

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2108/22

In the matter of:

Mr. Komarduth Hurry

Appellant

v.

The Municipal Council of Beau Bassin Rose Hill

Respondent

Determination

The Appellant had applied for a Building and Land Use Permit for the renovation of an existing 'kalimaye purposes' (as referred to in the decision communicated to the Appellant by the Respondent) to operate at 35, Berthaud Avenue, Stanley, Rose Hill. He was informed through the National e-Licensing System that the Permits and Business Monitoring Committee (PBMC) had not granted the permit applied for. The grounds on which the PBMC had refused to grant the permit are as listed follows:

1. "The development /building being proposed on almost the edge of the roads does not comply with PPG 3 as regards to setbacks with the edge of the roads which should have been a minimum of 3.0 metres.
2. The building has already commenced illegally (without having obtained a building and land use permit from the Municipal Council) and for which a case has already been lodged at the lower Plaines Wilhems District Court.
3. The building is located in a position on land which affects the visibility of drivers at this location and putting the safety of traffic at risk."

In a notice of appeal dated 9th June 2022, the Appellant appealed against the council's decision on three grounds:

1. "The building under construction is inside the existing boundary walls of the place of worship, which exists since 1860's and 6.5 metres from the original boundary of the plot.
2. The renovation provides a clear driver's view for vehicles either turning to the right on Cretin Road from Berthaud Avenue or for vehicles turning to the right on Berthaud Avenue from Cretin Road.
3. Two utility poles, one belonging to the CEB and the other one to Mauritius Telecoms, are located at the junction on the side of the Kalimaye."

Photographs at Annexes 1 and 2 attached to the notice of appeal illustrate the above grounds.

The Appellant explained in the course of the hearing that the 'kalimaye' is a place of prayer that has existed for more than a century and it is open to devotees to pray there without any restriction despite the fact that it is situated on his private land. He even stated that he has no right on that lot of land in practice. Yet, for the purpose of the proposed renovation, he was the one who had submitted the application for BLUP, as the land is legally his property.

It came out in his cross examination that he had also applied for a BLUP in respect of a training institution to be built on his land. One of the conditions of his permit was the need to lower the existing boundary wall to one metre, as recommended by the Traffic Management and Road Safety Unit, for visibility purposes. This has no connection with the subject matter of the present appeal, yet it illustrates the concern of the authorities on traffic management at that particular spot. The Appellant disputed the measurement of the setback of the wall from the edge of the road by stating that the road was initially 12 feet wide but it had been enlarged to 16.5 feet when the tarring of the road was done right up to the edge of the wall, thus reducing the setback from the road, as it initially existed.

The Appellant disputed the lack of visibility, which was a matter of concern for the Respondent, by explaining that the construction of the enclosure did take into account that aspect by providing wider enclosures so that road users can have a view of traffic coming from Berthaud Avenue.

It is understood by this statement that road users would have a view through the openings in the enclosures of the proposed renovation. He conceded that there is traffic congestion on the road opposite the 'kalimaye', however, he stated that this was not due to the activities of the 'kalimaye' but the congestion was caused by the volume of traffic and the size of the buses which operate along that road, coupled with the presence of a bus stop situated at that very junction. He explained that he had raised the matter with the Traffic Management and Road Safety Unit.

The representative of the Respondent deposed to explain that the Planning Policy Guideline No. 3 is applicable in the present case. This requires a setback of three metres to be observed from the edge of the road and these provisions have not been complied with. In this particular case, the 'kalimaye' existed since a long time and it did not have any slab on the roof nor block wall. It was an open space which was enclosed by only a low boundary wall.

The application, subject matter of the appeal, concerns the 'renovation' of the 'kalimaye', which consisted of the roof slab, which had already been cast and the construction of a wall structure, already completed (Annexes 1 and 2 to the statement of case) and in respect of which there is a prosecution pending before the District Court of Lower Plaines Wilhems.

The officer produced copy of a letter from objectors to the renovation (Document C), which had been sent to the council in connection with a previous application made by the Appellant, and the objections were based on the difficulties faced by road users at that spot due to the illegal construction. He also produced Document D, a letter from the Traffic Management and Road Safety Unit (TMRSU), containing recommendations for the lowering of the wall to one metre for better visibility and with a proviso on the intervention of the TMRSU to address any traffic problems (Document D is in relation to another development (a training centre), run by the Appellant and located in the same premises).

It came out that there has been compliance with the lowering of the wall, however, the block walls of the 'kalimaye' which were newly erected (the renovation), are now two and a half metres high, thus, are not compliant with the recommendations of the TMRSU.

A site visit was conducted by the Tribunal. This has enabled us to make an assessment of the locus, which has revealed that, indeed, the development is located in an extremely busy road.

The presence of a bus stop opposite the 'kalimaye' and opposite the junction of Cretin Avenue and Berthaud Avenue appears to us to be a mislocation, which would require the intervention of the TMRSU. Furthermore, the presence of two big electricity poles and a Mauritius Telecom pole at that very junction is already a cause for hazard for traffic emerging from Cretin Avenue. These are however matters that fall outside the purview of the present appeal, but we are duty bound to cast an alarm note on the need for intervention of the respective authorities to deal with this hazard.

Our assessment of the 'locus' shows that the construction of a structure consisting of a concrete wall to enclose the 'kalimaye' and the construction of a roof under slab exacerbate the traffic hazards. The Appellant insisted that the said concrete wall is located on his premises and inside the already existing lower wall, which has been there for decades. This does in no way reduce the hazards that exist at that place, which, by all means, has been impacted by the general increase in traffic flow. This also does not justify the fact that the construction was done without a permit being asked for.

The Respondent, as a local authority, is duty bound to act in accordance with the existing regulatory framework. This relates to the Planning Policy Guidance (PPG) and the Outline planning Scheme for Beau Bassin Rose Hill. PPG 3 regulates proposals regarding places of worship, which is defined as follows:

'A place of worship is a dedicated building or building complex or other location where a group of people assembled in a congregation perform acts of religious praise. It also includes places where religious instructions, ceremonies and festivities associated with faith are carried out.'

As per Section 4 of PPG 3, the following planning norms need to be catered for as regards to proposed development for 'Place of Worship':

- (i) *The permit authority should ensure that the interests of the three groups, namely, future occupants of the site, neighbours and community are cared for.*
- (ii) *No place of worship should be allowed adjoining a restaurant/bar or a place of public entertainment.....*
- (iii) *...*
- (iv) *...*
- (v) *A minimum setback of three metres on the rear and side boundaries should be complied. Front setbacks should be 15 metres for motorways, 6.0 metres for A and B roads, 4.5 metres for urban roads and 3.0 metres for other roads. (underlining is ours).*
- (vi) *....*
- (vii) *Public consultation in predominantly residential area includes: (a) site notifications (b) press notice in three dailies on three successive days (c) Legal notice served on all contiguous owners and property owners across the road in predominantly residential areas.....*

Evidence on record as well as the site visit conducted by members of the Tribunal have shown that the newly constructed wall surrounding the existing 'Kalimaye' has been erected without leaving any setback at all, let alone three metres setback. This gives rise to an absence of visibility over Cretin Road, while emerging from it, as well as when entering into Cretin Road from Berthaud Avenue. Suggestion was made to the effect that drivers have a clear vision through the wide openings left in both walls of the enclosing wall. It is unacceptable planning that drivers need to see through the windows to look for vehicles along the main road. It was also observed that the level of traffic along those roads is very heavy and the type of vehicles are matters for concern. Document C produced by the Respondent lists out the complaints made

by objectors. Although these complaints were made in relation to a previous application for BLUP, we noticed that they are still relevant in the present matter, in as much as the grounds of objection highlight that no required distance was left from the borders of the road for the concrete structure, the narrowness of the road, the density of traffic flow, the lack of space left for a turning bay, all this putting the public in danger there, especially given the presence of a primary school nearby.

Having taken all these factors into consideration, we find that the Respondent's decision in the present matter is compliant with the existing planning norms and is not faulted. We appreciate that the 'kalimaye' has existed for many decades now and there has always been devotees who perform and attend prayers there. The refusal to grant the BLUP for the renovation should not affect the continued use of the 'kalimaye' for the said prayers and rituals. The new construction of the concrete wall and roof is what is not compliant with the planning instruments. Security of the road users, neighbours as well as devotees attending the 'kalimaye' dictates that the area be kept safe from accident. For these reasons, we shall not interfere with the decision of the Respondent to reject the application for BLUP. We hasten to add that there is an urgent need for other authorities, namely, the TMRSU, the CEB, the Telecommunication agencies and other authorities having jurisdiction on the matter to act jointly to address the road safety issue at the locus. The Respondent can be minded to spearhead this action.

The appeal is otherwise set aside.

No order as to costs.

Delivered by:

Mrs. V.Phoolchund-Bhadain, Chairperson

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Mr. Roshan H. Seeboo, Member

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Mr. Rishiraj Seetohul, Member

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Date

18th September 2023