BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1966/20

In the matter of:

Gawtam Sharma Hurnauth

Appellant

v/s

The District Council of Riviere du Rempart

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having rejected the application of the Appellant for a Building and Land Use Permit ["BLUP"] for the extension of an existing building at Royal Road, Des Jardins, Mon Loisir, Riviere du Rempart. The ground for rejection communicated to the Appellant via the NELS is set out below:

   "Part of parking spaces and loading/unloading bay encroaches on road reserves and does not comply to the conditions as imposed by the RDA"

2. The 4 grounds of appeal as per the notice of appeal are set out hereunder:

"1. The Respondent relied on irrelevant considerations when refusing the Applicant's permit.
2. The proposed development of the Applicant is in no way encroaching on the road reserves.
3. The decision of the Respondent is irrational and is lacking in consistency.
4. The Respondent is depriving the owner use and enjoyment of its property by failing to allow the owner to use the space between the building and the road edge."

3. The Appellant initially legally represented, thereafter chose to conduct his own case. He had had a summons served on an officer of the EDB who no longer worked there and therefore, Mr. Kritanand Bundhoo, head of IT at the EDB, was deputed to depone before the Tribunal. The Respondent was legally represented and Mrs. Padayachi, planning inspector, deponed on behalf of the Council and was cross-examined by the Appellant.

4. During the hearing, after the close of his case, and even after the Respondent had closed its case, the Appellant sent several emails and documents addressed to the Tribunal on the merits of the case. Any such material that was not properly adduced in accordance with due process and was not subject to examination before the Tribunal has been disregarded. Directions to this effect were issued to all parties. We have, however, duly considered all relevant evidence that was properly placed before us and the submissions made by both parties.

I. THE APPLICATION

5. The Respondent's counsel at the initial sitting stated that the Respondent would not resist the appeal as such but that the Appellant would have to submit a fresh application on the NELS platform. This was not met with any objection by the then legal representative of the Appellant. However, at a later sitting, the Appellant informed the Tribunal that he was no longer legally represented and that he did not wish to submit a fresh application. The Respondent also revised its stand and decided to proceed with the appeal save that the Council was no longer insisting on the part of the ground of refusal which stipulates that the parking requirement "*does not comply to the conditions as imposed by the RDA".* Therefore, the ground of refusal should read as*, "Part of parking spaces and loading/unloading bay encroaches on road reserves."*

6. The Appellant's Statement of Case (SOC), at the first paragraph, states that the appeal is against the decision of the Council for having refused to grant a BLUP for the "*construction of a restaurant at 1st floor and erection of staircase at ground floor".* The refusal letter and the notice of appeal makes reference to "*extension of an existing building*" as development proposal.

7. In response to the Tribunal's inquiry about the nature of the application, which did not align with the actual proposed development, that is, the addition of a floor above the existing ground level and a proposed staircase intended for the operation of a restaurant, the Council clarified that it was aware of the true nature of the development proposal and had assessed it accordingly. This represents, in our view, a significant lacuna in both the application and its processing, highlighting a serious flaw from the outset since the parameters ofthe application were unclear thus reflecting a gap between the application and the ground of refusal. However, since the parties seemed to be on the same understanding on the intended nature of the application, the Tribunal heard the case on its merits.

8. Some flexibility was allowed to the Appellant to conduct his case as he was not legally represented. He called the witness from EDB to adduce evidence on matters relating to an alleged undertaking given to him by an officer of the EDB to "unlock" his application at the level of the EDB so that his BLUP can be granted and the Appellant based himself on the initial stand of the Respondent that the appeal would not be resisted- a stand which had been revised. The Head of the IT unit, Mr. Bundhoo, explained that the officer in question no longer worked at the EDB and that he is not aware of any such software application but that the EDB was not involved in the processing or operation of the BLUP applications. The EDB has an information system, which in this case is the National E-Licensing System ['NELS'] that tracks applications and since it is a digital system, once the application is closed, it cannot be re-opened. He explained that that was the disadvantage of having an online digital system. He further stated that the EDB, apart from password resetting and providing an e-mail ID is not involved in anyway and cannot re-open a BLUP application for security reasons- due to fraud and risk as per the **Data Protection Act**.

9. The Appellant through Mr. Bundhoo produced **Doc A**, an email purporting to show that the EDB was agreeable to unlock the application. According to the latter, the Appellant has misinterpreted the email which emanates from the EDB to the Council -not addressed to the Appellant – which requests additional information "as proof of the favourable decision from ELAT is also needed for EDB to take the necessary action." We agree with the witness. This evidence is neither here nor there and does not in any way whatsoever support the case of the Appellant. It is therefore disregarded.

II. GROUNDS OF APPEAL

(a) Under Ground 1

10. The contention of the Appellant is that in refusing the permit the Respondent relied on irrelevant considerations. The case of the Appellant in essence is that he wishes to operate a restaurant on the first floor of the existing commercial building and to meet this end he wishes to build an additional floor and a staircase.

11. Under this ground of appeal, the Appellant's case is that the Respondent wrongly took into account that "the loading/unloading bay encroaches on the road reserves" whereas the proposed extension does not provide for any loading/unloading bay since it is not a requirement of the Tourism Authority as regards restaurants. He submits that the provision of the loading/unloading bay on the plan is not for the proposed restaurant but rather for a commercial activity that already exists in the building.

12. In the course of the hearing, the representative of the Respondent agreed that there was no issue as far as the parking lots provided by the Appellant along the main road, that is, Route des Jardins are concerned. These have been indicated as parking lots nos. 1,2 and 3 on the plans annexed to the SOC and submitted as part of the application, marked as **Annexes N1 and N2**. The Respondent is satisfied that these lots are functional.

13. We agree with the Appellant that the loading/unloading bay indeed pertains to another commercial activity which is being carried out on the ground floor of the same building, namely a hardware shop. It is noted that the existing loading/unloading bay is located between the parking lots nos.2 and 3, which also makes it functional since it is along Rue des Jardins. The Respondent having agreed that the that the parking lots provided along Rue des Jardins are all functional, this is no longer considered an issue of contention for the Council and therefore any issue pertaining to the parking provided by the Appellant on Rue des Jardins is taken to be no longer in dispute. This ground is therefore set aside.

(b) Under Grounds 2 and 3

14. These 2 grounds are considered together as they are related. It is the contention of the Appellant that the proposed development does not encroach on the road reserves and the decision of the Respondent is irrational and lacks consistency. His case is in essence based on the premise that historically there did not exist any road reserve on his property and that in the absence of any clear guidelines from the Road Development Authority, it cannot be inferred that the Appellant's proposed development is encroaching on any road reserve. He submits it is unclear as to which part the Respondent is qualifying as "road reserves" on the roads. The road reserve has been wrongly assessed by the Council for these purposes, he disputes the rejection that is based on encroachment of a road reserve and states that the building setback is 15 feet.

15. The Respondent argues that the number of usable parking spaces provided for the proposed activity is not sufficient. Out of the eight (8) parking lots shown, the three (3) found along Rue des Jardins are actually functional. The other lots indicated as parking lots 4,5,6 and 7 as per plans annexed to SOC marked **Annex N1 and Annex N2** do not meet the required parking space dimensions. This is because the Appellant has included parts of the road reserve area within the parking layout. No issue has been raised on lot.8 by Respondent.

16. The case of the Respondent is not that the proposed development itself is encroaching on any road reserve as such, as the Appellant seems to be suggesting. The Respondent has made no pronouncement on the development proposal of having a restaurant and a staircase as such but rather on the parking, which is an integral part of the operation of the business of a restaurant and an important planning consideration.

17. To calculate the number of parking lots required, the Council relied on guidelines from the Tourism Authority and from guidelines under **Regulations** made under the **Food Act 2002** to come to the conclusion that for a restaurant to be considered as one, it should have at least 40 covers and a minimum total surface area allowed for 40 covers is 60 sq.m respectively. According to the guidelines of the Tourism Authority and the **Planning Policy Guidance** (PPG 1), for restaurants 1 parking lot is allowed for every 8 sq.m of dining area.

18. As per the **Food Regulations** made under **The Food Act 2002**, applicable at the material time, the Minister responsible for Health and quality of life issued guidelines. Guidelines No.30 issued by the Ministry of Health, which should normally be applicable since this involves a restaurant, where sanitation is an important and relevant factor, provides that restaurants should comply with **The Food Act** and that they should provide a dining area with a minimum size of 1.5 sq.m per seat. The understanding is that there should be sufficient distancing to minimize the risk of contamination. When read in conjunction with the provision of the guidelines of the Tourism Authority, for the proposed development there should be a minimum dining area of 60 sq.m for which a minimum of 8 parking lots should be available. Hence the requirement of 8 parking lots in this case, as per the evidence of Mrs. Padayachi.

19. We have considered the positioning of the parking slots as per the plans at **Annexes N1 and N2** of the SOC. We also note that at **Annex S** of the SOC the Appellant has provided the consent of a neighbour to allow him to use space for 2 parking lots. The Council's position is that parking lots indicated as lots.4, 5, 6 and 7 (as per **Annexes N1 and N2**) along the one-way road are not functional. They do not meet the requirement of 2.5 x 6 metres and encroach on road reserves which should be kept free.

20. The requirement of functional parking is important especially in the case of developments such as restaurants where there will be a dynamic movement of vehicles. The property of the Appellant is found at an angle where the road forks into two as noted at the site visit and from an annexure to the Statement of Reply (SOR) marked **Annex AB1**, a picture of the building. One road is the main road, Rue des Jardins and the other is the smaller one-way road, which is towards L'Amitie village. What is important at such junctions is that there should not be road blocks or traffic issues which can arise due to lack of fluidity in vehicular movement that can be caused due to unsatisfactory parking arrangements.

21. In this context we have also considered the guidelines on parking for restaurants. **Policy CR1** of the **Outline Planning Scheme of Pamplemousses/Riviere du Rempart** is applicable in the case of *Commercial and Retail Development* which includes restaurants which stipulates that planning permission may be refused if "*the development could give rise to unsatisfactory traffic, public transport, parking or environmental problems*".

22. Furthermore, the **Design Guidance for Commercial Development in PPG1** on **Commercial Development**, in this case a restaurant, provides under paragraph 2.5.2 that "*the provision of parking and delivery areas should generally be adequate to cater for the traffic likely to be generated by the development...*" It also provides that forecourt parking, as is the case here, should be discouraged and that car parking areas should not normally be permitted along main roads and other busy roads unless designed in a way that ensures safe access and egress to the satisfaction of the relevant authorities. The Respondent has averred in its Statement of Defence (SOD) that presently there are huge traffic jams and heavy traffic near the subject site and granting the BLUP will eventually intensify the traffic and jeopardize public safety, which the Appellant has denied.

23. A restaurant should have a functional parking area. While having the restaurant's parking area in an alternative place would possibly have resolved the issue from a planning perspective, the Appellant chooses to have forecourt parking which as per the guidelines is discouraged. Since we are only concerned with the parking lots 4, 5, 6 and 7 found along the one-way road, it appears that by its very nature, reverse parking will not be allowed since there should be safe access and egress which normally means driving and parking in forward gear when the road concerned is not wide, allows for only one way traffic and is located at a junction. We note that the recommendation from the TMRSU, **Doc C,** also mentions, "*No reverse parking shall be allowed for lot. 4 to 8 as the internal road is a one way street direction of Amitie.*"

24. This parking arrangement would possibly have satisfied the planning norms had the space for forecourt parking been wide enough within the property of the Appellant to allow for minimal and easy manoeuvre in and out of the parking lots but not when the lots are compact against each other, in between the building and the road, and so close to the junction. In fact for traffic along the Rue des Jardins from the direction of Mon Loisir and turning into the one - way road, the visibility splay is compromised, as noted during the site visit and as per **Annex AB1** of the SOR.

25. In support of their case, the Council explained parking lots 4, 5, 6 and 7 cannot be considered valid under the planning standards. She explained that during a site visit she measured the width of the strip between the building and the road edge which was found to be 3.2 metres

and deducted 1.5 metres for being road reserve as per the title deed (which should be kept free) and concluded that the width of 1.7 metres as setback from the building is insufficient for parking. The parking dimensions provided by the Traffic Management and Road Safety Unit (TMRSU) guidelines are 2.5x 6 metres, as per **Doc C**, letter dated 21st May 2020 issued in connection with the application at hand.

26. In support of his case the Appellant has annexed to his Statement of Case ["SOC"] 4 Actes de Ventes marked as **Annexes B1, B2, B3 and B4**. Annex **B1** is an Acte de Vente dated 1969 demonstrating that Mr. Radha Hurnath, father of the Appellant, had acquired ownership of the land *in lite*. As per this deed of sale, there is no road reserve mentioned. The boundaries have been described as follows:

« D'un premier cote, par la Route Publique, sur cent vingt six pieds.-
Du second cote, par l'axe d'un chemin commun et mitoyen, sur vingt et un pieds.-
Du troisieme cote, par l'axe d'un autre chemin commun, sur cent dix huit pieds.-
Du quatrieme cote, par le surplus du terrain de la Societe vendresse, sur cent quatre pied.»

27. **Annex B2** is another document evidencing the "*Donation D'Usufruit*" from the Appellant's father to his mother, Mrs. Sakoontala Hurnauth and describing the boundaries in the same terms and adding the equivalent distance in metres and centimetres.

28. On the other hand, **Annexes B3 and B4** of the SOC, both notarial deeds produced as part of the Appellant's case, now mention road reserves of 1.5 metres along both the public road, referred therein as La Route Royale des Jardins and the other road is referred as the "One Way" road. Both deeds evidence the sale of undivided rights for the property *in lite* from the Appellant's mother to the Appellant dated 13 March 2013 and Appellant's brother, Mr. Uttam Sharma Hurnauth, also to him dated 6 September 2013 respectively. The boundaries have been described as follows:

" D'un premier cote, par la Route Royale des Jardins, ***des reserves d'un metre cinquante centimetres (1.50m) de large entre****, sur une longueur de vingt sept metres et trente trois centimetres (27.33m).-*

*Du second cote, **par des reserves**, longeant La Route Royale des Jardins et le chemin « One Way », sur une longueur de six metres et vingt huit centimetres (6.28m)*

*Du troisieme cote, par le chemin « One Way », **des reserves d'un metre cinquante centimetres (1.50m) de large entre**, sur une longueur de vingt huit metres et vingt huit centimetres (28.28m)*

Et du quatrieme et dernier cote, par la portion distraite, sur une longueur de vingt six metres et cinquante et un centimetres (26.51m) » (stress is ours)

29. Upon careful examination of the notarial deeds produced in this matter, it is evident that the existence of road reserves measuring 1.50 metres between the building and the adjoining roads, namely La Route des Jardins and the "One Way" road, has been expressly and unambiguously stipulated. These notarial deeds, duly read over and signed by the Appellant, enjoy a presumption of regularity and authenticity under the law. The Tribunal must give full effect to their contents. The Appellant, having knowingly accepted the terms of these deeds, cannot now be heard to contest the existence of the road reserves therein described.

30. It is therefore not the role of the Tribunal to conduct a historical inquiry into whether such reserves existed prior to the execution of these deeds. Rather, the Tribunal must base its findings on the documentary evidence that establishes the current state of title. In this regard, **Annexes B3 and B4** of the SOC, being the notarial deeds evidencing the Appellant's *titre de propriété*, constitute a probative source of evidence. The Tribunal therefore accepts that the road reserves, as described in these deeds, form part of the configuration around the property.

31. The concept of a "road reserve" is defined under the **Road Act 1966** as being *"any part of a road, other than the carriageway, footpath, and cycle track"* [underlining is ours]. A "road" has been defined under the **1966 Act** as being "*any highway, and any other road to which the public has access and any public place to which vehicles have access and includes any bridge, ford, culvert or other work in the line of such road."* The road reserve between a building and a public road serves important functions: it allows for the laying of infrastructure such as water, electricity, and communication lines; provides space for future road expansion or drainage and can also act as a safety and visibility buffer between a building and the road.

32. This being said, a road reserve is still part of the road. The Appellant seems to dispute the road reserve as well as the setback of his building from the road. In this respect he purported to refer the Tribunal to **Annex Z** annexed to the SOR, which appears to be a document dated 2nd May 1980, an application for a permit to build and some figures mentioned therein which we cannot make sense of. We found this document to be of no probative value as neither the maker nor the recipient was present to testify as to the veracity or contents of the document. It is accordingly disregarded.

33. The Tribunal notes that the Council did not adduce any evidence from the Road Development Authority (RDA) nor did it produce any report from the RDA in support of their case. The RDA being the competent highway authority, was best placed to provide clarity on the width, starting point, and end point of the one-way road, as well as the extent and alignment of the adjoining road reserve. However, it appears that the Council relied on measurements taken from the visible edge of the tarred surface. In our view, this method is not appropriate, in cases where the precise location of boundaries is under dispute.

34. Furthermore, in support of the Appellant's case, a sworn land surveyor could have been called to assist the Tribunal by identifying how far the parking lots extend within the Appellant's plot, and whether any encroachment onto the road reserve has occurred. While the Tribunal does not suggest that the Council acted inconsistently, it is noteworthy that it did not raise objections in respect of parking lots 1, 2, and 3, even though those lots are also located adjacent to a road reserve and near the main road. In the absence of clear and reliable evidence identifying the building line, the property boundary, the road reserve, and the actual road, the Tribunal cannot reach any conclusion on the issue of encroachment. The fact that no evidence was adduced from the RDA cannot be taken to mean that there is no encroachment or that it renders the appeal and the application meritorious. The case of the Appellant is also lacking in the evidence of a sworn land surveyor. Ground 2 therefore fails.

35. We wish to add that from a planning perspective, we bear in mind that the building at the ground floor has been granted planning permission for commercial activities, some of which do not necessitate big parking space, hence the current parking area may have sufficed. However, adding a floor for a restaurant which may operate at lunch time and at dinner time,

as per the Appellant's version, will turn the locus into a place of convergence for vehicular and human traffic where safety and parking will become issues.

36. From the business registration card of the Appellant, annexed to the SOC and marked as **Annex C**, it is noted that the Appellant intends to sell liquor and other alcoholic beverages. This in itself is not an issue but when considered in the context of attracting customers, does have an impact on the convergence of traffic at a junction and where the parking space is compact and along a one way, as is the case with the application at hand. This problem could have been resolved by an alternative site for the restaurant's parking.

37. The Appellant cannot claim a legitimate expectation since each application is assessed on its own planning merits on the basis of whether a particular activity can be accommodated given the contextual plan and location. Having a restaurant within a commercial building does cause an intensification of activity which generates additional issues such as traffic, safety, sanitary and environmental. If conditions imposed are not likely to abate any such nuisance, then the Council is fully entitled to reject the application. **Docs B and B1** produced by the Appellant are the plan and BLUP granted on the subject site for a hardware shop with the right to sell cement, iron and steel bars at the ground floor whereby condition 12 imposes adherence on the Developer to the relevant guidelines emanating from various authorities and Ministries such as the Ministry of Health and Quality of Life. Ground 3 fails.

(c) Under Ground 4

38. The Appellant's contention under this ground is that the owner is being deprived of the use and enjoyment of the property for not being allowed to use the space between the building and the road edge. The Appellant submitted that there was no road reserve mentioned in his mother's title deed and that the government constructed a footpath of 80 cm wide on the property without her permission or any compensation.

39. The Appellant is free to use any part of his property and the road reserve can be used by the public including the Appellant but it cannot be monopolized for exclusive use by the Appellant as it is not private property but part of the road. The report of a sworn land surveyor, which

is missing, would have assisted in understanding the delineation of the Appellant's property boundary and building line from the road reserve. Otherwise, the other issues raised do not fall within the jurisdiction of this Tribunal and beyond the scope of this Determination. This ground is therefore set aside.

40. For all the reasons stated above, we find that this appeal is devoid of merit. While we note that both the Appellant and the Respondent have adduced evidence of limited probative value on the central issue of the appeal, such inadequacy does not, in itself, render the application for the BLUP nor the appeal meritorious. As previously observed, the identification of an alternative nearby site to be used as a parking area may offer a practical resolution to the issue at hand. The appeal is set aside. No order as to costs.

Determination delivered on 25th April 2025 by

Mrs. J. RAMFUL JHOWRY	**Mr. R. ACHEMOOTOO**	**Mr. S. BUSGEETH**
Vice Chairperson	**Member**	**Member**