

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1656/18

In the matter of :-

Gavin Ajagen Gooriah

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 the application for a Building and Land Use Permit ["BLUP"] to the Appellant for the use of land for playing football (5 A-side) and the conversion of two containers (CIS structure) at ground floor to be used as store, toilet and bathroom at 33 Ex 25, Ambrose Street, Rose Hill. The Appellant was informed of the decision of the Council by way of a letter dated 29th June 2018. The reason for refusal set out in the letter is:

"Site is located in a predominantly residential area and the proposed development is likely to be detrimental to the amenity of its residential neighbourhood."

2. Both parties were legally represented. The Appellant's father, Mr. P. Gooriah, deponed on the Appellant's behalf under solemn affirmation and was cross-examined. The Planning Officer of the Council, Mrs. Teeha, deponed on behalf of the Respondent. The Council called as their witness, the only objector to the proposed development, Mr. Irshad Pirbaccus. Both were cross-examined. We have duly considered the evidence before us as well as submissions.

3. The Appellant initially lodged some 6 grounds of appeal together with his notice of appeal which are reproduced hereunder in italics:

Grounds of appeal

1. *The decision of the Municipal Council of Beau Bassin-Rose Hill (the Council) is ultra vires and unlawful in law and on the facts in as much as the mere fact that the area is a predominantly residential area does not preclude the Council from granting the present application.*
 2. *The decision of the Council is ultra vires and unlawful in law and on the facts in as much as although the area is a predominantly residential area the Council has failed to provide any reason why it cannot grant the application.*
 3. *The decision of the Council is ultra vires and unlawful in law in as much as it failed to exercise its discretion and has merely allowed itself to be dictated.*
 4. *The decision of the Council is wrong in law and on the facts in as much as the proposed development is beneficial to the amenity of the residential neighbourhood.*
 5. *The decision of the Council is wrong in law and on the facts in as much as it has failed to take into account that land in the neighbourhood has been put to non-residential use.*
 6. *The Council is wrong in law and on the facts in as much as it gave unreasonable weight to the objection raised the more so since none of the immediate neighbours objected to the application.*
4. We note from the grounds of appeal, the 1st, 2nd and 3rd grounds, as couched, suggest that the Council acted beyond its powers. These are grounds for judicial review which are challengeable before another forum but not this Tribunal and hence these grounds are set aside. We will therefore consider the last three grounds of appeal together as they challenge the merits of the decision as regards prejudice caused to residents.

I. CONTEXT ANALYSIS

5. The subject site is a plot of waste land of an extent of 250 toises situated at Ambrose in Rose Hill and which lies within the settlement boundary and is a predominantly residential locality. The proposed development is to have synthetic grass on the five A side football pitch which will occupy most of the land and to have two containers, one to be converted into toilets and the other as store as well as office and where non-alcoholic drinks will be sold. It is also proposed that the subject site will be fenced and 7 parking slots will be provided. The case for the Appellant in essence is that the proposed development is beneficial to the locality as there is no such activity that currently exists in the area and that the Appellant himself is a 5 A side football player so he was keen to set up this activity.

6. It is the case for the Respondent that the site is located in a predominantly residential area, which is not disputed by the Appellant, and the proposed development is likely to be detrimental to the amenity of its residential neighbourhood which is the issue in dispute. Evidence was adduced by the Appellant's representative regarding the presence of non-residential developments in the immediate vicinity of the subject-site namely St Mary's college, a catechism centre and a plot of waste land which were not contested. The Appellant's representative also testified regarding the presence of a building under construction. As per the version of the Appellant, there are also other non-residential developments which are not far from the subject site, such as the Rose Hill tennis club which is situated 195 metres away, the Rose Hill Transport office situated 180 metres away, Assembly of God situated 150 metres away, another foot 5 Complex situated 180 metres away, the Municipality building situated 200 metres away, St. Andrews College situated 250 metres. While the exact distance of these activities from the subject site cannot be ascertained with precision, the Tribunal can appreciate that the presence of these developments renders the area not exclusively residential. While the planning policies make provision for certain types of developments which may be allowed within a predominantly residential area, we need to assess whether the proposed development is such that it can gain planning acceptance given the context.

II. APPLICATION OF PLANNING INSTRUMENTS

7. According to Mrs. Teeha, the Council has applied **policy UDS1** of the **Outline Planning Scheme of Beau Bassin Rose Hill** ["OPS"] to reject the application on the basis that it will adversely affect the local amenity of existing sensitive uses such as housing, schools and health facilities. **Policy UDS 1 on Development within Settlement Boundaries** 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*
- *Exceed the capacity of existing highway and utility infrastructure networks.*

III. MERITS OF THE CASE

8. The Council supported its case by having the representative produce the objection letter, Doc D, received from Mr. Pirbaccus who is not yet a resident of the locality but whose house was under construction and adjacent to the subject site. The minutes of the hearing before the Council, marked Doc E, was produced to show that the objector and the Appellant were given a chance to present their arguments against and in favour of the proposed development respectively and the PBMC gave reasons for rejecting the application. Mr. Pirbaccus also testified as the Council's witness to state in essence that the area, being a residential one, will be "destabilized" and traffic congestion will result if more vehicles access Ambrose Street, there may be parking issues as well as behavioural problems and noise pollution due to the entertainment aspect of the activity. We bear in mind that in a residential area one has to be able to have a peaceful enjoyment of one's property.

9. St. Mary's college, a secondary school, is found in very close proximity, a few metres away, of the subject site. This in itself is evidence of the fact that the area is not an exclusively residential one nor is it free from noise pollution. The presence of the school, together with it being a noise generating activity, is also a traffic generating one, both in terms of vehicles and human. This being said we bear in mind that these are but normal inconveniences that one has to put up with if one chooses to come and live in such a community. Furthermore, there would also be several instances during the day when the school kids would be playing in the school compound and this would normally generate some level of noise which the inhabitants have been putting up with. The proposed development cannot be said to affect any school or health facilities under **Policy USD1** as there has been no objection from any other quarters as regards the proposed development, especially not by St. Mary's College.
10. We note that there is also a need to enhance community health and have social activities that will benefit the community and this has always been the aim of government. In this context **Policy SC 4** of the OPS, *on Clustering of Community Facilities*, which we believe should also be applicable, favours the provision of new community facilities with suitable landscaping, within settlement boundary and being easily accessible which will also help improve the local amenity, enhance the wellbeing and health of the community and regenerate image of the area. This is in line with the community projects by the Government by the National Development Unit. In fact the evidence of Mrs Teeha reinforces in our view that such facilities are beneficial to the society because the Council also provides them. She testified to the fact that the Council has provided a mini soccer pitch, football pitch, stadium in the area. Now, if the Council is providing these community facilities, we fail to see why this cannot be done by a private individual and thus save on local government funding. The same purpose will be achieved in that those keen to keep fit by playing football will have such community facilities accessible to them as well the residents of the locality. When weighed up on a balance the benefit that will be reaped by the society with the provision of the activity from the development proposal, in our view, outweighs any prejudice that may be caused to the objector. The Tribunal is minded to look at the benefit to the society with the implementation of a proposed development, be it

recreational or educational which can only help in eliminating the scourges in society such as drug addiction, alcoholism and crime.

11. We have born in mind the Council's position is that the proposed development is a noise generating activity. There will be 10 players at any one time on the pitch and they can be accompanied. This, in our view, can be minimised by the imposition of conditions on the operation of the activity by the Appellant, which will also mitigate any prejudice that may be caused to the objector. The Appellant is ready to abide by any condition imposed by the Council as regards operating hours and otherwise. As stated above, the objector will have to expect some daily inconveniences of life when living in a community which is not exclusively residential.

12. For all the reasons set out above, the appeal is allowed. The Council is to reasonably assess, if need be, the parking requirements, the operating hours, any sale of food and beverages, the number of accompanying guests and any other conditions it deems fit in order to mitigate the noise and any risk of anti-social behaviour. No order as to costs.

Determination delivered on 25th November 2020 by

Mrs. J. RAMFUL-JHOWRY

Vice Chairperson

Mr. G. LEPOIGNEUR

Member

Mr. AUBEELUCK

Member