

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1539/18

In the matter of:-

Quincaillerie de L'Ouest Ltd

Represented by Mr. Yanesh Atmaram

Appellant

v/s

District Council of Black River

Respondent

IPO:

1. David Hyppolite

of Grande Riviere Noire, representing the "Force Vive" of the locality

2. Alain Bernard Marrison

of Morcellement Diocese at Grande Riviere Noire, representing the inhabitants of that
Morcellement

Co-respondents

DETERMINATION

1. The present appeal is against a decision of the District Council (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant, as represented by Mr. Yanesh Atmaram, for a Building and Land Use Permit ["BLUP"] for the construction of a one storeyed building to be used as store at ground floor for steel bars and cement, and on the first floor for plumbing, electrical fittings and paint located at Lot.19, corner of Royal Road and morcellement Diocese, Grands Riviere Noire. The decision of the Council was communicated to the Appellant by a letter dated 21st December 2017 which stated that the Council rejected the application on the grounds that

“(1) THE SITE IS TOO SMALL TO ACCOMODATE A STORE FOR THE SALE OF CEMENT, IRON BARS AND ELECTRICAL ITEMS, AND PAINTS WHILST ALLOWING FOR ONSITE PARKING AND MANOEUVERING SPACE FOR SERVICE VEHICLES AND CUSTOMERS PARKING.

(2) THE SITE IS ALSO LOCATED AT A JUNCTION ON THE MAIN ROAD AND IN THE VICINITY OF COMMERCIAL ACTIVITIES. AS SUCH TRAFFIC MOVEMENT GENERATED BY THE PROPOSED ACTIVITIES IS LIKELY TO CREATE TRAFFIC NUISANCE ON THE ROAD.

(3) THE PARKING ARRANGEMENT IS UNSATISFACTORY AND WILL NOT ALLOW FOR SAFE MOVEMENT OF VEHICLES WITHIN THE SITE AND ON THE PUBLIC ACCESSES.

(4) OVERALL, THE LOCATION IS INAPPROPRIATE FOR THE OPERATION OF A STORE.”

2. We pause here to make an observation. A Statement of Defence was filed on behalf of the Co-respondents, which incidentally was wrongly styled as “STATEMENT OF DEFENCE ON BEHALF OF THE RESPONDENTS” on the 17th October 2018 under the signature of their Counsel, Me. Ghoorah, the heading of the document refers to the Co-respondent no.1 as “*representing the ‘Force Vive’ of that locality*” and it refers to the Co-respondent no. 2 as “*representing the inhabitants of that Morcellement.*” It is a settled principle that a class action does not find its existence in our jurisdiction. In this context, I find that since there is no evidence on record to show that “**Force Vive**” is a legal entity, it cannot be a party to a case nor can we accept the blanket statement that Co-respondent no.2 represents the inhabitants of morcellement Diocese. The Co-respondents can however represent their own personal interests in the matter, since they are both residents of the locality.

3. All the parties were legally represented during proceedings before the tribunal. We have duly considered the evidence before us as well as the submissions of all counsel. A site visit was conducted on the 19th July 2019 which has also shed light on this case and we shall be making reference thereto. The grounds of appeal of the Appellant as per the Statement of Case are as follows:

“(a) The Respondent completely misconceived the application and failed to take into account that the site is enough spacious as in the same vicinity there are other hardware shop in smaller space and without any loading and unloading bay.

(b) The Respondent failed to take the views of other authorities before jumping to parking and traffic nuisances and in rejecting the application only on the issue of space, parking and traffic nuisance.

(c) The Respondent failed to take into consideration the parking space in comparison to the volume of activity that will be conducted by the appellant.”

I. CONTEXT ANALYSIS

4. The proposed development is a storeyed building with a total floor area of 215 sq.m as per the plan marked Doc E, on a plot of land of an extent of 364 sq.m as per plan annexed to the title deed marked Doc C. The building is being proposed to be used as a store and delivery such that the ground floor will be used for storage of steel bars and cement bags whilst the first floor will be for storage of plumbing materials, electrical fittings and paints. A total of 4 parking slots will be provided and a loading and unloading bay of 14 metres by 3.5 metres has been proposed on the site as per Doc E.

5. The development site is a lot of a residential morcellement known as Morcellement Diocese and the plot is located at the corner of the A3, which is the main Black River Road and Avenue Morcellement Diocese, Grande Riviere Noire. Moreover, a restaurant is also under construction on the opposite corner plot facing the subject site in Avenue Morcellement Diocese and cornering the A3 as well. The A3 is the main artery that runs along the coastal areas and links the southern part to western part of the island. Along the A3, that is the main Black River Road, into Grande Riviere Noire, there are predominantly commercial developments on both sides of main road. This is confirmed by the site visit as well as the photographs which have been produced by the Appellant. The character of the area where the subject site is found being a

predominantly commercial one, the proposed development cannot be said to be a misfit in the area. There is no doubt that the proposed development falls within the Commercial cluster since it entails the procurement of goods which are on sale.

6. This being said, we are not oblivious to the fact that at the rear of the subject site along Avenue Morcellement Diocese there is a residential building which forms part of the residential morcellement but other than that, all the other properties immediately surrounding the site are commercial. In fact, we find that this type of development, a hardware shop or a store to a hardware shop, is acceptable as it will blend with the amenity of the area but will also serve the needs of the locality since a lot of development is mushrooming around. It is provided in the **Outline Planning Scheme** for the area of Black River [**“OPS”**] that the area is witnessing a lot of development and that there is a need for clustering development around key growth centres, Grande Riviere Noire being one of them.

II. APPLICABLE PLANNING INSTRUMENTS

7. The area being in Riviere Noire, the applicable planning scheme is the **Outline Planning Scheme of Black River [“OPS”]**, as stated above and applicable planning policy is **Planning Policy Guidance 1 [PPG 1]** relating to commercial developments more specifically, the Technical sheets on Industrial and Commercial Roads.

(i) Under Ground 1

8. As regards the first ground of appeal, which is based on the first ground of refusal, that is, the site is too small to accommodate a store for sale of cement, iron bars, electrical items whilst allowing for onsite parking and manoeuvring space for service vehicles and customers parking. The stand of the Appellant is that the Council failed to take into account that the site was spacious enough and that in the vicinity there is another smaller hardware shop operating without any loading/unloading bay. The site has a few disadvantages as regards its positioning, it being a corner plot at the angle of a main artery and avenue Morcellement Diocese, which is one of the accesses into

the residential morcellement. The width of the road leading into the morcellement varies from 5.1 metres to approximately 5.8 metres. This road joins the main road, a classified road, the A3, which allows for two-way traffic. The width of the Avenue Morcellement Diocese being relatively narrow does not provide the required space for an adequate turning radius for heavy goods vehicles especially of the rigid type of lorry. According the technical sheet of the **Design Guidance on Industrial and Commercial Roads**, a kerb radius of 10 metres is normally recommended for junctions with main class A and B roads, the reason being that such a radius will then allow heavy goods vehicles to turn without interfering with traffic on the priority road. The heavy goods vehicles are mostly likely to have difficulty in turning past the vehicles on the 'non-priority' road. This will cause serious traffic blocks in view of the frequency of traffic on the two-way main road, bearing in mind the commercial character of the area.

9. With the predominance of commercial developments on both sides of the main road, as well as the site is located opposite a hospital, the influx of vehicles onto the main road is rather high and dynamic. Vehicles drive in and out of parking spaces on both sides of the road with traffic in both directions. Given the narrow width of the Avenue Morcellement Diocese, along which the Appellant has decided to have its loading/unloading bay, the kerb radius will be far from adequate to allow for the lorries that normally carry cement and iron bars to turn in and that too without disruption to the traffic conditions. The same guidelines from the Technical sheet provide that for every heavy goods vehicle of the rigid type a space of 100-150 sq.m of overall area which includes the access and maneuvering space should be provided. In the present case the layout of the proposed building on the plot as shown on the plan (Doc C) did not provide adequate space for maneuvering of heavy goods vehicle. The witness from TMRSU also explained that a lorry would have difficulty maneuvering in and out of the loading bay. In fact, in the course of the site visit, a simulation was carried out and the medium sized lorry that took part in the exercise had to manoeuvre in and out some three times to be able to exit the subject site. It is noteworthy that the lorry that took part in the simulation was not of the big articulated types that are sometimes used to carry cement bags and iron bars.

10. We have also addressed our minds to the submission made on behalf of the Appellant as regards the decision of the Tribunal in a similar case where the appeal was allowed in **Anju Muttur v/s Municipal Council of BeauBassin/Rose Hill [ELAT 137/12]**. While we do agree that the space allocated for parking of vehicles can, depending on the context, be used as loading/unloading bay and that arrangements can be made by imposing conditions regarding times of delivery, there is an important distinction to be made. The site in the present case is located at a junction. This increases the risk of traffic hazards thereby making it more prone to accidents. It is also worthy of noting that there is a bend on the main road a few metres from the site which also further compromises the visibility splay and safety of road users. In the case of **Anju Muttur** the Tribunal had a visual appreciation of the context and decided the case on the basis that there was no encroachment at the time of delivery of cement and iron bars that would adversely affect other road users, amongst other issues.
11. As per Doc E, it appears that the building, being a store would fall in the commercial cluster, will have a gross floor area of 215 sq.m, which will require 7 parking slots since the Planning Policy Guidance [“PPG”] provides that for every 30sq. m of floor area, one parking slot is to be provided for such commercial developments. The Appellant’s plans show that provisions have been made for only 4 slots. This is therefore not only insufficient but also as regards the positioning of the loading/unloading bay being in an oblique direction between Avenue Morcellement Diocese and the proposed building is likely to be unworkable in terms of the layout of the parking area and positioning of the building. It will entail a lot of reversing onto the access road of the morcellement which will be a source of hazard for the safety and security of other road users moving in and out of the residential area and also create traffic jams and hazards since the width of the access road where the lorries will have to manoeuvre is only around 5.1 metres at that point near the subject site. We therefore find that that the Council’s first ground of refusal was justified. True is it that there is another hardware shop in the vicinity with smaller surface area by the name of Quincaillerie Riviere Noire and we have addressed our minds to the contention of the Appellant. It is rather doubtful as to why that hardware shop is being allowed to sell cement and iron bars which entails heavy goods articulated lorries turning up for delivery and

having to manoeuvre on the road to the extent of causing the traffic to come to a total standstill when the lorry reverses into the loading/unloading bay. It appears from the evidence of the co-respondents that there were also objections against that hardware shop being given authorization to sell cement and iron bars. But since two wrongs cannot make one right, we cannot assess the planning merits of a development proposal on the basis of possible wrong decisions taken previously with regards to other developments. What motivates our decision is the application of the planning guidelines to the development that is being proposed as placed before us.

(ii) Under Ground 2

12. Under the 2nd ground of appeal, it is the contention of the Appellant that the Respondent rejected the application on the issues of space, parking and traffic nuisance without having taken the views of other authorities before coming to such conclusions. It appears that the RDA gave clearance to have the proposed store subject to conditions and this was confirmed by the witness from the RDA, Mr. Nabeebux. Although we note that when the Council's refusal is grounded on the issue of traffic, the views of the authority, that is TMRSU, are usually sought in the present case but it came out in evidence that this course was not adopted by the Council until the case was about to be heard. True it is that ultimately it is at the Council's discretion as to whether to take on board the views of the TMRSU or not but as a matter of good practice, this procedure should normally be followed. This being said we have had the opportunity to hear the witness from the TMRSU. As stated above, in his opinion a lorry would have difficulty maneuvering in and out of the loading bay. This evidence cannot be ignored especially when it is coupled with the evidence that there are commercial activities running on both sides of the main road. The point, in our view, is that the proposed development being at a junction, will create an additional outlet of traffic onto the main road of Riviere Noire as well as the Avenue Morcellement Diocese such that the vehicles accessing or egressing from the proposed store from and at 2 different points at the same time is likely to create traffic hazards in view of the layout of the parking slots and loading/unloading bay as they have been positioned on the plan, Doc C.

13. With vehicles ingressing or egressing at a strategic point, that is near a junction since the subject site is a corner plot, moreso the lorries in view of their length and rigidity, it would cause inconvenience to traffic on both roads bearing in mind the narrow width of the Avenue Morcellement Diocese nearer the subject site. Furthermore, having regard to the uncontested evidence as to the volume of traffic on that road, we believe that lorries manoeuvring into and out of a plot situated at a junction will inconvenience flow of traffic and it is likely to lead to some major hindrance in the flow on such an important road. From the location plan produced, Document C, it can be seen that between the 2 entry/exit points, near the junction. While we do take on board that the vehicles may not all come at the same time, it is possible that the arrival of lorries for collecting cement and/or iron bars coincide and that may also happen at a time when there is already a substantial amount of traffic built up on that road. It is conceivable that lorries entering into the subject site from 2 opposite sides of the main road of Riviere Noire with possibility of each turning in either direction at the point of exit, may create major traffic congestion. We are therefore, not convinced on this ground of appeal. It therefore fails.

(iii) Under Ground 3.

14. It is the contention of the Appellant with regard to the third ground of refusal that the Respondent failed to take into consideration the parking space in comparison to the volume of activity that will be conducted by the appellant. In view of our reasoning above, we find that since the store is a commercial development where goods will be provided which will entail customers driving in and out for collection, the required number of parking slots fall short by 3. The **Design Guidance on Commercial Development** provides for a minimum set back of 2 metres. The parking arrangements as proposed is not workable as the aisle distance is too short to allow easy access and egress with regards to the site. The **Design Guidance on Commercial Development** also provides that the entrances and exits to car parks of commercial developments should be located well clear of road junctions and at points where there is adequate visibility, both for drivers turning into the car park and for those coming out onto the public road.

15. The guidelines emphasize the need to have the parking arrangement in such a way so as to minimize the risk of traffic having to queue on the public road while waiting to get into the carpark, the layout should be such as to minimize pedestrian/vehicle conflict. Likewise, the location of the loading/unloading bay being so close to a junction and positioned in an oblique manner coupled with the narrow width of the road where the lorry needs access and egress to and from the site as currently shown on the plan, Doc C, will render manoeuvring very challenging and compromise the safety of other road users. This ground of appeal also fails.

(iv) 4th Ground of Refusal

16. As regards the fourth ground of refusal, it has been dealt with above but for the sake of completeness, we reiterate the fact that we do not believe that constructing a store to a hardware will be a misfit along the main road of Riviere Noire as the whole stretch of the road, on both sides are predominately filled with commercial developments. This being said, the development as proposed cannot gain planning acceptance since the store with its specificities in terms of its size, and the layout of the proposed building on the plot, its plot coverage and location, that is near a junction, as shown in the Doc C, will cause serious traffic hazards.

17. While the Tribunal is alive to the fact that there was litigation before the Supreme Court in connection with this case, we will not comment on any agreement reached amongst the parties in or out of Court. Whether the plot of land was bought by the Appellant for the purposes of constructing a store or that notices were served on the Appellant to discontinue the sale of cement and iron bars are collateral matters as far as assessing the planning merits of the present case is concerned and have been disregarded. The Tribunal will also not look into planning merits of the BLUP of the other hardware shop "Quincaillerie Riviere Noire" except that it will direct the Council to act with parity and assess the planning merits of applications upon proper application of the soft laws. The Council has however, under the Business Facilitation Act, a duty to assist applicants in their application for BLUP should their application be worthy of planning acceptance upon the necessary amendments being made.

18. For all the reasons set out above, the appeal is set aside. The Council is urged to pay heed to the directions of the Tribunal in the penultimate paragraph in the eventuality that it is of the view that upon amendments brought to the plans, the application is worthy of gaining planning acceptance. No order as to costs.

Determination delivered on the 16th October 2020

Mrs. J. RAMFUL-JHOWRY

Vice Chairperson

Dr. B. MOTAH

Member

Mr. P. MANNA

Member