

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

**ELAT 755/14**

**In the matter of :-**

**Baboo Amal Rye Ramdhonee**

**Appellant**

v/s

**The Municipal Council of Quatre-Bornes**

**Respondent**

**Super Unic Co. Ltd**

**Co-respondent**

**DETERMINATION**

1. The present appeal is against a decision taken by the Municipal Council ("the Council"), for having granted to the co-respondent, represented by Mr. Parsad Ramluckhun, a Building and Land Use Permit ['BLUP'] for the conversion of part of an existing commercial building at first floor (120 sq. m) to be used as bakery and pastry and installation of electric motors/engines consisting of 1 electric oven 3 phase/12KW and one electrical ('Petrins a Spirale') 32 Lts/3 Phase at Cnr S.S.R and Orchidees Avenues, Quatre Bornes. The appellant, who is a neighbour objecting to the development, was informed of the decision of the Council *vide* a letter dated 13<sup>th</sup> August 2014. The appellant lodged a notice of appeal containing nine grounds of appeal. The matter was heard and a site visit was conducted by the Tribunal in the presence of all parties on the 17<sup>th</sup> October 2017 and certain observations were made which we shall address in the course of our determination.

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2. All parties were legally represented. In the course of the trial the appellant, the planner of the Council and the owner of the supermarket (co-respondent's representative) deponed and were each cross-examined. No expert witnesses were called except for the planner of the Council. We have duly considered all evidence placed before us as well as submissions of all counsel. In this context we believe that in the present case, it is of utmost importance to analyze the context as it has a bearing on the planning merits of this application.

#### I. CONTEXT ANALYSIS

3. The development (which has now been implemented) is a production unit, more commonly referred to as bakery and pastry, is being carried out on a floor area of 120 m<sup>2</sup> on the first floor of a two storeyed building. The two lower floors are used mainly for commercial purposes. The major part of the ground floor (which is of an approximate area of 846m<sup>2</sup> as per plan of ground floor submitted in May 2013) of the commercial building is being used as a supermarket having two frontages; one along SSR Street and the other along a road perpendicular to SSR street, called Orchidees Street of Morcellement St. Jean. The production unit (comprising of the bakery) is located on the first floor at the corner end of the building found at the junction of SSR Street and Orchidees Street.
4. When facing the building *in lite* with it having its frontage on Orchidees Street on the eastern side, on the western side it adjoins another building, which we shall refer to as "the second building". The second building also has its frontage on SSR Street. That building consists of a basement floor used as parking area, ground floor which serves as an extension to the supermarket and the first floor is used partly for commercial activities but mainly for residential apartments and the second floor is put to residential use. The second building stretches back from SSR Street all the way to the next parallel road, that is, Goyaviers Street which is also a road perpendicular to Orchidees Street. Both buildings are owned by Mr. Ramluckhun and cover a total gross floor area of approximately 1360 m<sup>2</sup> at the first floor of the combined surfaces of both buildings, as per Pages 109 and 110 of the main brief, which are interconnected.

## II. THE INSTRUMENTS AND THE LAW

5. The subject site being in Morcellement St Jean, the applicable outline scheme is the **Outline Planning Scheme ['OPS'] for Quatre-Bornes** issued under the **Planning and Development Act 2004**. As per the **OPS** the subject site lies within a predominantly residential area. The relevant policy of the Outline Scheme for the development is policy **UDS1**. The **Environmental Guidelines on Bakery Development** issued in 2017 by the office of the Director of Environment will also be referred to as the **Local Government Act 2011 [LGA 2011]**.

### 6. Policy **IDS1 Development within settlement boundaries**

Under this policy, applications for development should normally be permitted within settlement boundaries, subject to the provisions of Policy UDS 2 (which provides that applications for development within settlement boundaries will not normally be allowed if it is defined as agricultural land or if it is within an Environmentally Sensitive Area), provided it does not generally inhibit the development of the area, restrict access to adjoining areas of land, disrupt existing business, adversely affect the local amenity, exceed the capacity of existing infrastructure. Amongst the justifications provided under this policy to allow development within the settlement boundaries there are two which refer to commercial as well as industrial developments, reproduced hereunder:

*“iv. Where the proposal is for a development of more than 1,000 sqm GFA commercial, 5,000 sqm GFA industrial or 100 plots/units residential, the applicant should be required to provide a Traffic Impact Assessment (TIA) clearance in accordance with PPG 1 Design Guidance as amended. Where the TIA demonstrates the existing infrastructure would become overloaded as a result of the proposed development, scheme promoters should be required to provide the necessary additional infrastructure capacity to the standards specified by the relevant authorities as part of the development costs.*

*v. Where the proposal is for a development of less than 1,000 sqm GFA commercial, 5,000 sqm industrial or 100 plots/units residential, the applicant should be required to*

*discuss the necessary improvements with the relevant authorities on a case by case basis.”*

7. A close reading of the above, in our view, may be taken to mean that some types of commercial developments as well as certain types of industrial developments may be allowed within the settlement boundary. Such applications are assessed on a case to case basis. We are here dealing with a light industrial development (in view of its scale, that is, one electrical oven and one ‘Petrin a Spirale’) within a commercial outlet.

**8. Policy CR 1 (Commercial and Retail development)**

**Policy CR 1** regulates a particular land use activity, that is, commercial developments. The basic principle is the clustering and sequential approach as outlined in the Strategic Development policies. The policy permits a clustering of commercial developments in existing commercial centres namely small commercial developments that serve the basic needs of the local people in residential neighbourhoods. This policy seeks to also limit the proliferation of commercial development in a dispersed manner which would dilute the centre. Under this policy, any new local shops with direct access onto highways and main roads would not normally be permitted. This policy is not strictly speaking applicable here but reference will be made to it.

**9. Policy ID1: Industrial Development on Existing Sites, Estates and Zones**

This policy regulates applications for new industries or expansion of existing facilities such as factories which require large sites and generate high volumes of vehicles and truck movements within the existing industrial estates and sites. It does state that small scale workshops and SMEs that are unsuitable in residential areas should seek sites in SME zones and Small Scale Business Industrial Workshop zones. We do not believe this policy finds its application to the present case. We are not dealing with SMEs and the like here.

## GROUND 1

10. Under this ground it is the appellant's contention that the site notification plate made it unclear as to the location and positioning of the proposed bakery and more so if the proposed development was in close proximity to the appellant's house. The appellant's contention is that the supermarket owned by the co-respondent is next to his house and that it has grown substantially in size over the years and that he was anxious about the consequences of having a bakery. There was also equipment near his boundary wall.
  
11. The appellant's residential property is located along Goyaviers Street. His property is bounded by a wall, and on one side it is a common boundary wall to part of the second building of Mr. Ramluckhun, which sprawls from SSR Street to Goyaviers Street. Part of the appellant's garden offers a setback from the common boundary wall. The second building which adjoins the building *in lite*, which is also the property of the co-respondent, has a much reduced setback from the common boundary wall to the appellant's property. Whether the statutory setback from the common and party wall has been respected is not a live issue. The structure of the buildings being setup as such, the appellant's property is shielded from the bakery by the whole of the two-storeyed second building as well as major part of the building *on lite* which comprises predominantly of the residential apartments and the supermarket. The production unit of the bakery and pastry is located at the south eastern end of the building *in lite*, when standing within the second building facing Goyaviers Avenue and the appellant's property would then be on the north western end, hence at a distance of anything between 50- 100 metres from a bird's eye view, as per the Council's representative present at the site visit, at a diagonally opposite end from the property of the appellant. Therefore, since the development is far from the property of the appellant, this ground fails.

## **GROUND 2**

12. The appellant's contention under this ground is that the activity being an industrial one in nature is not compatible with the commercial nature of the subject site and that there had been serious objections from several neighbours for a case which was heard before the Judge in Chambers. The appellant testified that he was not against Super Unic selling bread but that operating an industrial activity was going to change the nature of his neighbourhood, which was residential, and his lifestyle. Mrs. Busgeeth, representative of the Council, explained that although the activity of a bakery falls within the industrial cluster, and not the services cluster, under the **LGA 2011** over time the Council has noted that applications for bakery outside the settlement boundary are hardly received. Instead such applications are more common within the settlement boundary where there is habitation so that inhabitants can buy bread, hence, it being considered a service to the local community. She explained generally contiguous neighbours to such development do not object as it is in essence a matter of convenience. Since the operation of the Pastry and Bakery, which had already become operational at the time of her deposition, no complaints had been received.
13. As stated above, the view taken by the Tribunal is that **Policy IDS1** may be taken to mean that certain types of industrial developments may also be allowed within the settlement boundary but that such applications are assessed on a case to case basis. We are here dealing with a light industrial development (in view of its scale, that is, one electrical oven and one 'Petrin a Spirale') which is within the commercial outlet, that is, the existing supermarket.
14. The production unit of the bakery comprises of one electric oven and one spiral mixer. This was confirmed by the site visit. The co-respondent's representative explained that the co-respondent already has an established clientele within Morcellement St. Jean and that the bakery and pastry is being set up to offer a better service to the existing clients. He stated that even the Appellant comes to buy bread at his supermarket.

15. The distinction to be drawn in this particular case is that the production unit is a very small in scale (120 m<sup>2</sup>) and is part and parcel of the big supermarket (gross floor area 846 m<sup>2</sup>). It cannot be dissociated nor segregated from the supermarket as a stand-alone bakery. Infact it is comparable to the production units found in hypermarkets such as Shoprite, Winners, Super U and Jumbo where bread and all types of loaves and other pastries are produced on the spot and displayed on the shelves for purchase. Such production houses cannot be considered as an industrial outlet when it is small part of a big commercial outlet. With changing times, judicial notice can be taken of the fact that offering freshly made bread and pastries to the consumers is simply considered a good commercial strategy in the matrix of demand and supply. It is all part and parcel of offering a better service to clients who are there to shop, in line with **Policy CR 1**. The point being that although a bakery is classified as an industrial activity in itself, when it is on a small scale and within a much bigger commercial outlet such as the supermarket, it cannot be considered as a typical "stand-alone" type of industrial activity.

16. The **Environmental Guidelines on Bakery no.5 issued in 2017** acknowledges there are several types of bakeries which, "*vary in size and scale from small shop bakeries to in-store supermarket bakeries to very large scale bakeries.*" In the present case, we are dealing with an "*in-store supermarket*" bakery. It is not a commercial bakery. While commercial bakeries usually have extensive distribution networks, they do not directly sell to the final consumers. Instead they distribute their products to supermarkets, restaurants, specialty food stores, and convenience stores, just to name a few. We fail to see in what way the bakery is incompatible with the activities of the commercial outlet. Despite a sizeable supermarket like Super Unic Co. Ltd having been operational in the vicinity, the appellant acknowledged that his neighbourhood was quiet. He stated he was fine with Super Unic selling bread and when confronted with the fact that the Pastry was already operational, he stated that he was not inconvenienced, we have not been satisfied in what way the in-store bakery would change the nature of the residential neighbourhood and his lifestyle. This ground therefore fails.

### **GROUND 3**

17. It is the case for the appellant, under this ground, that the proposed activity is not in line with the spirit of the proposed agreement done before the Judge in Chambers. He testified that if one has to look at the history of the place, Morcellement St Jean was a residential morcellement where Mr. Ramluckhun opened his first shop which over the years became a supermarket which has grown physically over the years. The appellant also spoke about an undertaking before the Judge in Chambers that was given by Mr. Ramluckhun regarding the supermarket. We do not believe that this is an issue which can either be commented on by this Tribunal since we are not privy to the proceedings before the Judge in Chambers and in any even if there has been a breach, then action for contempt lies elsewhere. This Tribunal cannot remedy any such alleged breaches. As regards the other neighbours Mr. Pigeot and Mrs. Ernest, we believe that since there are no appeals lodged by them, the Tribunal is entitled to draw the conclusion that they not objectors for the purposes of the appeal at hand. This ground fails.

### **GROUND 4 and GROUND 7**

18. Under these two grounds the appellant's case is that the development will cause additional detriment to the amenity due to added noise pollution, air pollution, loud conversation by employees, clanging of doors, and in essence all inconveniences related to vehicular and human traffic. The activities will operate at unsocial hours causing disturbance to the peaceful area as well as to their sleep. The appellant explained that a bakery normally operates at night or early morning, normally at about one or two o'clock in the morning for bread to be ready about five or six o'clock in the morning. That would cause noise pollution, odour, traffic jam. He testified that there will be more traffic which will affect his neighbourhood and that things are not going to be as they are now. He explained "Like it's more quiet now." To questions put to him by Counsel for the respondent in the course of cross-examination, the appellant stated that he was not aware whether the activity was already operational but agreed that if



the Pastry was already operational, it was not causing him any inconvenience. Mrs. Busgeeth explained that the bakery was already in operation, at the time that she was giving her testimony, and that none of the complaints elicited such as smell, air pollution, loud conversation, clanging of doors, vehicles and increase in customers were received from anyone else. She disagreed that the granting of the BLUP was against the **Town and Country Planning Act** and the **s.117 (6) LGA 2001**. She disagreed that by granting a BLUP to the co-respondent prejudice has been caused to the appellant in his proprietary and personal rights. She disagreed that it would cause disturbance to the peace and quiet in a residential area and sleep requirements of the appellant and his family as the activity will be operating from 730 am until 730pm, not throughout the night. Infact, the evidence shows that the bakery's operating hours are between 8 am until 6pm. She disagreed that the Council did not process the application by disregarding the strong objection received against the proposed development.

19. We are re-inforced in our view that the context, is very pertinent in this case. The Council's representative testified, and this was confirmed by the testimony of the Mr. Ramluckhun, owner of the supermarket, and also well noted in the course of the site visit, that the exhaust of the bakery was found at the corner end of the building at the junction of the SSR Street and Orchidees Street, which is very far from the appellant's property and not on the same road nor even on the same side. Infact in the course of the site visit it was also noted that the engine was in a sound proof enclosure. As stated earlier, the bakery is at one extremity of the building *in lite* and the appellant's property is situated at the other extremity of the second building such that they are neither along the same road nor facing nor on opposite sides. Being given the small size of the production unit, and bearing in mind that bakeries do not warrant a Preliminary Environmental Report (PER) Approval nor an Environmental Impact Assessment (EIA) Licence, as also stated in the **Environmental Guidelines on Bakery [no.5]**, we are unable in the circumstances to make a finding that the appellant is affected by any "polluting" activities of the bakery by way of noise or smell or dust.

20. We have addressed our minds to the fact that an intensification of activity may result in an increase in traffic. With the flow of traffic that has been generated over the time with the presence of the supermarket and now with the Pastry being operational and a beauty parlour also being operational, it would appear that the appellant was not inconvenienced since he stated the neighbourhood was "quiet now" meaning where he lived was peaceful. The traffic influx is in fact limited along Orchidees Street by the fact that it is designated a one-way. From the evidence on record, it can be noted the wide distance between the bakery to the appellant's property. The site visit clarified to the Tribunal that the bakery and pastry is approximately 50-100 metres from the appellant's property from a bird's eye view, as confirmed by the Council's representative. Bearing in mind all the above and the location of the exhaust which is not anywhere near the property of the appellant and the fact that the oven is soundproof, we fail to see in what way the appellant will be inconvenienced by the noise emanating from the bakery or any activity from the bakery for that matter. The evidence also shows that loading/unloading bay is along Orchidees Street, near the building *in lite*, whereas the appellant's house is nearer the second building and on the opposite side. As regards the hours of operation of the bakery, we have to accept the evidence as per the conditions attached the BLUP, which is undisputed, are from 8 am until 6pm.

21. With some of these "inconveniences" having been pre-existing for years, such as traffic issues due to the presence commercial activities, we are of the view that the appellant was being speculative. **Section 5.2.1 of OPS of Quatre-Bornes** forecasts the growth of mixed use area in that part of Quatre-Bornes. When one lives in a society one has to bear "*les inconvenients normaux du voisinage*": **Ramguttty and Co. Ltd v/s Hanumanthadu 1981 SCJ 321.** From the testimony of the appellant, this ground appears to have been couched on a lack of information on his part especially regarding the location of the bakery, the size of the bakery, the hours of operation of the bakery and the scale of operation.

22. While the Tribunal can understand that the appellant has some apprehension and reservations regarding any new development of non-residential nature near his residential property, the Tribunal has a duty to judge on live and practical questions, not on hypothetical issues: Mc Naughton v/s Mc Naughton's Trs [1953]SC 387,392. These grounds therefore fail.

#### **GROUND 5**

23. It is the contention of the appellant that under the planning instruments such commercial developments should be in the village centre on the basis of this policy. Any departure from the principle thereby allowing such developments to move onto the outskirts is justified on basis of the infill of centre and sequential approach. In layman's terms, once the centre is saturated, development can be allowed to make its way towards the outskirts provided it is done one after the other geographically. The appellant did not call any technical expert on the issue to substantiate his case. The Tribunal therefore cannot take this ground to have been substantiated. However, the Tribunal will address the issue on the application of **Outline Planning Scheme.**

#### **24. The definition of Town Centre and Edge of Centre**

As per the **Outline Planning Scheme of Quatre Bornes**, approved in May 2015, the definition of town centre has been set out at **Box 5.1: Definition of Town Centre: Core and Edge of Core** which provides "*The town centre comprises two defined zones: the commercial core zone and the edge of core or outer zone which are identified on Town Centre Inset Plans.*" While the **Commercial Core or Core Zone** has been defined as the zone where the land use is predominantly commercial with secondary uses such as residential, institutional, community, social and transport facilities and reference in

essence here is *“the main commercial street of St Jean Road extending from the south of M1 motorway to the 5-leg junction at La Louise”*, as per **section 5.2.1 of the OPS**. The **Edge of Core or Outer Zone** has been defined as *“areas and lying adjacent to the commercial core where (within a reasonable walking distance of 400m) some form of land use change is occurring or expected.”*

It is also provided that the edge of core zone will typically include:

- *“Sites where the predominant land use (normally residential) is changing to commercial. If current trends continue the zone will become predominantly commercial in the foreseeable future.*
- *Land uses normally associated with a town centre, serving a catchment that extends beyond the town centre and which normally require good access for a variety of modes such as town halls and other public administration offices, street markets, traffic centres and mains taxi stands.*
- *Areas in decline which need revitalization or renewal and which can be redeveloped to enhance the centre’s image and identity by rounding off or filling in vacant or derelict sites or offering opportunities for new mixed use, mixed density developments including well-designed tall buildings.”*

25. In view of the above policies, we believe that all the policies must be read in conjunction so as to make better sense of how the Planning Scheme of Quatre Bornes has made provision for the progression of development of the town as per the plan. Planning is always for the future. From the evidence, it would appear that the development *in lite* is on the edge of the core zone. From our reading of the policies mentioned above, changes which foster development for the enhancement of the town will be favoured because the trend is that the zone near the edge of the core zone is likely to become *“predominantly commercial in the foreseeable future”*. We are therefore satisfied that the Council has applied the provisions of the **OPS** and in view of the fact that no technical evidence was adduced to substantiate this ground, which addressed the application of planning instruments, it fails.

### **GROUND 6, 8 and 9**

26. These three grounds have been clubbed together as we believe they relate to the powers given to the local authority under the law to assess the merits of applications for BLUP, although they may be related to other grounds too. It is the contention of the appellant that the Council in granting the BLUP caused prejudice to the appellant's proprietary as well as personal rights, did not appear to have carried out its functions within the limits of the law and that it failed to carry out a proper balancing, exercise despite objections, that would be in line with the public interest and chose to favour further intensification. Mrs. Busgeeth, in cross-examination stated that the Council grants BLUP to meritorious applications. She further disagreed that the Council failed to balance the interests of the appellant, who lives in a residential area and that of the co-respondent.
27. It appeared that the appellant has mistaken certain other structures as being part of the development for the bakery, namely generators that were affixed to the wall of the second building on the side of the common boundary wall. The generators that were found on the co-respondent's premises but visible from the yard of the appellant, since the appellant invoked his proprietary rights, are not part of the impugned decision, that is, the decision of the Council to grant a BLUP for a bakery and pastry shop. This is completely irrelevant to the present application, in that these generators are not related to the operation of the bakery or pastry shop. The Tribunal cannot rule on this issue hence it is disregarded.
28. While we do understand the point of the appellant regarding the lack of information provided as regards the location of the proposed bakery, which seemed to have shifted at different times, and the associated motors, the fact of the matter remains that neither are the bakery and pastry nor are the "electric motors/engines consisting of 1 electric oven 3 phase/12KW and one electrical ('Petrins a Spirale') 32 Lts/3" next to the

appellant's residential property. These together with the outlet for the exhaust of the bakery are in a totally different location far from the appellant's property.

29. Furthermore, as regards traffic management issues, as addressed above, the co-respondent testified that a parking area is provided opposite the commercial building along Orchidees Street on the eastern side of the supermarket. A number of parking slots are also available on the two sides along the frontages of the building. All in all it amounts to approximately some 35-40 parking slots as per evidence. The co-respondent's representative explained that provision for additional parking space is being made to provide approximately 100 parking slots in all.

30. Next to the car park along Orchidees Street, infact at the junction of Orchidees Street and Goyaviers Street, there is a beauty parlour, as was noted during the site visit. Along SSR Street opposite the building *in lite* there is also a residential-cum-commercial building with attached parking area, also owned by Mr. Ramluckhun, which is being used as a small mart for the selling of savory snacks amongst other commercial outlets on the ground floor. Given the circumstances in the vicinity, the appellant's peaceful enjoyment of his property does not seem to have been compromised by these activities, as per his testimony.

31. As stated above, the Tribunal cannot surmise on the objections received. This is a matter of evidence. The Council's representative has stated that there have been no complaints since the operation of the Pastry and Bakery and the co-respondent is seen to be abiding by all conditions. The Council also held a hearing whereby some people who are not appellants before the Tribunal had attended. As a matter of fact, before the Tribunal, the appellant is the only objector to the development. The co-respondent's representative has stated that having an in-store bakery was a means to offer an added service to his existing clientele. On the basis of all the evidence adduced, it is our view that the Council has duly exercised its powers as allowed by the law and has applied the relevant provisions of the **OPS** to assess the planning merits of

this case, which is a development within an existing development. These grounds therefore fail.

32. We do not believe, looking at the **Policy IDS 1** and **sections 5.1 and 5.2 of the OPS of Quatre Bornes** that there has been any departure by the Council from the guidelines in this case. The Tribunal is duty bound to look at compliance or non-compliance with the planning instruments: **Beau Songe Development Limited v/s UBP Ltd [2018]UKPC 1.**

33. As regards the state of affairs after the site visit, while it will be unfair for the Tribunal to tax the co-respondent on the issue of warehousing next to the bakery since this was not part of the case for the appellant hence the respondent and co-respondent were unaware of this point, the Tribunal is duty-bound to order that regular Fire checks be conducted to keep at bay any risks of fire especially as the warehousing is next to the bakery with no clear separator.

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

Determination delivered on 20<sup>th</sup> August 2018 by

**Mrs. J. RAMFUL-JHOWRY**

**Vice Chairperson**

**Mrs. B. Kaniah**

**Assessor**

**Mr. S. Karupudayyan**

**Assessor**