

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 400/13

In the matter of :-

Yashodhar Boygah

Appellant

v/s

The Municipal Council of Beau Bassin/Rose Hill

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Municipal Council ("the Council"), for having imposed certain specific conditions to the Building and Land Use Permit granted ("BLUP") for which an application was made by the Appellant in November 2012. The application as per the application form of the Appellant, Doc D, filed is for an extension of an existing commercial building for personal office use. However, as per Doc H filed, correspondence from the Council dated 23rd November 2012 under the signature of Mr. Vijay P. Bungaroo for Chief Executive, reference is made to an application for BLUP for the extension to an existing commercial building with a carport (parking facilities) at ground floor and personal offices at first, second and third floors at corner of Royal Road and Malartic Avenue, Rose Hill. Finally, a BLUP dated 14.02.13 was issued to the Appellant by the Council wherein it was stated that a BLUP was issued to the Appellant to carry out the development which was couched in 2 limbs, as follows:
"1) Extensive alteration to an existing commercial/residential building at ground, first and second floors;

2)Extension to an existing commercial building for parking use at ground floor, first floor for personal/private office use, second and third floors for residential use (owner's residence)' on land located at Cnr Royal Road Rose Hill and Malartic avenue, Rose Hill..."

2. The BLUP that was granted to the Appellant contained a number of conditions. However, an addition of six specific conditions are laid down in addition to the other 'standard' conditions which we also deem fit to reproduce hereunder:

"(1) A compliance certificate to be obtained from this Council on a yearly basis prior to the payment of Trade Fee for the Commercial space at level one within the existing part of the building,

(2) The Council or any other Highway Authorities may request for the removal of both the stone decorative column and the parapet wall at the applicant's cost in case the road fronting the site is subject to widening. To note:- a visibility splay/road kerb/road reserves shall normally be provided at road junctions, therefore the decorative columns and the parapet wall have been assessed as temporary structures until their removal are required,

(3) The existing open veranda along the Royal Road shall not be enclosed at anytime by means of glazing and/or curtains and the view across shall not be obstructed by any means,

(4) No trading activities/dining hall/reception area shall be allowed within the existing verandah along the Royal Road,

(5) Commercial/Office activities shall only be allowed at ground floor level of the existing concrete building having/and to a maximum surface area of 47 sq.m,

(6) No parking is allowed on site both along the Royal Road and Malartic Avenue except the use of the garage at the rear serving the residential unit."

3. We have duly considered the evidence placed before us including documents produced and the testimony of all witnesses as well as submissions of counsel appearing for both parties. The Appellant testified and Mr. Bungaroo, the Planning and Development Officer of the Council deponed on behalf of the respondent. We will not reproduce the testimony of witnesses except where we deem it fit to do so.

I. CONTEXT ANALYSIS

4. The proposed development as approved by the Council, at Annex E, consists of an extension at the rear of an existing building which comprises an existing ground plus two floors. The proposed development site is located at the corner of Royal Road and Malartic Avenue, Rose Hill. Royal Road is a main artery linking two towns, Rose Hill and Beau Bassin. Malartic Avenue is one of the roads linking Royal Road to Van der Meersch Street. Traffic Lights are found at the junction of Royal Road and Malartic Avenue. The undisputed evidence reveals that the property, as purchased by the Appellant, had been put to commercial use by the previous owner who held a trade licence for a restaurant. It is also not disputed that following a stop order by the Council, the Appellant stopped works undertaken on the proposed development site. The Appellant intends to extend the ground floor to have a car port, the first floor above the car port to be used as an office, the second and third floors to be used for residential purposes. He also intends to use, and had been using part of the existing building which is closer to Royal Road, for commercial activities (restaurant). As per evidence, the subject site is not enclosed but two parking slots have been shown on the plan for the proposed development.

II. THE INSTRUMENTS AND THE LAW

5. The site being in Rose Hill, the applicable outline scheme is **Outline Planning Scheme for Beau Bassin/ Rose Hill ['OPS']** issued under the **Planning and Development Act 2004** and **The Planning Policy Guidance**. All planning and development laws referred to in the **Local Government Act 2011** are also applicable, depending on the context.

III. THE ISSUES

A. BLUP FOR EXTENSIVE ALTERATIONS TO EXISTING BUILDING

6. The site is within settlement boundary as per the OPS of Beau Bassin/ Rose Hill which favours residential development. It is agreed by the parties that the proposed development as sought by the Appellant is for the extension at the rear of an existing building to accommodate a car port on the ground floor, an office for private use on the first floor on top of the car port and for residential purposes on the second and third floors. This was not contested before the Tribunal and to this extent we take note that the Council, in the BLUP granted to the Appellant, has included it as the second proposed development, the more so as the Appellant testified that he had made representations to the Council which can be taken to mean that the Council acknowledged the development intended by the Appellant. Apart from the first condition, which is not contested, the Appellant in essence is contesting the five other conditions (conditions 2 to 6) which have been included in his BLUP, specific to the development that he proposes on the subject site.

7. The construction of new buildings and extensive changes to existing buildings usually requires consent in the form of a BLUP from the local authority, which is the planning authority. The *raison d'être* for a planning system is for the control of inappropriate development. Each planning appraisal needs to relate to a specific application because every decision of the Council is based on the planning merits of an application as well as the site, as each development has different requirements. Therefore it stands to reason that the underlying basis for a decision of whether or not to grant a BLUP should imperatively stem from the fact that there is an application for planning permission before it in the first instance. Whether various applications can be made in one application form for which multiple approvals are sought, is a different issue.

8. In the present case, the Council has granted a BLUP for two separate developments, so to say; one for “extensive alteration to an existing commercial/residential building at ground, first and second floors” as set out in the first limb, which concerns the front part of the existing building and a second one for “extension to an existing commercial building for parking use at ground floor, first floor for personal/private office use, second and third floors for residential use”, which concerns the rear part of the same building and which is where the Appellant explained that he intended to carry out the development. In essence, the Appellant wished to have an extension made at the rear of his existing property, which is as at now a commercial property, such that he adds a car port on the ground floor, an office on the first floor right above the car port and on second and their floors above the office, he adds residential units. The Appellant has maintained throughout his testimony and in cross-examination that he has only applied for a BLUP for extension of the existing building and was very clear about the nature of the development. The witness for the Respondent also confirmed in cross examination that the Appellant had only applied for the extension and that the Council upon its own volition had given the Appellant a BLUP for “extensive alteration” although he added that the amended plans submitted by the Appellant did make reference to columns and parapet wall.

9. It may well be argued that the reason for which the Council deemed it fit to include the first limb in the BLUP was because the Appellant never applied for a BLUP for the alterations made to the premises. Normally when works are carried out without a BLUP, it does not render the development of the land illegal but it makes it unlawful for which the local authority has the power to take legal action to prosecute and seek a demolition order from the court. A retrospective planning application, to legalize the development, in itself is not precluded but is subject to decision by the Council. The fact remains though, that an applicant must put in an application for planning permission so that the Council, as the planning authority can then take a decision in the exercise of its powers under the law. We believe that where there is no application, there can be no decision regarding a planning permission.

10. In the present context, it is our observation that the Council's decision was wrong when it issued the BLUP to the appellant pertaining to the "extensive alteration to an existing commercial/residential building at ground, first and second floors." The case for the Respondent is that it has the discretion to look at the overall development and the building as a whole. While we agree that the Council may look at the overall development, we believe that this discretion is to be exercised when circumstances so demand. The approach should be, in our view, whether the proposed development/the new application will have a bearing on the existing development? If so, then the Council can look at the development site as a whole in its context. If not, then it is totally irrelevant to the current application. In the present case, will the new extension at the rear of the property (the car port, office and residential units) have a bearing on the pre-existing commercial/residential development? The answer seems to be in the negative. The new units will not alter surface area available for commercial activities, that is, the existing restaurant, nor there be any intensification of commercial activities through the extensions. In our view, the new application as made by the Appellant for extension of his existing property, would have no bearing on the existing development, and will be a separate development at the rear.

11. In any event, the Council, if it believed that the Appellant was not respecting the conditions of the BLUP attached to that building, could then have either revoked the BLUP for the commercial development granted to the Appellant, or imposed further conditions. If the Appellant did not hold a BLUP for commercial development for the front part of the building then the Council could have requested to Appellant to apply for one, failing which the Council could have prosecuted him. These are examples of recourses that the Council could have had but did not pursue for reasons best known to it. In any event the Tribunal was left in the dark regarding the type of BLUP held by the Appellant and the previous owner of the building, the Council having failed in its undertaking to provide the Tribunal with same.

12. Furthermore, not only did Mr. Bungaroo admit that the Council, of its own will, gave a BLUP for "extensive alteration" to the Appellant but it was clearly admitted by him in cross-examination that if the Appellant had not applied for the BLUP for extension to his premises, the Council would not have imposed those conditions relating to the front part of the building.

B. CONDITIONS ATTACHED TO THE BLUP

13. Planning permissions can be subject to planning conditions which are extremely important for the development to gain planning acceptance. However, in order to achieve the results sought, good planning decisions must be relevant to the application. Coming to the second limb of the BLUP regarding the extension to an existing building, the issue in dispute here is the specific conditions attached to the BLUP, which we shall now address. The condition no.1 being no longer a live issue will, therefore, not be addressed. The second specific condition attached to the BLUP is that

"The Council or any other Highway Authorities may request for the removal of both the stone decorative column and the parapet wall at the applicant's cost in case the road fronting the site is subject to widening. To note:- a visibility splay/road kerb/road reserves shall normally be provided at road junctions, therefore the decorative columns and the parapet wall have been assessed as temporary structures until their removal are required"

14. The Council makes reference to a parapet wall which has been put up along the pavement of the main road, that is, Royal Road and along the pavement of Malartic Street, as shown from the photographs produced. It is clear that this special condition is in relation to some form of development which has nothing to do with the application for extension which is found at the rear of the property *in lite*. This condition seems to have been included to address some changes previously made by the appellant to the frontage of his property for which the Council's representative agreed in cross that the Council agreed to give the BLUP to the Appellant, as per the first limb.

15. In our view these amount to aesthetic changes, such as decorative stones on existing walls and roller shutters to cover the big bay windows which already existed in wooden structure under CIS roof as erected by the previous owner. The undisputed evidence before the Tribunal is that the structure was erected by the previous owner of the property who carried out a restaurant business on the site and was prosecuted by the Council and fined on 3 counts namely Building without a permit from the Local Authority, building without permissible distance from roads and building without permissible distance from site boundaries. No pulling down order was granted by the Court and there is no evidence to suggest that the Council appealed against such a decision.

16. While the Council had the option of seeking a pulling down order by exhausting all its avenues if it was of the view that the then development offended planning norms, we are of the view the latter cannot as an afterthought include the condition in a BLUP for which the applicant has not even applied. As mentioned above, the Council should have requested the Appellant to apply for a relevant BLUP, if he is so required as per the law, failing which the Council should have prosecuted him, on the assumption that he does not hold a valid BLUP for the commercial premises. The conditions relating to the commercial/front part of the building should be attached to the relevant BLUP, not the Trading licence, which binds the owner to the land use on the site. This condition no.2 clearly relates to the front part of the appellant's property and having reached the conclusion above that the Council, in this case, should have given its decision only with regard to the application for extension at the rear of the Appellant's property as submitted by the latter, we believe that any condition imposed by the Council which relates to the existing building and not the subject matter of the application, is not justified by the respondent.

17. In the eventuality that the authorities need to retrieve part of the Appellant's land for the purposes of widening the road, the procedure will be by way compulsory acquisition by the State which any land owner of this country may be subjected to.

18. The site visit has enabled the Tribunal to have a visual appreciation of the locus as well as the context and it is confirmed that Malartic Road is a one way street and is wide. The junction of Royal Road and Malartic Road is equipped with traffic lights. Therefore the concerns relating to the visibility splay/road kerb and road reserves, which are meant to facilitate the emergence of traffic onto Royal Road, are mitigated. We agree with submissions of Counsel for the Appellant as was noted by the Tribunal in the course of the site visit, that the signal plates placed by the highway authorities as explained by the representative of the Council was at the junction of Royal Road and Malartic Road, which hindered the view to traffic coming from Malartic Road.

19. The special conditions 3, 4 and 5 attached to the BLUP again relate to that part of the building which was the not subject matter of the application for the BLUP. These conditions appear to have been imposed by the Council in view of its incapacity to take action as a result of the unlawful nature of the development for which the previous owner was prosecuted. The point we wish to drive home is that the Council has failed to exhaust its avenues of seeking a pulling down order, then this situation cannot be remedied by giving the Appellant a BLUP which he has not applied for and impose such conditions on him so that in the eventuality he fails to comply with the conditions, the Council will then have valid grounds to achieve what was achieved previously, that is, take action such as revoking the BLUP of the Appellant or pulling down the structure for non-compliance of conditions. We lay stress however on the fact that this case is to be treated in isolation in that it revolves around its own set of facts which it has its own background to the case. While the Council is vested with wide powers governing town planning, the Council also has a duty to exercise due diligence in its procedure and the application thereof. In the light of our abovementioned observation that the Council was wrong to have issued a BLUP on the first limb as set out in the BLUP itself, we are of the view that conditions 2, 3, 4 and 5, since they all relate to the existing building, more especially the existing front part, do not hold water.

20. Counsel for the Appellant referred the Tribunal to the landmark case of Newbury District Council v Secretary of State for the Environment [1981] AC 578 in which the test for validity of a condition of planning approval is set out. In essence, a condition is valid if it has a planning purpose, it fairly and reasonably relates to the development and it is not so unreasonable that no reasonable planning authority could have imposed it. On the basis of our observations throughout this assessment, we believe that none of the conditions imposed related to the proposed development hence they failed the test of validity.

21. We believe that the Council was wrong to have imposed these conditions which are an offshoot of the previous development vide, the front part of the existing building which was originally under wooden structure and under CIS roof. These conditions are mostly attached to the existing building which was originally under wooden structure, as borne out in evidence, and has no bearing on the extension for which the Appellant applied a BLUP. These conditions would have been justified when a BLUP was issued for the commercial development (restaurant) for the site. It transpired from Mr. Bungaroo's testimony that the conditions that were imposed infact concerned the front part of the building, which had been the subject- matter of a criminal case against the previous owner while admitting on a few occasions that had the Appellant not applied for the said BLUP the Council would not have imposed these conditions.

22. As far as the last condition no.6 is concerned, we believe that this condition again was attached to the BLUP with the Council having wrongly taken on board the fact that the front part of the premises are for the operation of the restaurant without paying heed to the fact that the application was in fact for office and owner's residence. Two parking slots as provided will suffice for these purposes, in our view. The Council's representative agreed that the parking requirement will suffice for the proposed development, that is, for extension of existing building. The parking requirements associated with the commercial activity of the Appellant does not relate to the proposed development.

23. The Council cannot cure any defects retrospectively in the manner in which it dealt or did not deal with the BLUP at the time it passed hands to the Appellant. In any event, even if the version of the Council were to be taken that there were several issues regarding the proposed development, the fact remains that the Council did grant to the Appellant a BLUP for the extension of the existing commercial building for parking, office use, residential use, without any special conditions attached, save for the standard ones.

24. For all the reasons set out above, the appeal is allowed. No order as to costs.

Determination delivered on 26th February 2018 by

Mrs. J. RAMFUL

Vice Chairperson

Me. A. JEEWA

Member

Mr. M. BUSAWON

Member