

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

**ELAT 1440/17**

**In the matter of :-**

**Manohur Samaye**

**Appellant**

v/s

**District Council of Pamplemousses**

**Respondent**

**Satyadeo Goppechand**

**Co-respondent**

**DETERMINATION**

1. The present appeal is against a decision taken by the Council for having granted a Building and Land Use Permit to the co-respondent for the construction of a one floor commercial and residential building at Dispensary Road, Triolet. The decision of the Council was communicated to the Appellant vide a letter dated 9<sup>th</sup> June 2017 as follows:

*“ This is to inform you that the Permits and Business Monitoring Committee at its sitting of 12 May 2017 has approved the grant of a Building and Land Use Permit for the above mentioned application with the following conditions;*

1. *The parking space (6) should be operational*
  2. *the time of operation be limited to 8.30 am to 5.30 pm*
  3. *the extractor in the toilet be removed*
  4. *the activities should not give rise to any nuisance*
  5. *clearance to be obtained from the fire services"*
2. All parties were legally represented and they all deponed and were cross-examined. The Appellant also decided to have as his supporting witness, Mr. Beechoo, a Sworn Land Surveyor who deponed and was cross-examined. We have duly considered all the evidence on record and shall only make specific reference to any part of the testimony or document on record where we deem it fit to do so.

I. **CONTEXT ANALYSIS**

3. From the documents on record, it is noted and it is not disputed that the proposed development is for the construction of a building with 4 commercial units at ground floor consisting of a General Retailers Shop (15.54 m<sup>2</sup>) victualler (eating area; 17.40 m<sup>2</sup>) beauty parlour (12 m<sup>2</sup>), office (19.50 m<sup>2</sup>) and a residential unit on the first floor situated at the corner of Dispensary Road and Impasse Dispensaire with a distance of 350 metres from the main public road of Triolet. The proposed development would also consist of a waiting area, store, and toilet blocks and would be built over a plot of land of the extent of 555.20 m<sup>2</sup> (13 p). Building is proposed to have a gross floor area of 382.56 m<sup>2</sup> inclusive of both storeys. The subject site being a corner plot, has two road frontages of 13.56 metres and 44.53 metres in length each. The building is meant to have a setback of 5 metres and 3.5 metres from the access roads, 0.90 metres from side boundary, which is on the side of the appellant, and 15.67 metres from rear boundary. The site *in lite* is located within the settlement boundary.

## II. THE LAWS AND PLANNING INSTRUMENTS

4. The area being within the settlement boundary is in a predominantly residential area and should therefore be considered under **Policy CR 1 of the Outline Planning Scheme of Pamplermousses on Commercial and Retail development**. The underlying principle here is the clustering of commercial activities within Central Business District or local centres so as not to dilute the viability and vitality of those areas. Within such residential areas small retail uses not exceeding 60 m<sup>2</sup> that serves the daily needs of the area are to be allowed. From the evidence on record it has come across that although the area is meant to be predominantly for residential use, it has over time accommodated some commercial activities which is predominantly to cater for the needs of the locality.
  
5. New developments should also conform to **Policy SD 5 on Design Quality and Sustainable development** and should reflect the **Planning Policy Guidance 1 ["PPG 1"]** in this case on **Commercial and Residential development**. From PPG 1 on commercial developments issued in November 2004, the following principles are to be considered when assessing a development project:
  - (i) Site location that is whether it is within the Central Business District, the local centre, the edge of Town centre, within it or in the fringe residential areas.
  
  - (ii) Density of the development on the site that is the plot size, mass of building, building height, the setback, the scale, the plot coverage, the floor area ratio in relation to existing context.
  
  - (iii) Access, circulation and parking

### III. GROUND OF APPEAL

#### Under Ground 1

6. The appellant's case is that *the distance on the setback is not as per Planning Policy Guidance (PPG) of Commercial building guideline*. The issue of setback is addressed in the **Design Guidance for Commercial Development** at **paragraph 4.1.6**. This planning instrument must also be read in conjunction with the provisions of the **Building Act** and it is clear that the setback from common wall for residential development is 90 centimetres for single storey and 2 metres for building up to 7.5 metres and for commercial development it is 2 metres up to 7.5 metres. It is clearly stated therein that the setback serves for daylight penetration, ventilation, privacy and noise and against fire spread. We couldn't agree more with Counsel for the Appellant that application of these soft laws is imperative, unless we are of the view that there are sound grounds for departure and we may exercise such discretion when the facts of the case, calls for it. We have not seen any reason advanced by the Council for departing from these provisions. It is agreed that between the common and party wall of the appellant and that of the co-respondent there is a setback of 90 centimetres but it has not been disproved by either the respondent or the co-respondent that the evidence of the proposed development does not meet the 2-metre setback as prescribed under the PPG1 for a building that is 7.5 metres or more. We have it in evidence that the building is a one storeyed building.
  
7. The representative of the council, Mr. Bhanjoo, stated that the Design Guidance for commercial and residential are different, however the parameters are similar. Therefore the setback required from a residential to commercial will be the same. This representative, in cross-examination, however, agreed that the **Design Guidance for commercial developments** at **paragraph 4.1.6** does mention that the setback is required *"to serve as special barriers to protect adjoining properties against fire spread, to reserve utilities and road corridor"* and that there was a purpose for having such setbacks between buildings. He agreed that the Council has to take this on board as a

serious condition and also agreed that for a building of height 7.5 m, as we have it for the one at hand, the minimum set back should be 2 metres. On two occasions, he agreed it should be a 2-metre setback but this was clearly not the case for the proposed development and this is one of the grievances raised by the appellant. This witness was far from being clear with his answers and seemed to contradict himself on several occasions on issues that were raised in cross-examination following his answers in examination in chief. Therefore the Tribunal has difficulty relying on his testimony. This being said, as stated earlier we believe that the Council should have applied the **Design Guidance** in this case and there were no explanation put forward to warrant any departure from the guidance, hence we fail to see why the 2-metre setback was not applied in this case when it should have been, the more so as the building is a new construction.

### **Under Grounds 2 and 3**

8. These two grounds of appeal raised by the Appellant are, in our view, related and will therefore be addressed together. ***“The victualler and beauty parlor such as smoke and bad smell will affect my family health”*** and ***“the environment is surrounded by houses and is a sensible place and such activities will operate on Saturday and public holiday which will disrupt our quiet enjoyment”***. We need to consider **Policy CR 1 (Commercial and Retail development)** which is a detailed development policy that 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 advocates a clustering of commercial developments in existing commercial centres, around town and village centres and allows small commercial developments (upto 60 m<sup>2</sup>) that serve the basic needs of the local people in a residential neighbourhood. This policy seeks to enhance and preserve the vitality of those centres and to limit the proliferation of commercial development in a dispersed manner which would dilute the centre.

9. On the facts of this case, the development site is located along Dispensary Road, some 350 metres off the Triolet main road, as per the plan produced, which is where one would have thought carries the majority of commercial development in the area. The proposed building is meant to consist of 4 commercial units at ground floor comprising of a General Retailer, a victualler having an eating area, a beauty parlour, an office and a residential unit on the first floor. The operation of all these activities on the ground floor depicts an imagery of a constant flow of human and possibly vehicular traffic. One can therefore expect some form of noise and dust pollution from a general retailer shop, a beauty parlour using accessories such as hair dryer, an eatery where cooking takes place with all types of foodstuff and flavouring agents, these are all bound to generate noise and smell, and more importantly such noise and smell may be felt as a nuisance by the appellant who will be subject to this on a very regular and almost constant basis, the moreso as there is less than a metre setback that has been observed by the co-respondent.
10. The Council has not enlightened the Tribunal on issues such as the width of the access roads, whether they are serviced by pedestrian facilities, the turning radii, whether the parking area is workable or it may encourage on-street parking thereby causing obstruction to the free flow of traffic depending on the width of the access roads and whether two vehicles can cross easily or not. We have not been enlightened on whether the parking area is accessible easily and whether it is visible. Bearing in mind that the proposed development is situated at the corner of two roads, the abovementioned issues especially relating to traffic was of utmost importance as the appellant has raised an issue of the peaceful enjoyment of his property, which is a right enshrined under our constitution, which translates to the right to a good quality of life. We could not agree more with Justice Domah when he said *"One cannot put a price to the peace and quiet enjoyment of citizens in their homes."*: **Suhootoorah & Ors v/s Al Rahman Co. Ltd & Anor (2013) SCJ 273.**

11. We are if the view the proposed development when taken as a whole in terms of intensity of commercial and residential activities on a gross floor area of approximately 380 sq. m, it would again defeat the objectives of **policy CR 1**. It will no longer be a small retail outlet which only caters for the needs of the local neighbourhood contrary to this policy which dictates that development in the outskirts should be small corner shops. Here it will be on a much larger scale for a wider population. We believe that the points raised by the Appellant were well taken as the proposed development is high in intensity and very close to his residential property and likely to affect the quality of his life and that of his family and deprive them of the peaceful enjoyment of their property.

12. For all the reasons set out above, we allow the appeal. No order as to costs.

Determination delivered on 11<sup>th</sup> April 2019 by

**Mrs. J. RAMFUL**  
Vice Chairperson

**Mr. Aubeeluck**  
Assessor

**Mr. Monaff**  
Assessor