

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1808/19

In the matter of :-

Madeena Saib Abdool Naziroodin

Appellant

v/s

The District Council of Grand Port

Respondent

DETERMINATION

1. The present appeal is against a decision of the District Council of Grand Port [“the Council”] for not having granted a Building and Land Use Permit [“BLUP”] to the Appellant for the construction of a building to be used as Bakery and Fitness Centre at Mamoo lane, Plaine Magnien. The reasons for refusal as communicated to the Appellant via a letter dated 28th March 2019 under the signature of the Chief Executive are:

“(1) The site is located in a predominantly residential area and the operation of a bakery would constitute an incompatible use.

(2) The site is accessed by a road where 2-way traffic is difficult and the proposed development is likely to create traffic problems.

(3) Activities arising out of the proposed development are likely to injuriously affect the residential amenities of the area.”

2. The Grounds of refusal as per the Notice of Appeal are as follows:

“(a) The ground of refusal to the effect that the site is in a residential area is not valid as all bakery are in residential areas and therefore is not an incompatible use.

(b) The reason of refusal concerning traffic problem is an imaginary one the moreso that parking space were provided.

(c) The reason concerning injurious effect also is fictitious and is not supported by any evidence.

(d) The application is deemed to have been approved as per the provisions of the law.”

3. The Appellant deponed and was legally represented. The Respondent, also legally represented, was represented by Miss Poonith, Planning and Development Inspector. We have duly considered all the evidence placed before us as well as the submissions of counsel.

4. We note that as regards the proposed gymnasium, the Council’s stand as per Miss Poonith’s testimony is that there was no problem and that it could be considered for a BLUP on the subject site since it amounts to a commercial development. As regards the pleadings exchanged and the hearing before us, the proposed development for the bakery was the live issue whereas that of the gymnasium was not canvassed as such. We will therefore make a Determination on the basis of the live issues as canvassed before us.

I. Planning instruments

5. The subject site being in Plaine Magnien, the applicable outline scheme is the **Outline Planning Scheme for Grand Port-Savanne [‘OPS’]** issued under the **Planning and Development Act 2004**. As per the **OPS** the subject site lies within a predominantly residential area and the proposed development of bakery being classified under the “Industrial Cluster” as per the **Local Government Act 2011 [‘LGA’]**, the relevant applicable policies for the proposed development are **Policy ID2** of the **OPS** and **Section 2.13-Industrial Use** under **Planning Policy Guidance no.1 [“PPG1”]** and the **Environmental Guidelines on Bakery Development** issued in 2017 by the office of the Director of Environment.

II. Grounds of Appeal 1 and 3

6. Grounds 1 and 3 are being considered together since they are related. It is the contention of the Appellant that the first ground of refusal is not valid as all bakeries are found in residential areas, hence is not an incompatible use and that bakeries do not generate noise beyond the limit prescribed by law. It is also his contention that the reason invoked in the third ground of refusal is a fictitious one, unsupported by evidence, and does not specify the type of injurious effect the proposed activity would have. His case in essence is that he has received the consent of his neighbours for the project. The Respondent's case is that the area is a predominantly residential one, and that apart from a few commercial developments on and nearer the main road, along Mamoo Lane there are mostly residential properties and the properties around the Appellant's property are only residential. Thus, having a bakery therein would affect its residential character and amenity and that objections have been received from a neighbour. Their stand is that the consent of the neighbours for the implementation of the project was never forwarded to the Council.

7. The **Environmental Guidelines on Bakery no.5** issued in 2017 by the **Department of Environment** under the **Ministry of Environment, Solid Waste Management and Climate Change** 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 a *"small shop"* bakery which will be involved in production and selling. There is no evidence on record to suggest that it will be involved in distribution of bread. The Guideline provides under paragraph 4.0 on **Location and Siting** that bakeries should preferably be located in commercial areas or in predominantly commercial areas within settlement boundaries. It also provides that the *"existing development context of the site/land should be compatible with the activity"*. It is admitted by the Appellant that the area is a predominantly residential one. Miss Poonith also confirmed that the subject site is surrounded by residential buildings and that the development along Mamoo Lane was mostly residential. We fail to see in what way the bakery is compatible with the residential amenity and character of the surrounding neighbourhood which is most likely to be of a quiet nature.

8. Having a bakery would not only permanently increase the human and vehicular traffic to and from the locus to buy bread but will also increase the flow of traffic along the already narrow Mamoo Lane. Leaving aside any noise generated by the equipment used for making bread, the mere fact of having such human activity of workers arriving early, talking and working at the bakery early morning, a place where otherwise the inhabitants could have a peaceful enjoyment of their property, would, in our view, be against the provisions of the **Environmental Guidelines No.5 on Bakery** as regards its siting. It is likely to change the quiet and peaceful nature of the residential area thereby causing inconvenience as it may entail a lifestyle change for the neighbours and change the nature of the residential neighbourhood.

9. As stated earlier, a bakery falls under the industrial cluster as per the schedule under the **Local Government Act 2011 [‘LGA’]**. The **PPG1** also provides the relevant policy dealing with any industrial development within a residential area. According to the **Design Guidance on Industrial Development of the PPG1**, at **paragraph 2.13 on Small Industrial Workshops and Home Working**, it is provided that *“Small scale enterprises that are carried out in the home without modification of the dwelling may in some locations be acceptable, but stringent criteria are necessary to ensure that surrounding residential amenity is not compromised.”*

10. Under this Policy, Industrial uses that normally cause dust, noise, fumes, vibration and other adverse environmental effects within residential areas are not allowed. From our reading of the policy, the types of enterprises that are allowed in such residential areas are typically those that can be done in one’s dwelling home where no major disruption is caused. The proposed development is a far cry from the type of development that can be done either in a dwelling home or within a residential. In town and country planning, it may well be that there are numerous commercial and some light industrial development along the main road within a residential area which is largely due to the easy access by vehicles including public transport or on foot and so as to cater for the needs of the locality.

11. The Appellant gave evidence and produced photographs, Doc K4, to show that there are other operating businesses such as a car wash and a hairdressing salon along Mamoo Lane. Miss Poonith explained that the hairdresser's and car wash are considered as commercial development, as opposed to a bakery which is considered industrial, and that they are both being carrying out activities on a small scale which are compatible with the residential character. The car wash business, according to Miss Poonith is around 60 metres from the Appellant's site and can only accommodate 3 cars which does not generate much traffic unlike a bakery.

12. The Appellant also produced photographs to show that a new bakery opened in the area, 300 metres away, a few months ago and that it has only some 3 parking bays. He also gave evidence of another bakery operating, 500 metres away, without any parking space as well as other commercial activities that are operating within the residential area. Miss Poonith agreed that both bakeries hold BLUPs but she demarcated those cases by explaining to the Tribunal that they are on the main road, which is a classified A 10 road of width 6 metres and where there are lots of commercial development. Those bakeries on the main road do not, in our view, flout the provisions of the **Environmental Guideline No.5** in terms of their location in a predominantly commercial area within settlement boundaries. The essential character of the locality where the subject site is located along Mamoo Lane is of a purely residential nature.

13. The Appellant also made reference to another commercial development, Bobby's fried chicken which can be seen in the first photograph of Doc K4 as well as in photograph H1. We note that Bobby's fried chicken is a commercial development found in a building, which commercial on the ground floor and residential on the first, situated at the junction of the main road and Mamoo Lane. Commercial developments are allowed in residential areas especially along or just off the main road where commercial developments already exist. We note also that in Doc H1, the larger width of the main road with the presence of the pavement can be clearly seen as opposed to the narrow width of Mamoo Lane.

14. The Appellant contends that bakeries do not generate noise beyond the limit prescribed by law. We find this a rather presumptuous statement. All bakeries have a production unit which normally consists of electric oven and spiral mixer amongst others. The level of noise generated will vary depending on equipment capacity and output and cannot be determined at this stage. In any case, no evidence was adduced on this point by the Appellant.

15. The Appellant's property is located along Mamoo Lane. His property is bounded on 3 sides with common boundary walls with other residential properties. The setback of the proposed building from one neighbour will be 2 metres and from the other will be 3.6 metres, as per the plan Doc D, filed by the Appellant. In cross-examination the representative of the Council stated that one of the objectors, Mr. Naiko, who is the neighbour stated that no notice was served on him. The Appellant's counter-argument to this point was that this was not brought up in the course of the hearing and that it was not a valid reason to refuse the BLUP. The evidence also reveals that there was a hearing at the Council whereby few objectors had come forward to explain that they were against the proposed development. The Appellant on the other hand stated there were many people in the neighbourhood who gave their consent for the proposed development. The Respondent's case is that this was never forwarded to it. In the circumstances, such a consent cannot be accepted since the veracity of it has not been cross-checked by the Respondent. The Respondent has not had the opportunity to verify the authenticity of these consents nor whether the signatories indeed live in the vicinity of the subject site. In addition, no witnesses were called by the Appellant.

16. **The relevant parts of Policy ID2 are reproduced hereunder in *italics*:**

"Policy ID2 of the OPS - Small Scale Enterprises and Home Working Proposals to operate or extend office/business uses or small-scale enterprises from residential properties should only be permitted if the use is ancillary to the principal use as residential. Criteria should include:

- (i) Premises are of a suitable size and design to accommodate the additional activity and all its ancillary requirements such as parking, loading area and adequate setbacks from neighbouring properties.
- (ii) No neighbours' objections within a radius of 50 metres.
- (iii) No serious adverse impact on residential occupiers in the area or the character of the neighbourhood particularly in regard to noise, smoke, fumes, smells, dust nor excessive vehicle movements or loading and unloading of goods and products;
- (iv) Sufficient parking space within the curtilage of the property available to accommodate any staff or visitors;
- (v) Safe access from the roadway. Storage of materials should be able to be contained within the curtilage of the property. The operator of the office/business use or smallscale enterprise should reside at the premises."

Under the "Justification" of this Policy it is provided-

"Light industrial uses such as panel beating and spray painting, manufacture of furniture and vehicle repairs are not normally suitable in residential areas due to dust, noise and fumes and other environmental effects. However in order to provide for establishing small scale enterprises where start-up capital outlays for new premises may be beyond the operator's means, use of home may be appropriate where vehicle movements and noise and parking, loading and unloading are not disruptive to the amenity of the surrounding neighbourhood...."

"For both use of home as office and for small scale enterprises the key decision is whether the overall character of the dwelling and surrounding amenity will change as a result of the business or enterprise. If the answer to any of the following questions is "yes", then permission is likely to be refused:

- Will the home no longer be used mainly as a private residence?
- Will the business result in a marked rise in traffic or people calling?
- Will the business involve any activities unusual in a residential area?

• Will the business disturb your neighbours at unreasonable hours or create other forms of nuisance such as noise, dust, fumes or smells?” [stress is all ours]

17. From our reading of this policy, and the points highlighted above, there are many criteria which the proposed development may infringe. These planning guidelines must be followed when assessing a development proposal and to make a reasonable assessment of what the development is likely to bring with it.

18. The setback of the proposed building from Mamoo Lane is 6 metres with a frontage extending over a length of 13.5 metres. Within this setback of 6 metres, 3 parking bays are to be accommodated including a loading/unloading bay, as per Doc D. Miss Poonith stated vehicles repairing to the locus can drive in forward gear inside the premises and turn around within the site to emerge. This, in our view, involves a lot of vehicle-manoeuvering while driving in and out in view of the narrow width of Mamoo Lane, especially at peak time when there will be human and vehicular traffic which is likely to cause further commotion, safety hazards, nuisance and disruption to the neighbourhood. According to the undisputed evidence on record the lane is so narrow that two vehicles cannot cross each other. We are of the view that any compromise in the safety and security as well as the disruption that would most likely be caused to those living in the neighbourhood in the peaceful enjoyment of their property will affect their lifestyle and negatively impact their lives. These two grounds of appeal therefore fail.

III. Ground of Appeal 2

19. It is the contention of the Appellant under this ground that the reason invoked by the Respondent that the access road to the site is narrow wherein 2-way traffic is difficult hence the proposed development is likely to create traffic problems, is an imaginary one the moreso that parking space would be provided. The cursum, as can be noted from the policies cited above, has always been that any commercial or industrial development will not be allowed in a predominantly residential area if it is likely to cause a major disruption in the area, be it in terms of overall character of the dwelling

or in the surrounding amenity. It stands to reason that the presence of a bakery will cause a marked rise in human and vehicular traffic in a locality. The question is whether this lane can contain that flow and type of traffic that will be generated through the proposed enterprise.

20. The evidence, Doc M, shows that the development along both sides of Mamoo Lane is residential, save for two commercial developments. It is also agreed that even though the road is meant for two-way traffic the road is so narrow that 2 cars cannot cross. However, the Appellant tried to argue his case by giving examples through photographs marked Doc H, H1, H2 and H3, of how at various points in the day it is not a busy road. True it is that the new link road, Chemin Balance, shown in Doc M, may have alleviated the traffic to some extent along a strip of Mamoo Lane where the subject site lies by providing an alternative route to and from the main road. However, it will be a flawed logic to either assume there will be no traffic issues because of the alternative route or that inhabitants will simply have to put up with an increase in traffic flow. We cannot stress enough on the context- Mamoo Lane is a predominantly residential area. In a country where buying and consuming bread forms part of our daily routine, having a bakery in a locality will automatically create a point of convergence for people and vehicles. The width of the Mamoo lane is uneven but varies between approximately 3.2 metres to 3.5 metres. With the lane being so narrow, 2 vehicles are precluded from crossing each other; one will imperatively have to lay by in an attempt to let the other pass. The fact that the Appellant has made provision for 2 loading/unloading bays gives an indication that larger vehicles will be using Mamoo Lane for accessing the property regularly possibly for delivery of stock or raw materials. The photograph produced by Miss Poonith, Doc L2, shows clearly a small van along Mamoo Lane taking the major part of it, widthwise. Doc L, another photograph produced by her shows 2 vehicles facing the same direction on the same road but one actually parked in a parking space for the other to pass through. At peak hours, this will simply be unworkable if vehicles are to park on the side of the road whilst others have to either overtake them or cross them or both. A road which otherwise is not busy will end up becoming one where the fluidity of traffic is compromised and susceptible to

congestion hence leading to disruption in terms of vehicular movement, noise nuisance and compromised road safety.

21. The Appellant also stated that the plan for the proposed development had 5 parking slots in front and around 10 parking slots at the back of the proposed building. We note however that the plan submitted by the Appellant to the application, marked Doc D, provides for 3 parking slots at the front of the proposed building, with one of them being the loading/unloading bay and a further 4 parking slots provided at the back of the building with one of them also being the loading/unloading bay. His case is that there will not be traffic problems since parking spaces have been provided. Even if loading and unloading activities are to be carried out within the premises, in our view, this will not in any way cure any congestion problem, even if vehicles can drive in and out of the subject site in forward gear. The plot size is approximately 15 perches, which is not sizeable in our opinion to cater for the building, the parking lots for all vehicles likely to come to the bakery especially at peak hours and the access within the premises for vehicles to go in, turn around and egress. The possibility of vehicles parking on the road itself to buy bread from the bakery is considerable. The very foreseeable traffic constraint will be that the lane will be burdened by not only more vehicles but larger vehicles and that in turn may also slow down the movement of traffic generally along Mamoo Lane. It will also compromise the safety for the road users and be disruptive to the overall amenity of such a locality- a residential area depicts imagery of a locality with minimal nuisance. This ground therefore fails.

IV. Ground of Appeal 4

22. The Appellant contends under this ground that the application is deemed to have been approved as per the provisions of the law. The undisputed evidence on record is that the application for a BLUP was made on 8th March 2019, the decision to reject the application was taken by the PBMC on 21st March 2019 and the refusal letter dated 28th March 2019, was posted on 2nd April 2019 was received by the Appellant on 3rd April 2019. On 26th March 2019 the Appellant paid for wastewater clearance at the Council.

23. The present application is for a BLUP with respect to a bakery and hence was made under **s.117(7) of the LGA**.

Section 117(7) LGA provides

“(7) With the exception of an application under subsection (8) and subject to subsection (9), the Permits and Business Monitoring Committee shall, within 14 working days of the effective date of receipt of the application –

(a) approve the application where it is satisfied –

(i) that the application is in accordance with the Acts and the guidelines referred to in subsection (6);

and (ii) in the case of an application for a Building and Land Use Permit relating to a scheduled undertaking, that there is, in relation to that undertaking, an approved preliminary environmental report or EIA licence under the Environment Protection Act; or (b) notify the applicant in writing that the application has not been approved and give the reasons thereof.” [stress is ours]

24. From our reading of this part of the law, within 14 working days of the effective date the Permits and Business Monitoring Committee (the ‘**PBMC**’) must imperatively have taken a decision to either issue the BLUP or notify the applicant of the rejection of his application, as the case may be. The crux of the matter is whether the refusal is time-barred and therefore of no effect. To be able to determine this, the computation of the days as provided by law must be done in relation to the “effective date”. The definition of “effective date” under **Section 2 of the LGA** *“in relation to an application under Sub-part F of Part VIII, means the date by which all the information, particulars and documents specified in the application form are submitted.”*

25. It is submitted by the Appellant’s counsel that *“In the present matter there is no letter that was issued by the Respondent after the application made on 08.03.19 to ask for any further information and this rightly so as all particulars were given on 08.03.19.”* and that therefore the effective date is deemed to be the 8th March 2019. We believe that the record does not show that all relevant information and evidence was clearly and adequately elicited from the Appellant for the representative of the Respondent

to come to a clear conclusion that the effective date is the 8th May 2019. It is borne out in the Tribunal's record that the computer-generated registration of the application was made on 8th March 2019, Doc A. In the "Notes" section of this document mention is made that within 8 working days from the date of receipt of the application, the applicant will be informed whether-

"(a) An effective Date together with an acknowledgement receipt have been given to your application and the Due Date for determining same.

(b) An effective Date cannot be given and the reasons thereof."

26. No other evidence was produced by the Appellant nor was the Council's representative cross-examined to pinpoint the Effective Date. The only evidence elicited was from the Appellant in examination in chief- it was put to him by his counsel that following his application he received a letter dated 28th March 2019 whereby he was informed that his application was rejected and he answered in the affirmative. We cannot surmise on such issues more so in the absence of any evidence on the notification which was meant come from the Respondent within the 8 working days. This issue may have been canvassed more thoroughly. We cannot adjudicate on the application of these time lines in the absence of clear evidence especially as it could lead to planning decisions. Since the effective date has not been clearly established, this ground fails.

27. As regards the date of receipt of the refusal letter, Counsel appearing for the Appellant submitted at paragraph 5 of his written submissions that the Appellant received the letter dated 28 March 2019 on 04.04.2019 and at paragraph 7 he submitted "*The evidence of the Appellant was not challenged and therefore the 04.04.2019 should be considered to be the date the Appellant received the letter of 28.03.2019 and should be accepted by the Committee.*" This submission was in fact not correct since the record shows that the Appellant stated in his Notice of Appeal that he received the Council's letter dated 28th March 2019 on the 3rd April 2019, which he confirmed in his testimony. **Rule 3 of the Environment and Land Use Appeal Tribunal Rules** provides that the envelope bearing the date of receipt of notification shall be annexed to the

statement of case where possible. This is done precisely to cater for situations where the computation of the time becomes relevant.

28. For all the reasons set out above, we find that the decision of the Council to refuse the application for bakery is correct and this appeal is devoid of merit. The Appellant may, however, wish to seek clarification from the Council as regards his application for a gymnasium in view of the stand of the Respondent on the issue. The appeal is otherwise set aside. No order as to costs.

Determination delivered on 31st May 2023 by

Mrs. J. RAMFUL-JHOWRY

Vice Chairperson

Mr. R. ACHEEMOOTOO

Member

Mr. R. SEEBOO

Member