

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1918/19

In the matter of:

The Professional Medical Healthcarers Ltd.

Appellant

v.

The Municipal Council of Quatre Bornes

Respondent

Determination

The Appellant has appealed against the decision of the Respondent for having, by a decision dated 26th November 2019, declined to grant a Building and Land Use Permit (BLUP) to operate a residential care home for elderly at a location found at Lot 55 Residence Trianon, Avignon Street, Quatre Bornes. The decision was communicated on the 3rd December 2019 and the notice of appeal was lodged against this decision on the 17th December 2019. The ground for refusing the application, as contained in the email sent to the Appellant on the 3 December 2019, were as follows:

- (a) As per the condition of the deed governing the morcellement regarding 'condition particulière of Lotissement', it is considered that the proposed activity is not permissible with the said morcellement,
- (b) Proposed development is not a compatible use within the residential morcellement,
- (c) Objections received from inhabitants of the morcellement.

Five grounds of appeal have been put forward to challenge this decision in the notice of appeal as follows:

1. Ground A of the rejection of the application is not sustainable as the Appellant's application was for residence and care of old people. Besides in the landlord's deed of purchase, there is no restriction related to the nature of the application.
2. Ground B of the rejection is unwarranted, arbitrary and does not state why the proposed development is not compatible with the residential morcellement especially as the proposed development is for the residence and care of old people, i.e., a home destined for old and elder people.
3. The Appellant was never given a copy of the objections from inhabitants of the morcellement by the Respondent.

4. All the objections voiced at the hearing are devoid of merit. What was stated by the objectors related to noise, parking, although there is sufficient space for parking on the premises. Old people are not noisy.
5. The decision of the Respondent has and is causing hardship to the Appellant.

In the statement of case, the Appellant further stated that the title deed of his landlord, owner of the premises does not contain any provision that is contrary to his proposed activity, nor has the landlord objected to the said activity. His version is that the proposed development is not incompatible with the residential nature of the areas it will provide for the residence of elderly people, which is not likely to lead to external nuisance which would be disruptive to the surrounding amenities. The Appellant averred that the Respondent's decision is not sufficiently motivated and particularised in as much as it fails to state which alleged objections were taken into account by the Respondent to refuse the application. He also averred that the said decision is flawed as he was never given a copy of the objections allegedly received from the inhabitants of the morcellement. He also stated the proposed development will not lead to additional external noise incompatible with the characteristics of a residential area and that there is sufficient parking on its premises. The representative of the Appellant highlighted that the said premises had specifically been rented for the purposes of the proposed development and the Appellant company is encountering hardship due to the Respondent's decision.

In the statement of defence filed on behalf of the Respondent, all the grounds of appeal were resisted. The Respondent maintained that the proposed development falls under the cluster referred to as "services". Being a profit-making business it does not qualify as a residential development and the nature of a non-residential development is excluded from the deed of sale. The Respondent added that the Appellant had been put before the particulars of the objections in the course of the hearing and reiterated that the nature of the development falls outside the realm of the deed of sale. The Respondent further averred that the issues of noise and parking do not fall within the scope of the refusal letter. It maintained that the application was made for a profit-making organisation (i.e. the sole objective of the activity was that of providing services in exchange for payment), this is not allowed by the title deed and by the 'purposive nature' of the residential morcellement.

At the start of the hearing, a joint statement was made by counsel for the respective parties to the effect that, as conceded by the Respondent at paragraph 6 of its statement of defence, the issue of noise and parking do not fall within the scope of the Respondent's refusal letter. As such, the hearing would proceed solely on the issue of restrictions imposed on the Appellant based on the title deed of the property *in lite*.

The representative of the Appellant company deposed to confirm the contents of the statement of case filed. He explained that his company has been paying rent for the premises where he proposes to run a residential care home since November 2019 at the rate of Rs. 50,000 per month. He added that the title deed for the property had been shown to him by the landlord and this document (Annex D to the statement of case) contains no restriction as to the use of the property in which the activity of residential care home is being proposed.

A perusal of the title deed (Annex D) indeed shows no restrictive covenant whatsoever as to the use of the building by the purchaser. This is even confirmed by the representative of the Respondent in his testimony. The reason for which reference was made by the Council to restrictions, is that the whole morcellement is governed by a certain Cahier des Charges, yet the representative confirmed that none of the conditions that may have been present in the Cahier des Charges found their way to the title deed in respect of the property *in lite*. As such, reference to the *'condition of the deed governing the morcellement regarding condition particulière of Lotissement, it is considered that the proposed activity is not permissible with the said morcellement'* as a ground of refusal contained in the refusal letter (sent by email on the 3rd December 2019) is misconceived. This justifies that the first ground of appeal raised by the Appellant and the first ground of appeal is allowed.

The second ground of appeal relates to the issue of incompatibility of the proposed activity within a residential morcellement. No evidence was adduced to show how the proposed activity was incompatible with the residential characteristic of the morcellement. We are only in presence of averments contained in the statement of defence filed by the Respondent stating that *'the development of a residential care home falls under another cluster, which is referred to as 'services'. A residential care home is known as a service and is a profit-making business and not a residential development.'* No evidence whatsoever has been adduced to support this averment. Furthermore, it does not appear from the refusal letter that the issue of 'clusters' and that of 'profit-making nature' of the proposed activity had been addressed by the Respondent in reaching its decision. This would tantamount to introducing a new ground of refusal at this stage, which the Respondent cannot do. We therefore uphold the second ground of appeal raised by the Appellant.

The third ground of refusal relates to the objections raised by inhabitants of the morcellement. This too has not been supported by any evidence at the hearing, so much so that the averment that there had been a lack of communication with the Appellant on the grounds of objection has been un rebutted. In addition, the Respondent has confirmed in its statement of defence, and also by way of a statement made before the Tribunal, that the issue of noise and parking do not fall within the scope of the refusal letter. This brings support to the fourth ground of appeal that the objections are devoid of merit. Based on these, the third and fourth grounds of appeal are upheld.

Finally, the hardship caused to the Appellant by the fact that it has been paying rent for the property since November 2019 (as raised in the grounds of appeal and explained at paragraph 15 of the statement of case) has remained un rebutted by the Respondent. This is not a planning consideration *per se*. Nonetheless, it weighs in the balance when considering the grounds of appeal *in toto*, and the impact of the decision on the Appellant and it supports the averment of prejudice that is caused to the Appellant, justifying that the fifth ground of appeal be upheld.

For all the reasons given above, we allow the appeal under all the grounds raised by the Appellant.

We furthermore remit the decision back to the Respondent for it to issue the permit applied for and to impose conditions that it deems necessary for such activity.

Delivered on 15/11/2022 by:

Mrs. V. Phoolchand-Bhadain, Chairperson

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Mr. R. Seeboo, Member

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Mr. S Busgeeth, Member

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