

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 161/12

In the matter of:

Mr. ANDRE OLIVIER HUGUES REY & OTHERS

Appellants

v.

DISTRICT COUNCIL OF RIVIERE DU REMPART

Respondent

In the presence of:

SANATAN VEDIC TRUST

Co-Respondent

DETERMINATION

1. The appeal is against the decision of the District Council for granting a BLUP to the Co-Respondent for the development of a property leased to it by the State for the construction of a building to be used as a 'Multi- Purpose Complex for Socio-Cultural purposes'. The Appellants' respective properties are in the immediate proximity of the proposed development.
2. The Appellants have lodged an appeal, initially at the Town and Country Planning Board, then transferred to the Environment and Land Use Appeal Tribunal. The grounds of appeal are thus not formulated in the manner as prescribed by section 5 sub section 4(a) of the ELUAT Act, nor has the appeal been made in the form as per the schedule to the Act.
3. By virtue of section 9(3) of the ELUAT Act, this appeal has been transferred to be heard by the ELUAT, as lodged before the TCPB. The grounds of appeal as

formulated before the TCPB and on which the Appellant led evidence at the hearing are in a gist, the following:

- (i) The proposed development is incompatible with the character and tranquil charm of the locality. (see also page 11 of the main brief)
- (ii) The noise that would emanate from the activities of the permit holder.
- (iii) The traffic hazard that the increase in traffic flow resulting from the activities run by the Co-Respondent in the premises, more specifically given the topography of the land and the road leading to the subject property.
- (iv) The loss of privacy of the neighbouring properties.
- (v) The Respondent has not acted in compliance with the planning instruments for the area, namely, the Outline Planning Scheme and the Planning Policy Guidance.

4. At the outset, there has been much emphasis placed on some aspects that led to the decision, which call for our comments.

4.1 Firstly, we find no reason to doubt the version of the representative of the Appellants, Mr. Rey, and the witness called on their behalf, Mr. Radhakisson, who maintained that they had been present at the hearing before the 'Permits and Business Monitoring Committee' at District Council, where they had expressed their position on the proposed development. The fact that such presence had not been recorded by the Respondent is a matter for concern and reflects a bad administrative practice which can have serious consequences.

4.2 Secondly, the Appellants have highlighted in the course of the hearing as well as in submission, that there may have been potential influence exercised by the planner of the Ministry of Housing and Lands, which issued the planning clearance, and the role played by him at the level of the meeting of the Permits and Business Monitoring Committee (PBMC). The Appellants expressed that there was clear conflict of interest between the functions of the planner and his role at the hearing before the PBMC. We have taken a concerned note of these apprehensions expressed by the Appellants and raise a note of caution on this. However, this is a matter which is not within the jurisdiction of this Tribunal to address. Any redress that the Appellants may wish to seek based on any potential bias or unfairness ought to be directed and addressed before the appropriate jurisdiction.

4.3 Thirdly, the Appellants have laid emphasis on the composition of the PBMC at the time when the decision was taken and the stand of the respective members. The Head of the Planning Department had stated that the application should not be favourably considered being given that the development site was found within an area that was primarily residential where there was a presumption in favour of touristic development. Yet, the majority that approved it were not technical experts in

planning: they were the Financial Controller, the Head of works department and Principal Health Inspector.

Although we note that this may be indicative of the underlying influences that may have dictated the decision, at the end of the day the decision is that of the Respondent. The internal operation of the PBMC is not under our scrutiny. It is the decision reached by the Respondent that is under appeal.

5. The planning merits of the decision have to be assessed and we propose to look at the grounds as they unfolded during the hearing.

5.1 The traffic hazards:

The Appellants have persistently raised the fact that the presence of such a development will lead in the increase in the traffic flow along that road, which is already a source of hazard given the presence of a sharp bend at a short distance from the site along the Cap Malheureux road. The Respondent attempted to counter this argument by leading evidence to establish that there have been several roads (by-pass) constructed in the northern road network which have alleviated the traffic flow along the Mon Choisy- Cap Malheureux coastal road. The Co-Respondent came up with the version that there will be few cars attending the social activities being given the limited membership of the organisation, so much so that there will not be a significant increase in the traffic flow.

The two latter arguments have not convinced the Tribunal on the impact of the proposed development on the traffic at that particular spot. The issue of low membership of the organisation, and thus few cars, cannot be a pointer, the reason being that this state of affairs is not a static one. Land use and Planning call for an assessment taking into account future capacity of any proposed development and its impact on the environment. This is what sustainability is all about.

Similarly, the development of the road network in the northern part of the island may have resulted in reducing the congestion along the existing roads. Yet, we cannot overlook that there has been concurrently a significant increase in the car stock on our roads. Besides, the Choisy- Cap Malheureux coastal road has remained the main road and it remains the bus route for that region.

Finally we have made the following observations in the course of the site visit effected by the Tribunal: The Choisy- Cap Malheureux coastal road bears a sharp bend at a distance of approximately fifty metres from the proposed access to the site. Visibility from the exit point from the site to the bend is poor being

given the topography of the road. This state of the road is a potential source of accident, the more so that this is a route for buses proceeding from Choisy towards the village of Grand Gaube as well as other vehicles. This potential danger has been highlighted by the representative of the Appellants in his testimony. As the road stands presently, we are of the view that there is a need for the Traffic Management and Road Safety Unit (TMRSU) to look into the safety aspect along that road.

We have also noted the lack of clarity as regards a second exit from the site, which is on the plan (Document M), but which was only brought to light in the examination in chief of the senior surveyor of the Ministry of Housing and Lands. His evidence revealed that, as per the lease agreement, the access road from the subject site is a seven metre wide road at the back of the site but which is not open on site. The lessee may use both sides of this access road to reach the coastal road. Our observation was that the second access is in fact much closer to the sharp bend referred to above, having the consequences as highlighted earlier.

Against such a topography, we are of the view that find that the increase in traffic flow, resulting from the activities of a 'Multi Purpose Complex for Socio-Cultural activities', is in our opinion, rightly outcried.

5.2 The issue of noise

The Appellants have laid emphasis on the fact that the area is a 'tranquil' one, which is why they have invested in that area. The establishment of such a complex will be a potentially noise creating development. This will cause disturbance to the neighbourhood.

We have considered the evidence adduced on behalf of the parties. We are of the view that the Appellants' apprehension that such a development will create noise calls for concern. It has not been disputed that the area is a 'tranquil' one, with residential buildings (be it primary residences or secondary residences). The implanting of a Multi Purpose Complex in such an area will impact on the tranquillity of the residents who are immediate neighbours and also those who live further away. There have been several versions put forward as to what types of activities will be conducted there. These range from meetings, to meditation, to weddings and prayers. The crowd-pulling effect of any of those activities is likely to generate noise. The imposition of a condition that soundproof structures be installed is unlikely to resolve the potential noise generated. However, as stated

by the Appellants' representative, noise will not necessarily emanate from the inside of the building but from the gatherings outside as well.

It was stated on behalf of the Respondent that the concerns expressed by the Appellants are mere apprehensions. We firmly state that one cannot wait for any potential damage to occur before reacting to it and then seek remedy. Planning calls for assessment of the impact of developments before occurrence of any potential damage.

5.3 Suitable Development

5.3.1 It has been submitted on behalf of the Appellants that the development is not a suitable in the context. This has been contested by the Respondent and Co-Respondent. The Respondent submitted that the proposed development is not listed as a bad neighbour development, and is, as such, is permissible development within a residential area as defined in policy SD 1 of the Outline Planning Scheme.

5.3.2 Although the proposed development is not listed as a bad neighbour development, as defined by the Outline Planning Scheme, this calls for some observations: (1) We find it necessary to look at the proposed development 'in concreto' and assess its impact on the neighbourhood. Traffic hazards and potential noise are matters, as dealt with above, which call for consideration. It is for the Respondent to ensure that developments are done in accordance with the planning instruments but also in compatibility with the surrounding areas in which they propose to implant. The tranquil and peaceful character of the area has not been disputed.

5.3.3 In the comments filed by the Co-Respondent on the Planning Report of the Appellants, the Co-Respondent highlighted some of the planning instruments that would be applicable. We note from those comments that the Co-Respondent construes policy SD 1 of the Outline Planning Scheme as meaning that any development within settlement boundary that qualifies as 'other than bad neighbour development' should be permissible.

It is our view that sustainable development requires that there be compatibility of proposed activities with its surroundings. Policy TM1 on tourism zones has been relied upon by the Co-Respondent, namely that a sequential approach to tourism development to be favoured. Similarly, Strategic Policy SP 16 on Coastal Development and Tourism which favours mixed use tourism and other forms of complementary employment creation. This policy contained in the National

Development Strategy, favours a clustering of such activities within or adjacent to existing settlements. Although these policies are relied upon in the comments filed by the Co-Respondent, we note that the proposed development, subject matter of the BLUP, does not disclose any employment generating potential which would justify a sequential approach. Instead, on a balance of considerations, we find that the grounds raised by the Appellants to dispute the granting of the BLUP for the activity as proposed by the Co-Respondent are justified ones.

5.3.4 It is to be noted that the issue of the devaluation of the property of the Appellants, as submitted by the witness for the Appellants, although a live economic consideration, is not 'per se' a planning criterion as per the planning instruments, and we note that it has not been raised as part of the grounds of appeal. We shall therefore not address this issue.

6. Fettering of discretion

It is on record that there has been a lease agreement already issued by the Ministry of Housing and Lands for the said development.

We have time and again drawn attention to the fact that the Respondent is by virtue of section 117 of the Local Government Act the sole body entitled to grant a BLUP, irrespective of the stand of any other Government agency. It is the prerogative of the local authority which must be exercised within the parameters of the law. There is no evidence as such on record that the Respondent has actually fettered its discretion, although invited to do so by some members of the PBMC. At any rate, if it had fettered its discretion, the remedy would lie in a challenge of the said decision by way of judicial review.

7. It has been submitted on behalf of the Co-Respondent that this Tribunal is empowered to impose further conditions to the BLUP. We maintain that new conditions will not cater for the sustainability of the proposed development in that particular area. It would be appropriate that, in lieu, the Co-Respondent contemplates alternative activities which are sustainable, compatible with the surroundings and environmentally friendly in the leased premises.

8. As matters stand regarding the Building and Land Use Permit that has been granted, for all the above reasons we uphold the grounds raised by the Appellants in challenging the decision.

The appeal is accordingly allowed.

Delivered by:

Mrs. Vedalini Bhadain, Chairperson

Mr. V. Reddi, Assessor

Mrs. Ayesha Jeewa, Assessor

Date:

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15th December 2017
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