

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1684/18

In the matter of:

Mr. Noorani Hajee Jamalsah & Mrs. Faranaaz Jamalsah

Appellants

v.

The Municipal Council of Beau Bassin Rose Hill

Respondent

Determination

The Appellants have lodged the present appeal pursuant to section 117 of the Local Government Act 2011 following the decision of the Respondent to decline their application for a Building and Land Use Permit (BLUP) for the use of land for playing football (5A side) at No. 2 A, Captain Bruce Street Rose Hill.

Four grounds have been put forward by the Respondent in a letter dated 21 August 2018 to decline the application for BLUP, which are as follows:

1. Site is located in a predominantly residential area and the proposed development is likely to be detrimental (especially with noise nuisance and on-street parking) to the amenity of its residential neighbourhood.
2. No adequate provision for on-site parking of vehicles generated by the development has been proposed as only one on-site parking space has been shown on the plan. This is likely to result in parking along access roads causing obstruction and inconvenience to traffic and the neighbourhood. Hence the proposed development is against the principles of Policy UDS 1 of the Outline Planning Scheme in force for Beau Bassin Rose Hill Municipal area.
3. Concrete walls with fencing on top with a total height of 4 metres (approximately) from the ground level have been erected, contrary to law.
4. Objections have been received from property owners and residents of the area against the proposed development.

The grounds of appeal raised by the Appellant are contained in Annexure C to the Notice of Appeal which was lodged by the Appellant on the 10th September 2018. Subsequently, counsel for the Appellant informed the Tribunal that grounds 3 and 4 entitled 'Objection in law', as contained in the statement of case, are dropped by the Appellant. Evidence was also adduced to the effect that the Appellant has purchased two plots of land, one being adjacent to the

premises *in lite*, evidenced by Document J, and the other one being at a short distance away from the said premises, as evidenced by Document K, for his two sons, Mr. Ashfaq Jamalsah and Mr. Noor-E-Mohammad Mustapha Jamalsah respectively. Both his sons were called as witnesses and they deposed, confirming that they had no objection that their respective properties be used as parking space for the users of the football pitch subject matter of the present appeal. This development therefore, addresses the issue of inadequacy of parking facility, as raised in the second ground of refusal by the Respondent. As such, there is no reason for us to consider the ground of appeal raising the issue of parking.

The Council has raised the incompatibility of the proposed development with the residential nature of the neighbourhood, the noise nuisance and the objections that were made by the neighbours for the proposed development. We have considered the evidence adduced by the parties and, more importantly, the planning parameters applicable to such a development.

The Beau Bassin-Rose Hill Outline Planning Scheme, in its Policy UDS 1 (Development within settlement boundaries), provides the following: “*Applications for development should normally be permitted within settlement boundaries subject to the provisions of Policy UDS 2 (which governs development on land defined as agricultural land or environmentally sensitive areas). Within settlement boundaries proposed development should not: ...adversely affect the local amenity of existing sensitive uses such as housing, schools and health facilities (among others)*”.

Three aspects have to be considered in this appeal.

Firstly, the Appellant has already built an enclosing wall which is, as per the evidence of the Respondent, above 1.8 metres, thus being contrary to the provisions of the ‘Building Control Act’. The Appellant’s version is that he had sought guidance from the representative of the Respondent (he identified the officer as being the same one who represented the Respondent before the Tribunal) and the information imparted to him was that no permit was required for the enclosing structure of the proposed football pitch. This is however denied by the officer representing the Respondent.

We have done an assessment of the respective versions of these two witnesses. It is on record that an ex-post control done by the officers of the Respondent that caused them to inform the Appellant of the need for a BLUP, to which he complied and submitted an application for BLUP. This was rejected on the grounds contained in the refusal letter. The Appellant disputes that the height of the wall is more than the permissible 1.8 metres as per the Building Control Act. It has been submitted by counsel for the Appellant that the Building Control Act does not define what is a boundary wall and that a ‘chain link fencing’ does not amount to a wall. The parties have not canvassed this point further and it is in our view a moot point.

Be that as it may, it is our view that even if, at worst, the version of the Appellant is to be believed, and in the eventuality that there may have been a misunderstanding or misinformation, it could have been open to the Respondent to take corrective measures in terms of the imposition of conditions for the Appellant to comply with, especially with respect to the height of the ‘wall’.

Secondly, the insufficiency of the road access due to lack of parking should no longer be a ground of refusal for the reasons as stated above. Besides, the representative of the Respondent conceded, in cross examination, that “there wouldn’t be any issue with regards to parking now”.

Thirdly, the compatibility of the proposed development with the residential nature of the surroundings is a ground of refusal. The rationale for Policy UDS 1 of the Outline Planning Scheme for Beau-Bassin Rose-hill is that 'the proposed development should not bring a material change to the neighbourhood so that it does not create disturbance to the peaceful and residential character of the area'. In this respect, the evidence of the representative of the Respondent is material. As per the Appellant's version, that there have been numerous developments in the same nature as the Appellant's proposed activity within that zone. Reference is made here to the presence of no less than ten tennis courts operated as a tennis school that run on extended hours (until 20.00 hours). The Respondent's representative explanation is that these tennis courts have existed for fifty years in that area, at a time when the provisions of the Outline Planning Scheme were not in force.

It has also come out in the course of the hearing that there are other football pitches set up by the Respondent itself in the predominantly residential areas of Plaisance and Stanley, which are not far from the Appellant's site. There is also the presence of two secondary schools in close proximity to the site. These elements have not been disputed by the Respondent. The characteristics of the neighbourhood reveal a cohabitation of sensitive land uses and other activities, in particular sports activities.

It is our view that a proper assessment of the area in the light of the existing reality, coupled with a balancing exercise between the proposed activity and the apprehension of nuisance, could yield a different qualification. The benefits of sports activities to the inhabitants of the area, or even other areas, need not be highlighted. This could have shown that there is no rationale for estopping a project which is beneficial to the community, the more so that the Respondent is itself putting efforts to set up football pitches, as per Documents L and M. Private initiatives to the same end should be encouraged by the Respondent whilst taking into account the planning parameters. The benefits to the community highlighted by the Appellant are that students from the neighbouring and other schools have shown interest in playing football on this pitch. The existence of the football pitch has shed a different light on the surroundings, as opposed to the crime-prone characteristic that it displayed before. These matters have not been disputed by the Respondent.

We find that such initiatives coming from the community and that encourage young persons and students to converge towards sports activities, albeit with financial contributions, should be encouraged by the authorities. The planning considerations, although important, should be applied to reflect the objectives for which they have been set. A balancing exercise between the incompatibility, if any, and the potential nuisance ought to be exercised and, if need be, these can be mitigated by conditions and monitored by the authority.

The concerns expressed by the Respondent as regards the objections received from residents of the area have not been substantiated before the Tribunal. No evidence was adduced in support thereof, save for a statement from the representative that there had been objections. We have thus been deprived of the possibility to make an assessment of those objections.

In view of all the above considerations, we find that the grounds raised by the Appellant against the decision of the Respondent have been amply substantiated. We uphold the grounds and quash the decision of the Respondent and remit it back to the Respondent for it to issue the BLUP and impose the conditions that it deems fit for this activity.

Delivered by:

Mrs. V. Phoolchand-Bhadain, Chairperson

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Mr. Sujoy Busgeeth, Member

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Mr. Roshan Seeboo, Member

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Date

13th September 2022