for development and subdivisions are granted by the local authorities. In addition to these "traditional" planning controls, there are activities that can affect land use for example environmental protection and heritage sites. It is important to note that these controls fall within the power of the Council if it is given the power to do so under an Act of Parliament. Infact the Council, as part of its planning control powers, has to take on board the "value" of places to assess if their conservation is necessary in view of its aesthetic, historic, scientific or social significance. The underlying logic being for the enjoyment of the present community and future generations. These must however be covered under provisions of some planning instruments, be it legislation, schemes or guidelines.

6. There exist no planning instruments which specifically cover crematoriums in Mauritius, except for the Outline Planning Schemes which generally regulate the position with regards to applications for new cremation grounds, which is not the case here.

7. In Mauritius, the closest piece of legislation that comes to the protection of sites having social value is the **National Heritage Fund Act 2003** which offers protection to places of national heritage, as listed in its schedule, including *"intangible heritage"* , which has been described as *"intangible aspects of inherited culture and includes culinary arts, cultural traditions, customs, festivities, oral history and traditions, performing arts, rituals, popular memory and skills and techniques connected with material aspects of culture"* and *"cultural significance"* is take to mean that having *"aesthetic,*

*anthropological, archaeological, architectural, botanical, ethnological, geological, historical, linguistic, palaeontological, scientific, **social**, spiritual or technological value*"[stress is ours]. Although this law provides for places of social value, it is in the context of sites which are of "cultural significance", and the list provided under the **2003 Act** is an exhaustive one which does not include the cremation ground of Calebasses.

III. GROUNDS OF APPEAL

8. After perusal of the grounds of refusal and grounds of appeal, we are of the view that a more cogent way to address this appeal is by addressing the grounds of appeal under the specific grounds of refusal and we shall therefore proceed in that manner. We believe that first and last grounds of refusal may be taken together as they address the issue of the pending court case before the Supreme Court lodged consequent to the crematorium being no longer available to the inhabitants.

A. The development has caused much social prejudice to the inhabitants of the area

9. It is the contention of the Appellant,under grounds 1 and 2 of its grounds of appeal, that the reasons invoked by the Respondent were not based on the technical assessment and the merits of the application for BLUP and the reason as couched in the Respondent's refusal letter failed to show how the latter considered the use and proposed development and that there was no evidence of social prejudice of a past or future development. According to the testimony of the head planner of the Council, this application for BLUP has gained planning acceptance from the head planner herself, the only technical member who sat on the Permits and Business Monitoring Committee ["PBMC"] when deciding on the fate of this application and that the rest of the PBMC comprises of councillors who are elected members.She explained that the other members on the Committee have no expertise in planningmatters but that since a decision was taken by way of majority vote, this application was rejected. Doc C, the minutes before the PBMC, confirms this.

10. From the evidence it would appear that despite the assessment of the application for the proposed development was made by the technical expert, this assessment did not ultimately prevail and the decision of the Respondent rested on a social issue. Mrs. Busgeeth explained that the councillors had borne in mind the fact that there was a "public outcry from inhabitants" when the cremation ground ceased to be available with the acquisition of the property by the new owners. Based on our assessment regarding the state of our legal and planning framework as discussed above, the Council was duty bound to make an assessment of the application for BLUP on the basis of the planning instruments first and foremost, together with any conservative value of the land *in lite,* if any, and weigh this against any social impact that the development may potentially have. The Respondent had a duty to assess whether guidelines under the **Building Control Act 2012, TCP Act 1954, PDA 2004** and **Environment Protection Act 2002** amongst others were met. The Council was thus wrong to have forgone the assessment of the planning merits of the application.

11. We do not subscribe to the contention of the Appellant that there is no proof of social prejudice or that it is not legally defined. Cases relating to environmental issues or planning issues cannot be decided like typical civil cases, with the application of such burden and standards of proof. The Council would not typically be able to prove"social prejudice", it is a matter of appreciation from which inferencescan been drawn on the totality of the evidence. In any event, the Council's representative explained that the accessibility of the cremation ground which was used for decades by the locals was denied to them and this resulted in an outcry amongst the inhabitants. She explained that the inhabitants of Calebasses and Pamplemousses villages *"were in some way prejudiced by not having a cremation ground and they have to go to another village to cremate the dead. So, that what we are referring to the social prejudice caused to the inhabitants."*

12. Without making any inference on the "social prejudice" aspect of this, we can rely on the evidence of the Head Planner, the minutes of the PBMC (Doc C) and the Plaint with Summons lodged by the Council against the Appellant before the Supreme Court (Doc B) to come to the conclusion that the events which led upto what has been described as "social prejudice" were infact a live issue that was consideredat the meeting before the Council. We are of the view, however, that the Council was wrong to have rejected the application outright on the basis of social prejudice, it should have assessed the merits of the application based on planning criteria.

B. The proposed development would be ancillary to the existing school and was not acceptable.

13. Under ground 1 (c) it is the contention of the Appellant that by stating that the proposed development was "ancillary", which is not a valid reason for refusal, it was not well informed of the requirements of the school. The representative of the Council stated that she seemed unsure of the term herself but purported to offer some explanation as regards to what the

14. Where a particular development has been approved, the question that arises is whether it is possible to have other uses on the same lot which might otherwise not be a development or use which is preferred in that location. An acceptable definition of "*incidental use*", as set out in the Australian '**City of Armadale Town Planning Scheme No.4'** under **clause 4.4.4** is that it means "*use of premises which is ancillary and subordinate to the predominant use*". As a matter of general principle of planning law, a development can be approved if its use is incidental to the predominant use. In other words, there has to be a predominant use of the land and only then a development which is incidental to that predominant use may gain planning acceptance. We hasten to add that in such cases a common sense approach has to be taken as to what the predominant use of the development is and whether the proposed addition is an incidental use. This can only be assessed on a case-to-case basis.

15. In the present case, the representative of the Appellant explained that the proposed development, which is a 100 sq.metres in floor area, that is , 10 m x 10 m store, will have a utility value as it will be used for storage and building of furniture for the school. She explained that this development was important for the operation of the school and was in line with the requirements for a school to have a storage space. We believe that, again we need to take a common sense approach. We are here dealing with a school and having furniture for the classrooms and the offices is an intrinsic part of the school. It is a given that the store is an ancillary development to the predominant use, which is a school, but in our view, nevertheless an important feature to be had in a school, just as it is in a house or any building for that matter. The justification given by the Appellant's representative is a perfectly plausible one, in our view, that the space will be used to store things and as a utility for building furniture. It is a fact that in places such as schools, there are bound to be furniture items that need repairing such as broken chairs or a table with a broken leg which needs just a quick fix. It appears that the Appellant has a team of 4 people for these jobs.

16. In the normal course of things, one would normally have expected the Council to approve a development which is incidental to the main development provided the ancillary development is acceptable planning-wise and can be accommodated on the site, and for the Council to not allow a development which is not a "preferred use" on the basis that it does not qualify as an "ancillary" development to the main use. However, in this case after having approved the BLUP for the construction of a school on the locus, the Council now seeks to restrict the development on the basis that it is ancillary to the main use of the development, which appears to be a contradiction in the stand of the Council. We have also taken on board the undisputed evidence that the proposed development is to be located several metres away from the area where the cremation ground was when compared to the building which currently accommodates 12 classrooms and for which a valid BLUP has been issued by the Council on a previous

occasion. We have no qualms in accepting that this ancillary use can be accepted in this context.

C. There is a pending court case.

17. As far as the pending court case is concerned, this issue is before another jurisdiction. We can only take cognizance from the evidence on record that there appears to be a dispute as regards a claim for a"droit de servitude" on part of the land now belonging to the Appellant lodged by the Respondent. In this context, we have lengthily questioned the Appellant's representative and the Respondent's representative. It appears from the evidence of these witnesses and Doc E that the location proposed development of the store/ utility is further away from that part of the land which is the subject matter of litigation before the other jurisdiction as compared to other concrete blocks of the school for which it already holds valid BLUPs.Irrespective of how it came about, whether through the BLUP being granted by the Council or by a virtue of a determination by the Tribunal, the fact of the matter as it stands is that the Appellant has valid BLUPs for the school and its mandate regarding the running of the school is not an issue of dispute, as considered in the Appellant's statement of case under grounds 3 and4 of the grounds of appeal. In our view therefore, the pending court case, since it is not an issue of dispute of ownership on the site where the new development is proposed to be carried out, is not, for our purposes, a relevant ground for refusal. We note that there exists on the plot a canal, which serves as a boundary demarcating the area where the school is and that part which is the subject-matter of litigation before the Supreme Court.

18. Under ground 5 of the grounds of appeal the Appellant's contention is that no information was sought by the Respondent within the prescribed timeframe under **s. 117 (5) (a) LGA 2011** and consequently the decision was misconceived, unreasonable and *ultra vires*. We do not subscribe to this contention in as much as it was never the case for the Respondent that it did not have sufficient information before it or that it

needed to have more information, nor does the record show that the Respondent took a decision in the absence of relevant information that it may not have had at the material time.

19. Under ground 6 of the grounds of appeal, the Appellant has raised a ground that this and previous actions have caused and are causing prejudice to the Appellant and has claimed that costs be awarded. We believe that neither this appeal nor the defence raised by the respondent are frivolous or vexatious in nature. The Tribunal cannot take it that as a matter of fact previous actions or other actions involving the two parties were merely done to cause prejudice. As such this in itself cannot amount to a ground of appeal. We therefore set aside this ground aside.

20. For all the reasons set out above, except for the issue addressed in the penultimate paragraph of this determination, we allow the appeal and find the reasons for refusal of the Council were not based on a proper planning assessment of the application. We make no order as to costs.

Determination delivered on 26th April 2019 by

Mrs. J. RAMFUL	**Mr. AUBEELUCK**	**Mrs. RAWOOTEEA**
Vice Chairperson	**Member**	**Member**