

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1407/17

In the matter of:

Miss Sooryawatee Beeharry

Appellant

v.

Municipal Council of Quatre Bornes

Respondent

Determination

The present appeal has been lodged by the Appellant against the decision of the Municipal Council of Quatre Bornes for having refused to grant a Building and Land Use Permit (BLUP) for the conversion of an existing building at ground floor to be used as victualler selling cooked food on and off premises at Palma Road Quatre Bornes. The grounds for refusing the application are as follows:

1. The kiosk being presently used for food preparation in connection with the proposed victualler has been illegally constructed and does not observe the minimum prescribed setback of six metres from the classified Palma Road (B2), stating also that Notice has already been served and legal action will follow.
2. Notification plate affixed is not according to procedure.

The Appellant has filed five grounds of appeal as follows:

1. The renovation/construction of the kiosk dated back to 2015.
2. At the time of setting up of the kiosk, which was 'au vu et au su' of the general public, there was not any objection that was then made by either the Council or any other party.
3. Being given that other commercial premises are allowed to operate without complying with the minimum setback of six metres, the decision of the local authority is unfair, discriminatory and biased.
4. There are several employees with children who would be unemployed should they stop to operate.

In the course of the hearing, the Appellant has stated that she is dropping the fourth ground of appeal being given that she has ceased to operate the business since the confinement period due to Covid-19.

The Appellant was lengthily examined and cross examined on the circumstances in which the construction of the building for which the conversion is now required. It has

come out that the said construction had been done without having obtained a BLUP. The version of the Appellant is that her husband was the one who had attended the Council for the purpose of the administrative formalities and she did not know the procedures that had been followed. Be that as it may, there has been no BLUP issued for the construction of the said building, and this is the main ground of refusal from the Respondent. It has come out that there have been proceedings instituted before another jurisdiction for the construction without a permit, for which the outcome is awaited.

The decision that is presently under appeal before the ELUAT concerns the refusal to grant a permit for the conversion of the said building. Much of the cross examination of the Appellant revolved around the fact that no BLUP had been issued and the construction was an illegal one. Although this is a material consideration for the Council, it is noteworthy that the existence of the building *in lite* dates back to the year 2015, as evidenced by Document D, a Site and Location Plan submitted to the Council in connection with another application for BLUP, the latter one having been granted. This gives support to the second ground of appeal raised by the Appellant, which is that 'at the time of setting up of the kiosk, which was 'au vu et au su' of the general public and there was no objection from either the Council nor any other party'. We have not been favoured with any reason as to why no action had been taken against this construction since then.

The issue of setback is also central to the decision of the Respondent. The representative of the Respondent explained that as per the *Planning Policy Guidance, Design Guidance for Commercial Development issued by the Ministry of Housing and Lands*, produced as Document G, the 'Indicative Building Setbacks to Road Frontages' is six metres for a classified road (i.e. Classified A Road or B Road). The contention of the Respondent is that this has not been observed for Appellant's building.

The Respondent's representative has explained the history of Palma Road with a view to rebut the evidence adduced by the Appellant that there were numerous other business entities that were operating on the edge of the road, without leaving any setback at all. As per his evidence, the status of Palma Road had evolved from a 'lateral road' (where the indicative setback required was three metres) to a 'classified road' (where the setback as per the Planning Policy Guidance (hereinafter referred to as PPG) is six metres). In view of this evolution, the road had been widened, so much so that the road had been brought closer to the old and existing buildings, leaving no room for setback. He explained that in the case of the Appellant's construction however, the building had been constructed after the widening of the road, and did not observe the regulatory setback.

We are alive to the fact that the Respondent is bound to act within the parameters of the law, thus as per the PPG. However, it is our view that the application of the PPG needs to take into account the features of the area where it is applied, the features as they existed prior to the entry into force of the PPG as well as post-enactment. It is in this spirit that the representative of the Respondent rightly explained the lack of setback in respect of other existing buildings, which was justifiable.

The third ground of appeal also raises that the decision of the Respondent is unfair, discriminating and biased. The contention of the Appellant on this score is that, unlike

the criteria applied to the assessment of her proposed development, the other business entities operated without any setback and almost on the edge of the road. This can be seen on the pictures produced (Documents B to B4 and C to C15) This, in her view, was discriminatory towards her.

Although we highlight that there must be consistency in decision-making, we do not propose to dwell onto this point, which, in our view, has to be raised before the appropriate jurisdiction. However, from a planning point of view, we need to make some observations:

1. The Respondent's explanation was that the general lack of setback requirement, as shown on Document H was due to the fact that they were old or existing buildings and that the Road Development Authority had enlarged the road and upgraded it to a classified road. We were not given any information on when the road had been enlarged, thus reducing the setback with the existing buildings. The Appellant's qualm is that the activities conducted in those buildings continued/ or were granted permits to operate (we are left in the dark as to the sequence of these).
By the continued operation of other businesses with a reduced setback, the Respondent has implicitly acknowledged that the regulatory setback is not the only criterion. The pre-existence of the buildings and the enlargement of the road are matters that the Council considers, failing which the BLUP for those businesses would no longer have been issued.
2. The Appellant's premises for which a BLUP is sought **for its conversion** shows certain specificities, as opposed to the other buildings along the alignment. It is on the far-right hand corner of the parking for an existing building for which a BLUP has been issued. The frontage of the proposed development is on a parking area which is common with the commercial building. The Appellant repetitively stated that she has a wide parking that can be used for those attending her shop. The issue of visibility span from the parking has been raised in cross examination, but this was not part of the Respondent's case, nor ground of refusal.
3. The proximity of the building with the classified road (1.7 metre as per Document D), if taken in isolation, has led to the rejection of the application. But when taken in the context where it is situated, the continued operation of businesses in buildings that have with a reduced setback along the same classified road, the decision of the Council shows lack of consistency.
4. As regards the illegality of the construction, the building has been put up since 2015. We are not in presence of the outcome of the proceedings before another jurisdiction for sanctioning **the construction**. The present matter is for **conversion** of the existing building.

In view of the above we find that the grounds of appeal, as raised, have been supported. However, it is undeniable that the Respondent has the duty to ensure compliance with the existing legislations. The issue of illegality of the construction for a building having existed since the year 2015 is not before this jurisdiction. It is for this sole reason that we agree that the Respondent has rightly declined to grant the BLUP to convert a building whose very existence is disputed.

In spite of this, however, it is our view this is a fit case for the Respondent to consider any possible remedial steps, procedurally or otherwise, that the Appellant can take in relation to the existing building, so that the issue of conversion thereof be assessed

anew, and also for the Respondent to consider imposing conditions that it deems fit, if the need arises. This would call for that a fresh application to be made. The present appeal is otherwise set aside.

Delivered by:

Mrs. V. Phoolchund-Bhadain, Chairperson

Mr. R. Acheemootoo, Member

Mr. R. Seetohul, Member

Date: 25th April 2023