

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2006/21

In the matter of :-

Zen Ways ltd.

Appellant

v/s

The Municipal Council of Beau Bassin/Rose Hill

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having refused a Building and Land Use Permit ["BLUP"] to the Appellant for the construction of 2 buildings in metal structure at ground floor to operate as a restaurant (excluding liquor and other alcoholic beverages) without entertainment purposes at 22 Dr Roux Street, Rose Hill. He was informed of the decision of the Council through the National E-Licensing System ["NELS"] and the grounds of refusal are:

"1) The proposed "development works" by its nature would be incompatible with and detrimental to the amenity of the existing sensitive uses (residential & educational) found in its development context. As such, it would be contrary to policy UDS1 of the Outline Planning Scheme for Beau Bassin/Rose Hill.

2) The proposed use is likely to attract vehicular traffic resulting in parking along the road thus disturbing the inhabitants of this area and road users.

3) Objections from property owners/occupiers of the area have been received against your proposed "development works"

2. The grounds of appeal of the Appellant are:

“1. (a) The area is sparsely residential, with the nearest residence situated at some 70 metres away from the locus. Within its own jurisdiction, the Respondent granted a BLUP to operate a block of flats with a food court and a shopping centre in a heavy residential centre with a church and two primary school in the vicinity.

(b) Within the jurisdiction of the Respondent there are several restaurants with no private parking situated in a heavily populated residential area, near two secondary schools and a place of worship.

(c) In the surrounding area of the locus in lite there already exist a nursery and a company providing information date services and is adjacent to the proposed project.

(d) The project does not provide for alcoholic drinks or entertainment and is restricted to 20 seats only.

2.The Appellant has made provisions for seven slots of parking compared to other restaurants in the area that do not provide for any parking. Dr. Roux Street is a two way street with limited traffic and is dead-end. Furthermore, both sides of the road until the Royal Road, are marked in majority with single or double yellow lines, so that few vehicles can park along the road.

3.The objection of a neighbour is not per se a ground of objection unless such ground is valid in law, which is not the case here.

4.The Respondent has failed to comply with the provisions of section 117(7) and 117(11)(a) of the Local Government Act 2011, which is expressed in mandatory terms.”

3. The Appellant, legally represented, was also represented by its Director, Mr. Sunassy who deponed under solemn affirmation and was cross-examined by the Respondent’s Counsel. The representative of the Council, Mr. Kirodhur, Planning and Development Inspector, also deponed and was cross examined by the Appellant’s counsel. We have duly considered the evidence placed before us.

I. Context Analysis

4. The evidence on record, including Annex 8 to the Statement of Case, reveals that the site, previously used as car park of a surface area of 20m x 25m, is situated on Dr Roux Street. This road has some 28 lots, out of which 12 are residential and 16 non-residential mostly used for commercial, educational and parking purposes and a couple of vacant plots. Dr. Roux Street, which is approximately 4m20 wide as per the evidence, runs perpendicular to the main road thereby connecting it to the Promenade Roland Armand which runs alongside Vandermeersh Street and the metro corridor in Rose Hill. The subject site is the penultimate property situated at the metro corridor end of Dr. Roux Street. As noted in the google map, marked Doc A, opposite the site is a girls' secondary school, Loretto College Rose Hill and next to the site there is an office on one side and a vacant plot on the other. After the bare plot, there is a residential property and an infant school followed by the private access. On the opposite side of the road there are 3 residential buildings after Loretto College Rose Hill. Dr. Roux Street provides for two-way traffic but is a no-through road beyond the office next to the subject site. According to the evidence of Mr. Sunassy, the site is accessible through Lourde Church and from the metro corridor by pedestrians, cyclists and motorcyclists. He also stated, which was not disputed, that from Dr Roux Street to the infant school there is mostly double yellow line as well as single yellow line which roughly allows for a maximum of 4 cars to park along Dr Roux Street near Loretto College.

II. Nature of the proposed development.

5. The development proposal is based on the concept '*restaurant de jardin*' whereby people can enjoy local food in a small comfortable environment with the tables spaced out. For the structure three prefabricated containers of 20 ft will be used and converted into a kitchen, washrooms, a small store and the serving area. The dining area will be outdoors. The restaurant will operate during lunch time typically from ten o'clock in the morning until two in the afternoon and as per the evidence on record, in the evenings as from half past seven with a delivery service to other restaurants

within the region of Rose-Hill and Ebene between these times as from three o'clock in the afternoon.

III. **Grounds of Appeal**

(a) **Under Ground of Appeal 1 (a) to (d)**

6. Under this ground, it is the contention of the Appellant in essence that the proposed development will not be incompatible or detrimental to the surrounding environment since it is a sparsely residential area with a nursery and a business adjacent to the proposed development and it will be restricted to 20 seats only with no alcoholic drinks or entertainment provided therein. His case is also that the Respondent has recently granted a BLUP for a block of flats having a food court and shopping centre in a highly residential area close to a church and two primary schools and that there are several restaurants with no private parking in the region including a victualler along Dr. Roux Street. The stand of the Respondent, on the other hand, is that in view of the development context, that is residential and educational, by its nature the development will be detrimental to the amenity of the existing sensitive uses and contrary to policy UDS1 of the Outline Planning Scheme of Beau Bassin/Rose Hill.

7. Given the nature of the proposed development and its location within the settlement boundary, **Policy UDS1 of Outline Planning Scheme of Beau Bassin/Rose Hill** ['OPS'] is the relevant policy to assess the acceptability of the development. It provides:

*"Proposals for development should normally be permitted within settlement boundaries, subject to the provisions of **Policy UDS 2**.*

Within settlement boundaries proposed development should not:

- *Inhibit the comprehensive development of an area and/or*
- *Restrict access to adjoining areas of land appropriate for development and/or*
- *Prevent expansion or disrupt existing business / employment-generating activities and/or*

- *Adversely affect the local amenity of existing sensitive uses such as housing, schools and health facilities and*
- *Exceed the capacity of existing highway and utility infrastructure networks.*

The justification for this policy is:

i. The policy underlies the sequential approach specified in the National Development Strategy for compact, sustainable development that tends towards concentration rather than dispersal and provides the rationale for controlling the nature and scale of new development within settlement boundaries, provided the proposed site is not located on land of high agricultural value, environmental sensitivity in support of Policy UDS2.

ii. Piecemeal development or one-off developments which would impact the comprehensive development or redevelopment of areas by sterilising land, stagnating or inhibiting access to other land parcels, prevent expansion / disrupt existing business activities or adversely affect the local amenity of neighbouring sensitive uses should not be encouraged...”

8. The context analysis has clarified that the area, especially Dr. Roux Street, is one which has the amenity of sensitive land uses since there are mostly residential developments and schools. According to **Policy UDS1** any development which is likely to adversely affect the local amenity of existing sensitive uses such as housing, schools and health facilities will not be allowed within the settlement boundary. A restaurant, by its very definition, under the **Guidelines** of the **Tourism Authority**, refers to *“premises that have at least 40 covers and structurally adapted and used for the purpose of supplying prepared meals and beverages, against payment, to the public for consumption on or off the premises.”* This is therefore a development, by its very nature, which will be a point of attraction where the public, whether by car or on foot, will converge. A restaurant will automatically attract customers and the more it builds on its clientele over time the more the influx of traffic along Dr. Roux Street and to the locus, hence, the more the likelihood of disruption in an otherwise rather quiet environment. The Appellant even describes the area as being *“sparsely residential”*.

9. It may well be that the Appellant is not expecting to provide more than seating for 20 but that only means a maximum of 20 people will be dining at any given time. There will be a constant dynamic influx of human and vehicular traffic during the hours of operation. This consideration is to be taken on board in view of the local amenity. Even if the nearest residential building is around 70 metres away, there will be a marked rise in the traffic along Dr. Roux Street which is likely to cause disturbance to the existing character of the area because this will be a one-off development, not following a sequential approach as per the application of **Policy UDS1**.
10. Mr. Sunnassy, representative of the Appellant, gave evidence that a restaurant was opened in year 2020/2021 near St. Mary's college at around 400 metres from the site near the main road. He also gave the example of Intermart at BeauBassin and the Commercial centre which are roughly 250-300 metres from the site and that there are other restaurants not far from the main road behind the church. Although apart from his testimony, no other evidence was produced on this issue, we believe that the existing planning policies, more specifically **Policy CR1 of the OPS of BeauBassin/Rose-Hill**, allow for commercial developments in established centres. Infact this policy allows for the promotion of mix uses such as commercial, leisure, entertainment and residential in established centres, but it specifically provides *"applications for commercial development outside established centres, other than for corner shops and small retail outlets, should not normally be permitted."* The development site being along Dr. Roux Street but falling outside the edge of the core zone as per the **Management Development Map of the OPS of BeauBassin/Rose Hill**, the proposed development is likely to clash with the principle of development set out in this policy. On the other hand, the examples cited by Mr. Sunnassy may well be policy compliant. All development proposals even within the same district cannot be treated in the same way; they depend largely on the applicable policies of the planning instruments and their location on the Management Development Map.
11. The Appellant's representative mentioned the existence of a restaurant nearby without a parking area and closer to the main road. It came to light that reference was in fact being made to, not a restaurant but rather, a victualler by the name of Royal

Treats. The Respondent confirmed that a BLUP was issued to it. As regards victuallers, the application for such a BLUP is assessed on different criteria. It being a commercial development, on a rather small scale and close to the centre, the Council would have assessed it on the basis of the applicable policies. One of the criteria defined under the **OPS** by the **Urban Development Strategy Policies ['UDS']** applicable within the defined settlement boundary of the Municipal Council Area is that focus should be placed on new major traffic-generating uses in strategic growth zones (including pre-designated sites along the motorway), where integration of complementary activities will be promoted to maximize use of available infrastructure facilities and services. Royal Treats being at the junction of Royal Road and Dr. Roux Street makes it quite central in terms of location where commercial developments are to be promoted and it being a victualler, the requirement for parking is less stringent. Similarly, the other developments referred to by the Appellant are closer to already built-up more central areas.

12. It is important to bear in mind that the application at hand being one of restaurant, the Council had no alternative but to assess it as per the existing guidelines. The wheel is not to be re-invented when the guidelines already exist regarding restaurants. The Guidelines of the Tourism Authority are there to be followed. According to the Appellant's case, the proposed development may be aptly considered as a restaurant and not as a victualler; the reasons put forward by him to support his contention are that the price range of the food will be between Rs 300-400, as opposed to a lower price range at a victualler's, hence the application for a BLUP for restaurant and parking. The Appellant's premises will have 7 parking slots although, according to its representative, there is provision for 12 cars to park. A victualler normally needs barely some 2 parking slots. He also claims not to sell alcoholic drinks as his permit is alcohol and entertainment free. We do not agree with the views of the Appellant that these criteria are tantamount to rendering the proposed development as falling within the category of a restaurant. We agree with Counsel for the Respondent that it is not a question of appellation but rather one of criteria to be met as per the applicable guidelines. Where guidelines have been provided, they need to be applied unless there is a compelling reason to derogate from them, which we do not find in this case.

13. The Appellant's representative having stated that the proposed restaurant will have a restricted seating capacity of 20 seats, his project does not meet the minimum requirement for seating capacity outlined by the Tourism Authority's Guidelines. According to the prevailing Guidelines, a restaurant should have a minimum of 40 covers. Therefore, the proposed project does not meet the definition of a restaurant as set forth by the Tourism Authority. We have it on record that the Council was ready to consider a fresh application for victualler for this project in view of seating capacity which makes it fall outside the definition of a restaurant but the Appellant's stand was that no new application will be made. With the prevailing guidelines for a restaurant having an express categorization of "having a minimum of 40 covers", this cannot be overlooked and we are therefore of the view that the application is flawed in that it does not fall within the category of a restaurant. Be it as it may, we are left with no alternative but to consider the application for a restaurant and assess its planning merits accordingly. We find that the application does not comply with the Guidelines of the Tourism Authority nor with Policy UDS1 and therefore this ground fails under all its limbs.

(b) Under Ground of Appeal 2

14. The Appellant contests the fact that the proposed use is likely to cause disturbance to the local inhabitants and road users by parking along the road because it has made provision for seven parking bays within its premises and that Dr. Roux Street is a two-way street with limited traffic with a dead-end and that both sides of the road are marked in majority with single or double yellow lines, so that few vehicles can park along the road. We agree with the Appellant that Dr. Roux Street is a no-through road and that it is marked by either single yellow or double yellow lines which will limit or restrict parking on the road. If the Appellant provides the adequate number of parking bays then parking on the road should not be an issue as such. Infact the Appellant's representative stated that there was sufficient parking space for 12 vehicles. Even if the Council has apprehensions on this issue, it can always be mitigated by imposing conditions such as provision for more parking space.

15. However, as stated above, we are of the view that a restaurant is a traffic generating business which is likely to change the character of the road due a marked increase in people visiting the eatery which is mostly like to cause disruption to the locality, not necessarily due to cars being parked outside. We believe that the ground of refusal as couched is justified.

(c) Under Ground of Appeal 3

16. The Appellant contests the ground of refusal that is based on objections made by property owners/occupiers in the area on the premise that the objection of a neighbour is considered as being valid only if it is so in law, which according to it, is not the case here. It is a settled principle of planning law that how the neighbours are impacted upon by a “new” development in their neighbourhood is a very relevant factor to be taken on board by the decision-maker and therefore as far as *non-residential* development in a predominantly inhabited area is concerned, in numerous policies of the Planning Policy Guidance as well as of the OPS, provision is made to take into account, for instance, objections from neighbours within a 50-metre radius of the subject property or to refuse some developments if the site is surrounded by housing: **Policy ID2 of the OPS** (for Industrial development) and **Design Guidance in PPG1** for Commercial Development on Edge-of-Centre and Out-of-Town locations, respectively. **Policy UDS1** *supra* also provides that the proposed development should not adversely affect the local amenity of existing sensitive uses. The reasoning being that the local authorities will have to assess whether any nuisance or disturbance will be caused to those who have been living in the area that may interfere with the peaceful enjoyment of their property.

17. While the Council is perfectly entitled to consider the objections from neighbours, it needs to assess the merits of those objections. In the present case objections have been received from the management of Loreto College, Rose Hill, a secondary school found opposite the subject site. The reasons put forward by the school at the hearing before the Council on the 15th January 2021 are predominantly based on the intensification of traffic which will exacerbate the existing traffic congestion and noise.

The school also raised concerns regarding the security of the students in case of sale of alcohol and with regards to the kind of people who will be coming to the restaurant which will be across the road.

18. We have taken note of the anomalies in the version of the applicant at the hearing before the Council and the version put before us. It is however not an issue in dispute that no alcohol will be sold on the premises. Therefore, in our view there is no merit in the apprehension of the school on that score. Any apprehension of the Appellant applying for a licence from the MRA subsequently, can already be dealt with by the imposition of conditions in a BLUP since the site is found opposite a school.
19. The version of the Appellant was rigged with inconsistencies with regard to the hours of operation. On this issue, we will however take on board the version of Mr. Sunnassy upon questions put to him by the bench. As per his version, the restaurant is intended to operate for lunch from 10 30 hours until 1400 hours, although it is unclear whether the last order will be taken at 1400 hours or the restaurant will close its doors by 1400hours. He also stated that from 1500 hours until 1930 the restaurant will be closed for ghost service, that is, food will be prepared in the kitchen of the restaurant but for delivery to other restaurants. Thereafter, the restaurant will open its doors again for dining in and no time has been specified for when it will close except that in Doc B, a letter from Appellant's counsel, mention has been made of "normal closing time". No clear indication has been given regarding weekends but the Appellant's business is likely to operate for roughly 12 hours in a day.
20. With an analysis of the context of Dr. Roux Street in mind, especially its width and the fact that it is a no-through road which services an area of mostly residential properties and some 3 educational institutions, some offices but no retail business as such, it can be gauged that the road is one which only gets busy at certain specific times such as the beginning and end of the school day. There are no customer-serving businesses on that road except for 4 businesses including a laboratory and a carwash which are nearer the main road and "Royal Treats" which is actually also on the main road, nearer the city centre. This proposed development will be a one-of-its-kind in that

area since there is no such trade in the area that would attract customers on a daily basis. A restaurant differs from a small fast-food outlet in that the latter tends to attract mostly customers from the surrounding locality who can make it on foot for a quick bite. A restaurant, on the other hand, is more high-end and can attract customers island-wide. This will not only exacerbate the traffic issue but can also further compromise the safety of the road-users including the students on the road when the school ends. From a social perspective, it may also promote unsocial behaviour amongst adolescents having an eatery just at the doorstep of their school. With the restaurant, the amount of traffic will also increase at off peak times. In our view, most of the objections in the present circumstances have merit and the Council was right to have taken them on board.

21. We have also considered **Policy CR2 of the OPS** in assessing the application at hand. This policy allows for development of small commercial outlets such as corner shops, small groceries and snack foods premises, and for conversion of residential premises to a shop or other small retail outlets which serves the needs of the local neighbourhood especially in residential areas. However, the floor space should be restricted to 60 square metres and an impact assessment made on the amenity, traffic and pedestrian safety. The justification for this policy is that such small retail outlets can assist in providing services for the daily needs of those living or working in the vicinity which is accessible on foot. The type of economic activity envisaged by Zen Ways Ltd. differs substantially from being the type of small commercial outlet allowed under this policy.
22. We have borne in mind business facilitation. Part of the subject property will be reserved for cultivation of vegetables and the plan includes a collaboration with 10-12 women entrepreneurs. There will be around 4 cooks, servers and helpers because food will be prepared during those 12 hours of operation for the customers dining in at the restaurant and to cater for the ghost kitchens, an activity that was never brought to the attention of the Council. The nature of the business is such that it will be receiving patrons during its hours of operation which will be impactful on the area; only a handful of commercial buildings are found at the beginning of Dr Roux Street,

closer to the main road as can be noted at Annex 8 of the Statement of Defence, whereas the subject site is found at the other end of the cul-de-sac where it is almost exclusively residential.

(d) Under Ground of Appeal 4

23. It is the contention of the Appellant that the Respondent failed to comply with the provisions of **section 117(7)** and **117(11)(a)** of the **Local Government Act 2011**. The chronology of events is that the application was made on the 12th November 2020. Additional information was requested on the 30th November 2020 by the Respondent. On 15th December 2020 amended plans as requested by the Respondent were submitted. Written objections had been received by the Respondent against the development proposal since 3rd January 2020. A meeting was initially set to hear the applicant and the objectors on the 8th January 2021 but it only took place on the 15th January 2021 where the PBMC decided to reject the application. The refusal letter was received on the 20th January 2021.

24. The provisions of the **Local Government Act 2011 [“LGA”]** are provided hereunder:

“(6B) In the course of the processing of an application under subsection (6), the Permits and Business Monitoring Committee may request the applicant to attend a meeting of the Committee, within the time limit referred to in subsection (7) or (8), as the case may be, for the purpose of giving such clarification or explanation relating to the application as the Committee may determine.

(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.”

25. It is a fact that the meeting at the Council was first scheduled 17 working days after the 15th December 2020 when the last set of documents were provided. However, there is no evidence on record to suggest that the Council, after receiving the documents on 15th December 2020 were satisfied that all the required information was within its possession. No evidence was produced regarding any communication from the Council about the effective date. There may have been none but the fact that the Council only got to assess the merits of the objections at the hearing of the 15th January 2021, renders the application complete for the purposes of making an assessment on its planning merits only then, for the purposes of meeting the requirements of “effective date” as per **section 2 of the LGA** which in essence means that the effective date does not start to run if all the information in relation to the application is not there. We believe this is how the law should be read.

26. This has also been the reasoning of their Lordships in the case of **GBM Properties Ltd v The Municipal Town Council of Quatre Bornes [2022] SCJ 356** where they considered the meaning of “effective date” to make the observation *“For obvious practical reasons, strict adherence to the 14 working days would make no sense as that would defeat the purpose of this piece of legislation aiming at diligence in the processing and determination of such applications. It would only be quite logical to expect that the effective date would start running as from the date of the application is in shape when all the required information and documents would have been made available by the applicant for a BLUP.”* They concluded *“It is also appropriate to observe that the respondent has a discretion in determining an application for a BLUP and as for all discretionary powers, the respondent is bound to act judiciously. That would mean gathering all relevant information and documents that would enable it to take a meaningful and well-informed decision.”*

27. In the absence of any clear evidence as regards when effective date starts to run, the Tribunal is not ready to make assumptions by implication that the effective date is to be taken as being the 15th December 2020 when the Council had all the relevant information with regards to the application; this would lead to bad planning decisions. In our view, the Council was only able to decide whether to take on board the objections after assessing their merits at the hearing of the 15th January 2021 and that is when the application was complete with all the relevant information being on record. It was only after having heard the objections that the PBMC was able to take an informed decision on the planning merits which followed suit. Having duly considered the provisions of the law, we believe that **s.6 (B) of the LGA** is not infringed as it may be interpreted also as allowing the Council a discretion of non-adherence to the statutory time of 14 working days wherein the PBMC "*may request the applicant to attend a meeting of the Committee*". This ground therefore also fails.

28. For all the reasons set out above, we find that the Council was right in its decision. The appeal is set aside. No order as to costs.

Determination delivered on 26th July 2023 by

Mrs. J. RAMFUL-JHOWRY

Mr. R. ACHEEMOOTOO

Mr. R. SEEBOO

Vice Chairperson

Member

Member