

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 259/12

In the matter of:

MARIE CLAIRE MACHABEE

Appellant

v.

BLACK RIVER DISTRICT COUNCIL

Respondent

DETERMINATION

The Appellant had submitted an application to the Respondent for '*conversion of an existing ground floor into a victualler, seller of fruits and vegetables and general retailer foodstuffs and non foodstuffs including liquor*' at a property situated at La Ferme, Bambous.

The Respondent has, by way of letter dated 6 September 2012, refused the application. As stated in the letter, the refusal was made under section 117(7)(b) of the Local Government Act 2003 as amended and the grounds for refusal are as follows:

1. The existing building stands at only 3.66 metres from Black River Road instead of 6 metres.
2. The BLP of the existing building was not produced.
3. The proposed development has not been favourably recommended by the Road Development Authority and the Traffic Management and Road Safety Unit.

The appeal was initially lodged before the Town and Country Planning Board and was subsequently transferred to this Tribunal.

The case for the Appellant, as contained in the statement of case is that the application concerns an existing building on a small plot of land and several other business operators are

situated at a distance of less than 3.66 metres from Black River Road. The applicant has submitted a comprehensive layout plan with adequate parking facilities for the size of business under consideration. The absence of BLP for the existing building is due to the fact that the said building dates back to several years. The Appellant has also raised the issue of an unfair and unjust reliance on the recommendations of the RDA and TMRSU being given the specificities of the area.

The Respondent's statement of defence maintained the grounds for rejecting the application and, in addition, stated that its executive committee has taken into consideration the security aspects of the users of the footpath and the public in general. The Respondent relied on letters dated 26 April 2012 from the RDA and 30 May 2012 from the TMRSU respectively, both authorities not having recommended the application. The Appellant also produced a letter of consent from one Clency Casambo (Annex 4) where the latter authorised the Appellant to use part of his land as parking facilities.

In the course of the hearing before the Tribunal, evidence was adduced by the sworn land surveyor Mr. Bhurtun who produced a report ('rapport de constat') containing the plan drawn up by him on behalf of the Appellant as well as photographs showing several other business entities operating along the same road and which did not observe the parameters for parking and road safety.

Two main points have emerged from the evidence adduced by the Appellant in the course of the hearing, the first one being the issue that no BLP was produced in respect of the existing building. In this respect, the Appellant has amply explained that her house and property had been subjected to flood and rains and that all her documents are now untraceable due to those incidents. This, as well as the fact that the construction of the existing building dates back to many years, is in our opinion, satisfactory explanation as to why she was unable to trace out any of those documents. It came out from the cross examination of the Respondent's representative that part of the record of the Council had been destroyed by fire, and no copy could not be available. This contradicts the contents of Document D produced, by which the Respondent purported to establish that the Appellant had not been issued with a BLP or any other permit, such information could not have been obtained with certainty for the above reason.

The decision under appeal is in respect of an application for the conversion of an existing building to operate a small business for selling fruits, vegetables etc. The planning merits of this proposed development in an existing building call for an assessment of this particular project and we find that this is not dependent on the permit in respect of the existing building. This cannot dictate the planning merits of the new use that the Appellant contemplates in those premises. The second ground of refusal is no ground at all.

Secondly, the issue of setback being less than the required distance of six metres has to be assessed whilst taking into account that the building has existed for a very long time. Also, and more importantly, it has come out that the width of the Black River Savanne road was enlarged due to more recent development that took place in that part of the island. This aspect has not been disputed. The requirement of the six metres setback is a provision of the Planning Policy Guidance (PPG) that dates to 2006. It is agreed that the Respondent is bound to observe this provision. Yet existing building would certainly not be in a position to abide by this requirement. This is a matter that the Respondent ought to consider in their decision making.

Furthermore, the Appellant has explained that while the case was before the Tribunal, she had submitted amended drawings to the TMRSU and the RDA. The RDA has by letter dated 18 August 2014 stated that it had no objection to the proposed development following the submission of revised drawings (Document C). The TMRSU has by way of letter dated 16th October 2014 given its green light to the proposed development subject to four conditions relating to parking arrangements as contained in Document B. This being the case, the third ground of refusal would now no longer applicable.

It is true that the Respondent was not in presence of these elements when the decision was taken. We find that it would be appropriate for the application to be reconsidered by the Respondent. In line with the provisions of Section 5 (3) (b) which empowers it to take a less formal and technical approach in the conduct of its proceedings, we are of the view that the calling for a fresh application for this consideration is not required.

The Tribunal remits the decision back to the Respondent for reconsideration in the light of the clearances now obtained and of the observations made above.

Determination delivered on 3rd March 2017 by:

Mrs. V. Bhadain
Chairperson

Mrs. B. Kaniah
Assessor

Mr. M. A. Busawon
Assessor