

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1801/19

In the matter of :-

Shamping Co. Ltd

Appellant

v/s

Municipal Council of Beau-Bassin/Rose-Hill

Respondent

DETERMINATION

1. This is an appeal against the decision of the Respondent ["the Council"] for having refused the Appellant the granting of a Building and Land Use Permit ["BLUP"] for the change of use of part of an existing commercial building at ground floor to carry out economic activity of victualler, selling cooked food on and off premises at 18C, Royal Road, Beau Bassin.
2. The grounds for refusal as per the letter sent by Council dated 29th March 2019 are:

"1. The proposed development will not be in harmony and will adversely affect the amenity of the existing sensitive use (Place of Worship – Vinayak Mandir) of the adjoining property and as such it will be contrary to the principles of policy UDS1 of the Outline Planning Scheme for Beau Bassin/Rose Hill Municipal Area.

2. *Objections have been received from inhabitants of the area where your development was proposed and also from the management and devotees of the existing place of worship (Vinayak Mandir)."*

I. GROUNDS OF APPEAL

3. The grounds of appeal are reproduced hereunder and will be numbered in the same way as in the Statement of Case of the Appellant for ease of reference:

“4. The Appellant therefore submits that the respective decision of the Respondent rejecting the application on the reasons set forth are irrational, unlawful, bias, unfair and against the rules of natural justice.

5. Appellant shall also submit that ex facie the records, there is no evidence in support which have been motivated the respective decision.

6. It shall be also submitted that Respondent did not indicate where and how the proposed development shall adversely affect the local amenity of existing sensitive uses such as housing, schools and health facilities as provided itself under the Respondent own Policy Guidelines namely UDS 1 and UDS 2 of the Planning Policy Guidance.

7. The Appellant shall submit that the Respondent failed to consider that the Place of worship is not the sole criteria for rejecting the application as other considerations such as on-going traffic, noise and any other human activities that are likely to generate inconvenience which were not the case here were simply ignored. The Appellant submit that Respondent could have granted the BLUP by granting strict conditions the more so in view of the proposed development where no alcohol, liquor and entertainment are provided.

8. It is the contention of the Appellant that there is a difference from a restaurant selling alcohol and providing entertainment as opposed to a victualler selling cooked food on and off premises (which is clearly the basis of the application here). Whilst the Appellant understands that a restaurant can be a factor for incompatibility with the existing Place of worship, in the present case it is clearly NOT

9. The Appellant shall submit that the assessment of the application of the proposed development of the Respondent is flawed, bias and unfair in as much as whilst the latter had a duty to ensure that the principles of the Planning Policy Guidance (PPG3) and

the place of worship precedes such proposed development, this is again **NOT** the case here since:

(a) The region of the proposed development is surrounded by various businesses and it cannot be said whether they were given a BLUP recently or before 60 years back.

(b) Such businesses as clearly demonstrated by **Annexes 1 and 2** showed the nature and activities operated next and opposite to the **PLACE OF WORSHIP**

(c) What is more shocking and revealing is the activity of a business of Le Flamboyant selling cooked food with the same line of the Appellant's proposed business and which is adjoining the property of the Appellant is now in operation very recently having been granted a BLUP by the Respondent (**Annex 3 and 4**)

(d) In spite of the above, there is opposite to the Place of Worship under reference another Place of Worship as per **Annex 5 and 6**, a "snack and/or victualler selling Cooked food and this adjoining such Place of worship, this speaks volume of the decision of the Respondent and the issue raised about "harmony"

(e) The decision also to grant the BLUP to Le Flamboyant is unfair and unjust **since** if the proposed business development of the Appellant is not in harmony and affect the "amenity" of existing use same ought to have been the case for Le Flamboyant.

10. Appellant will submit that the Respondent has breached its own rules and practices in as much as Places of Worship at paragraph 4.1 in the "context and Location" of the PPG states that "**No place of worship should be allowed adjoining a restaurant/bar or a place of public entertainment**" and this implies that these two uses are not compatible and should not normally be authorized in the same area to avoid **conflicts and issues**. Therefore, it stands to reason that rejecting the Appellant's application and granting the Flamboyant a BLUP is in contradiction of the Respondent's PPG in the same area. Appellant therefore submits it was not treated on the same level playing field and has acted arbitrarily and unlawfully."

4. The Appellant was represented by its director Mr. Ng Chin Chang and the Council's representative was Mrs. Theea, Planning Officer of the Council. We have duly considered all the evidence placed before us and the submissions of counsel for both.

II. Under ground numbers 4, 9 and 10

5. Under these 3 grounds, it is the contention of the Appellant in essence that the assessment of the application by the Council and the decision to reject the application on those reasons are flawed, bias and unfair because the area is surrounded by various businesses, a development has recently been granted a BLUP for selling cooked food next to the Appellant's property while another food selling business is operating in a space adjoining a place of worship thereby questioning the issue of "harmony" of the amenity within the area.

6. **Policy UDS 1 of the Outline Planning Scheme of Beau-Bassin/Rose-Hill ['OPS']** regulates development within the settlement boundaries and is reproduced hereunder:

"Development within Settlement Boundaries Proposals for development should normally be permitted within settlement boundaries, subject to the provisions of Policy UDS 2.

Within settlement boundaries proposed development should not:

- *Inhibit the comprehensive development of an area and/or*
- *Restrict access to adjoining areas of land appropriate for development and/or*
- *Prevent expansion or disrupt existing business / employment-generating activities and/or*
- *Adversely affect the local amenity of existing sensitive uses such as housing, schools and health facilities*
- *Exceed the capacity of existing highway and utility infrastructure networks". [emphasis laid by us]*

Under the OPS, "sensitive uses" has been defined as uses, such as residential, health and education, that are sensitive to potential nuisance from noise (including vibration), smoke, dust, fumes etc. Mrs. Theea from the Council confirmed that a Place of Worship is considered a "sensitive use" and that as per the Planning Policy Guidance no place of

worship should be allowed adjoining a restaurant/bar or a place of public entertainment. This is to be found in PPG3 on Places of Worship.

7. We take note of the fact that the PPG3 provides for the policy applicable when the proposed development is a Place of Worship. In the present context the proposed development is to operate a victualler within a building while the place of worship is in the adjacent building. The place of worship is a Vinayak Temple found on the main road which has been in existence since 1975, as per the evidence of the Council. The reasoning behind having a policy which states that a place of worship should not be adjoining a restaurant/bar or place of public entertainment is so that people can practise their religion without any disturbance or nuisance so that no inconvenience is caused to them in the exercise of their religious practice. The Appellant wished to sell non-vegetarian food on the premises next to the temple. He stated that it will be mostly a take-away service but that there will also be seating within his premises for those who will have their food on premises. His main contention about the irrationality of the Council's decision is that other shops and pastry shops such as Le Flamboyant have been granted despite it is in very close proximity to the temple.
8. The evidence shows that the Appellant's site is next to the temple and there is a distance of some 4-6 metres between them from the entrance of the temple. According to the Council's representative, objections have been received against the development from the President of the temple and one Mrs. Dabysing who lives behind the property where the Appellant intends to open his business. Although we understand that in this part of Beau-Bassin especially along the main road there are several commercial developments, including eateries the location of the Appellant's property is crucial for the Council's assessment as to whether specifically this development can take place at this particular location. The fact that the Appellant intends to cook and serve non-vegetarian food and its kitchen will be just a few metres away from the temple, we believe that it can lead to odours escaping to the nearby temple thus disturbing the religious sentiments of devotees as well as possibly offending the religious sensibilities of devotees. This is the idea behind not having bars and restaurants near places of worship.

9. Just as one would expect not to allow a Bar to be opened near a place of worship so that people do not get drunk and behave anti sociably, nearby thereby disturbing the rituals and prayers at the place of worship. Since such a policy has been provided in the planning instruments, the Tribunal will have to take this on board the moreso as the Temple came into existence several decades before the Appellant's development proposal. The Council was bound to make at the context analysis and whether the new development can co-exist in that environment with the pre-existing developments which are already well-established. One's freedom to practice one's religion should not be curtailed, whether directly or indirectly, by new activities which can injure religious sentiments. The objection has come from the President of the Vinayak temple, in his capacity as the representative of the Temple. This cannot be ignored, since it is also goes to the fundamentals of one right to practise one's religion, as enshrined in our Constitution, which also means not disrupting the environment in which one habitually offers prayers and performs religious rituals and celebrate religious festivals when visiting their regular place of worship.
10. True it is that there is also the pastry shop next to the Appellant's site but it is further away from the temple so that not only the setback from Le Flamboyant is much greater than the Appellant's site from the temple, it also is not an unacceptable development there since it does not breach the policy as per PPG3 in that it is not adjoining the temple. The ordinary dictionary meaning of "adjoining" is "next to" or "joined with". The Appellant's site is right next to the temple with a shown in the photograph marked Doc A6 while Le Flamboyant is not next to the temple. Furthermore, a place of worship is considered as a "sensitive use" as per the Council and we believe it to be so, in view of the fact that it is a place which would normally attract a lot of human traffic and it is sensitive to potential nuisance, more especially when prayers are on and hence the application of the Policy UDS1 is relevant. Under this policy, the local amenity of existing sensitive uses should not be adversely affected by any new development. It is clear from this policy that priority is given to the existing activities within the area, and how the existing uses will be impacted upon by the new development. The objections coming from existing neighbourhood *de facto* shows the discomfort vis-à-vis the proposed development.

11. While one would have thought that the existing neighbourhood would normally be used for such types of developments in the area, the objections from the temple and an adjoining neighbour, Mrs. Dabysingh, were mainly geared against the fact that non-vegetarian food would be cooked and served on the locus and the apprehension is about odours are likely to escape through the Appellant's extractors, which in our view, is also in relation to the positioning of the Appellant's kitchen from where there may be other nuisances associated to kitchens such as sanitary issues. The objections are also with regards to the increase in human traffic that will be generated in the vicinity.

12. The Appellant's representative also contented, at ground 10, that in granting the Flamboyant a BLUP the Respondent acted in contradiction to the PPG and that in refusing its application it was treated unfairly. Neither Policy UDS1 nor the PPG is flouted by the granting of a BLUP to Le Flamboyant from the evidence that we have on record before us since Le Flamboyant is not next to but more than 16 metres away from the temple, as can be gauged from the width of the building where the Appellant intended to trade as per the plan submitted, Doc B. Furthermore, under ground 9, the Appellant used as example the fact that there is a "Kovil", place of worship, opposite the subject site which has an adjoining victualler. Evidence was adduced to show that the "Kovil" is in fact more than 100 metres from the subject site. Irrespective of this distance, which we believe is immaterial for our purposes, we believe that it was a wrong planning decision to have granted a BLUP for a victualler to sell food adjoining a place of worship. It is a bad precedent which we will not follow for the sake of being consistent with a previous decision.

13. We also wish to add that way ground number 4 has been couched that the Respondent's decision is being challenged for being "*irrational, unlawful, bias, unfair and against the rules of natural justice*" as well as ground number 9 are grounds for challenging an administrative body's decision in judicial review, not an appeal before this Tribunal. These 3 grounds therefore fail.

III. Under ground number 5

14. It is the contention of the Appellant that *ex facie* there is no evidence on record in support of the motivation behind the decision of the Council. Having heard Mrs Theea from the Council, we are of the view that the Council has done all that it should have to come to a reasonable assessment of the application. The Council's representative had a site visit to have a visual appreciation of the locus and she took some measurements. Her measurements of the distances of the various landmarks from the subject site were more accurate, compared to the distances provided by the Appellant's representative, and these can be noted from her testimony and the extracts of the google map of the area, marked Doc G and G1. The Council offered a hearing to all the parties who were legally represented and the minutes of the PBMC meeting were produced, marked Doc E and it can be clearly seen from that document that the PBMC correctly applied the relevant Policy UDS1 of the OPS to the facts of the present matter to come to the conclusion that the application cannot be allowed eliciting the various planning grounds. We therefore find that there is sufficient evidence on record for the Council to come to an informed decision about the character and amenity of the area, the setbacks from the buildings to see if it can cause disturbance to neighbours, the parking space, objections and nuisance amongst other issues. This ground therefore fails.

IV. Under ground number 6

15. The contention of the Appellant under this ground is that the Respondent did not indicate where and how the proposed development shall adversely affect the local amenity of existing sensitive uses under policies *UDS 1 and UDS 2*. Firstly, policy UDS2 of the OPS is not applicable in the present context and was, rightly, not applied by the Council in this case since it is policy that regulates development on land considered to be agricultural land or land which is within or adjacent to an Environmentally Sensitive Area (ESA) which is not the case here. We have addressed our minds to the point raised by the Appellant as regards the amenity of the area. We do believe it to be a valid point that the area already bears a number of commercial developments, but the long established temple

and neighbours in the vicinity have been used to the certain amenity which developed over several years. The temple is considered to be a sensitive use, as addressed above. The Council needed to assess how the neighbourhood that had had an enjoyment of their property all these years and co-existed with other developments would be impacted upon by the new development, the activities of dealing with the food business that will attract human and vehicular traffic converging on the locality everyday from morning to evening including weekends and public holidays and the impact that of making and serving non-vegetarian food next to the temple, in view of the odours and sanitation, is in our opinion a very valid point. Temples, as any place of worship, are places where sanctity is of utmost importance not just within the premises but also around so that devotees are neither distracted nor offended while offering their prayers and devotion. We have also addressed our minds to the fact that there did exist previously a commercial business of selling furniture on the subject site. While other commercial activities could potentially not have met with objections, as stated by the representative of the temple, we are of the view that the nature of this development is likely to offend, disrupt and disturb what the neighbourhood has upto now enjoyed in terms of their habitual activities. This could potentially impinge on the freedom of the devotees who regularly visit the Vinayak Temple to practise their religion. This ground therefore fails.

V. Under grounds 7 and 8

16. It is the contention of the Appellant that the Respondent failed to consider that the Place of worship is not the sole criterion for rejecting the application and there are other considerations to be taken on board. A victualler selling only cooked food without alcohol and entertainment is not incompatible with the existing Place of worship and the Respondent could have granted the BLUP by granting strict conditions.
17. **Policy CR1 of the OPS** promotes applications for mixed used developments in established commercial centres. However, the policy also states “Applications for commercial development outside established centres, other than for corner shops and small retail outlets, should not normally be allowed”. The subject site is not located within the commercial centre of Beau-Bassin, however it is accepted that being situated along the

royal road that runs through the town, there are several commercial developments along this main artery. The Council had to strike a fair balance when making its assessment of the present application between providing protection of the residential neighbourhood found in the vicinity of the subject site from use that is objectionable and detrimental to its amenities and to allow commercial developments which are compatible with the character and amenity of the neighbourhood. On the one hand, the members of the temple as well as the residential neighbour who lives behind the subject site have exercised their right to raise objections. What the members of the temple found mainly objectionable is the fact that non-vegetarian food will be sold next to their premises which they judge as being “provocative” and in defiance of their “religious conviction” and which could “destroy the sanctity of the sacrosanct divine environment of Hindu temples” since the location of the temple was originally selected where there was no eatery or place of entertainment so that devotees could practise their religion without nuisance or disturbance. True it is that having an eatery in the neighbourhood will attract people, which can be disruptive to the amenity of the place but on the other hand we take on board the fact that there are other commercial developments along the main road which already attract crowds.

18. The main “constraint” which, we believe, tips the balance against the development proposal in this case is the presence of the long-standing temple, which simply cannot be ignored and creates a specificity to this case. Having people converge to a place where they buy and also consume food on the spot can create disruption to the devotees of the temple whenever there are religious celebrations. The cooking and serving of non-vegetarian food will be done during the hours of operation from 10 am until 8pm everyday including Sundays and public holidays time of the day will lead to odours which can disturb devotees who attend the temple. Some of the objections raised at the hearing before the PBMC were that the restaurant will be operating at the time when devotees will be attending prayers and “The food smell (chicken, fish, fried noodles etc) will distract the devotees which might be the root cause of unnecessary issues.”, the devotees are mainly vegetarians and that having an exhaust system will not work.

19. Although the Appellant's kitchen may not be facing the side of the temple, as was suggested at the hearing of the PBMC, it does not preclude the escape of the odours of non-vegetarian food especially to the premises of the contiguous neighbours, the temple being one of them. Even if stringent conditions are imposed on the Appellant, one cannot vouch for the escape of odours. The exhaust will help extracting odour and fumes from within the Appellant's building but it cannot be controlled once it is out in the air. We are of the view that the Council was correct in its assessment of the strong objections received as being valid and that it will not be in harmony with the specificity of that locality in view of the presence of the temple on the contiguous lot. These grounds therefore fail.

20. For all the reasons set out above, we find that the Council was right in its assessment of the present application. The appeal is set aside. No order as to costs.

Determination delivered on 24th February 2022 by

Mrs. J. RAMFUL-JHOWRY

Vice Chairperson

Mr. MOOTHOSAMY

Member

Mr. MANNA

Member