

IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1199/16

In the matter of:

Komarduth Hurry

Appellant

v/s

District Council of Black River

Respondent

DETERMINATION

1. The Appellant has lodged an appeal against the decision of the Council for having refused to grant it a Building and Land Use Permit (BLUP) for the conversion of an existing building of ground plus 2 floors into a Guest House at Cnr. Moulin Casse and Marons Streets, Morcellement Anna, Flic en Flac. The ground for refusal set out in a letter dated 20th June 2016 is that "With the increase in the number of Guest Houses in residential areas nuisances have been increased and further intensification of such type of development will interfere with the residential amenities of the area."
2. Mr. Hurry gave evidence and was legally represented. Mr. Ahmadi, planning and development inspector, gave evidence on behalf of the Council and was also legally represented. The respondent also, in support of its case, called a witness who objected to the development proposal. Both parties were cross-examined. We have duly considered the evidence of both parties as well as submissions of counsel for the Respondent.

I. CONTEXT ANALYSIS

3. The proposed development site is located within a residential morcellement, Morcellement Anna, on Moulin Casse road which is off the main Flic-en-Flac road. As per the title deed, there is no restriction on the type of development allowed on the subject site. The property is a two storeyed building consisting presently of 11 units and having an accommodation capacity of 22 people. In the course of the hearing counsel for the appellant informed the Tribunal that if the proposed development is allowed, then there will be a sum total of 17 units on the three floors thereby accommodating 34 people. The parking spaces for 12 vehicles have been provided on the premises. The building set back and road reserves and road width appear to be in conformity with the prescribed norms, standards and guidelines for a morcellement.

II. THE PLANNING INSTRUMENTS AND THE LAW

4. The site being situated in Flic en Flac the applicable outline scheme is **Outline Planning Scheme of Black River** and the applicable Planning Policy Guidance is **PPG1** issued under the **Planning and Development Act 2004**. As per evidence on record, the subject site lies within Morcellement Anna which is within the settlement boundary and is close to the Tourism Growth Zone. **Policy CDT1 of the Black River Outline Planning Scheme** regulates development within Growth Zone in Tourism Zones and is reproduced below:

“CDT 1

Coastal Development and Tourism

On the coast within Tourism Zones identified in the Tourism Development Plan and illustrated on the Development Strategy Map and Development Management Map, clustering of tourism and other employment-generating activities within or adjacent to existing settlements, resorts and campement sites and utility and transport networks should be encouraged. Major new developments should be focused within the South West Tourism Zone from Flic enFlac/Wolmar to the Le Morne peninsula, where Tourism Action Area Plans and other Government-approved schemes have been identified and committed. In this Zone and where sites are within or adjacent to existing settlements, existing tourist resort complexes or major campement sites,


there should be a general presumption in favour of mixed use tourism and other forms of complementary employment creation. Proposals should generally comply with the design criteria contained within the Hotels and Integrated Resorts Design Guidance and other relevant Design Guidance outlined in SD 5. Developments within the Coastal Lands should also conform to detailed coastal development design principles defined in the Design Guidance.

Justification: The South West Tourism Zone was identified by the Ministry responsible for Tourism in the Tourism Development Plan 2002. Clustering of development within Tourism Zones would support the objectives of the NDS and provide more sustainable development patterns, support existing local communities and build on existing transport and utility provision whilst enabling parts of the coastline to remain open and in their natural state through environmental management plans.

Further development guidance is provided within the Hotels and Integrated Resorts Design Guidance and the Residential Development Design Guidance. More stringent design parameters have been devised to ensure sustainable development occurs in such sensitive locations. In all cases of major development on the coast, building and land use permit applications will be required to include a comprehensive EIA in accordance with the Environment Protection Act 2002 as amended.”

III. THE ISSUES

(I) Ground of Refusal.

5. The refusal of the Council is based on the increase in the number of Guest Houses in residential areas which have resulted in nuisances being on the rise and therefore, the local authority has taken the stand that further intensification of such type of development will interfere with the residential amenities of the area. In order to have a better understanding of the operation of a guest house, which may be argued, serves as lodging units and hence, are also residential in nature, it is apposite at this point to make an assessment of what the proposed development entails. In this context, we will need to consider the definition of a guest house and the context of the development proposal.
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6. The proposed development is the conversion of a two storeyed building to be converted into a Guest House. The operating licence for a Guest House is issued by the Tourism Authority under the **Tourism Authority Act 2006**. Under **section 2** of the Act, Guest House has been defined to mean *“any premises where lodging and sleeping facilities and breakfast are provided against a payment.”* In other words, a Guest House is what is more commonly known as a “Bed and Breakfast”. Under the 2006 Act, “Tourist Residence” has been described as *“any residence other than a Hotel or a Guest House that offers sleeping accommodation to Tourists with or without meals for a fee.”* This being said the application made by the Appellant is for conversion of an existing building into a guest house which is a commercial development. “Commercial activities” has been defined under **section 1 of the Eleventh schedule of the Local Government Act 2011** as relating to the provision of goods and services within building premises such as shops, showrooms, post offices, hairdresser salons, undertakers’ parlours, ticket and travel agencies and cafes. Since the definition of Guest House relates to the provision of services of lodging, we find that the activity falls within the ambit of what constitutes a commercial activity.

7. The **National Development Strategy** [‘NDS’], under paragraph 8.2 which addresses issues of Tourism Development and Growth, provides amongst others that the **South West Tourism Zone** (from, Flic en Flac through to Le Morne Brabant), development control is to be strengthened. It is important to note that the reason for the creation of these tourism zones is that they are regarded as important for the economy and economic growth, where development would be encouraged in relation to tourism with the promotion of more sophisticated and attractive tourism services like type of lodging or accommodation offered, leisure or recreational facilities made available, entertainment and brand shopping amongst others.

8. We are alive to the fact that the planning instruments should be applied with some flexibility. However, one should also bear in mind that there should be reasonable and logical adherence to planning instruments which have been devised in the first place to ensure there is a proper structure and planning for the various types of developments within a country to avoid haphazard developments so that there is sustainability.

9. A right balance has to be struck between what the proposed development will bring to the neighbourhood and how it will impact upon by the residents in the vicinity. The appellant submitted that there are other guest houses in the vicinity and that one of the reasons why he wanted to have the guest house is so to cater for a market of tourists and foreign students who come for higher education. The Tribunal takes judicial notice of the fact that there are some educational institutions offering higher education courses around the area of Flic-en-Flac. It would seem that the appellant is targeting a particular type of crowd. The planning principle is however that the activities proposed must not affect the area where people live, and the things affecting the local area include disturbance to neighbours and increased footfall.

10. Mr. Ahmadi explained that the refusal of the BLUP application of Mr. Hurry was due to the complaints that were frequently received regarding disturbance in terms of noise, traffic, celebrations of weddings and birthdays and that such a situation has arisen because of the granting of BLUPs for guest houses in the morcellement. He also submitted that there have been complaints against the occupants of the building of Mr. Hurry as far back as 2012. He produced complaint letters received at the Council, documents marked A, A1, A2 and A3.

11. In the present case, the BLUP applied for is in respect of a whole building of 17 units to be converted into a commercial development, that is, a guest house where some 34 people can be accommodated. This is indicative of the marked rise in footfall. The nature of the business of Guest House involves human traffic in other words "outsiders" calling in and going out of the premises at any point in the day and night since it offers sleeping and lodging facilities. A marked rise in such human traffic can be disruptive to the neighbours as well as to the residential character of the small community in the vicinity where the inhabitants have an expectation to live in peaceful enjoyment of their property. There is evidence on record that there were complaints received as far back as 2012 from neighbours due to nuisance in terms of noise and unsocial behaviour emanating from Le Gentilly, the building owned by the Appellant, which incidentally used to operate as guest house but without a valid BLUP from the Council.

12. Mr. Heeralall testified before the Tribunal in support of the Council's stand and confirmed under solemn affirmation as to the veracity of the complaints and objections sent to the Council by him. He explained in detail the constant source of nuisance that the guest house of appellant has been for him and his family due to unsocial behaviour. The Council's representative also mentioned the name of Dr. Yousouf Maudarbacus, whose residence is opposite to the Appellant's guest house, had complained against the guest house of the appellant due to nuisances which have disturbed their peace and that of the locality due to unsocial behaviour and loud music when parties were organized and there were celebrations.

13. We, therefore, agree with the planning inspector of the Council that in the present case, allowing such a development would be against the amenity of the residential nature of the area because at a time when the building of the appellant was operating as a guest house, albeit illegally, it has proven to be a severe source of nuisance to the neighbourhood. It would be most undiligent to now officially grant a permit to legalize such activity there the moreso as the planning history of the subject site has shown that the activities carried out therein have been severely disruptive to the amenity and character of the residential neighbourhood. The guest house which can lodge more than 30 people will mean an increased as well as constant flow of traffic, both human and vehicular in that neighbourhood, at any time of the day and night. The residents would be in and out for daily activities such as beach enjoyment, for food and shopping. There is also likely to be some entertainment. All these are not conducive to residents who reside in their area permanently and any form of condition imposed on the appellant's BLUP, cannot possibly serve to restrict the movement of the potential residents of the Guest House. Agreeably the appellant argued that he intends to target a particular market but this does not bring reassurance since once a BLUP for Guest House is given there is not guarantee that the appellant will not allow others to use the premises especially in off-peak seasons. What is of prime importance is the impact of the proposed development on that particular surrounding neighbourhood, the moreso as it would appear from the evidence that many of these residents who have objected have been living there for a number of years and enjoy the peace and tranquility of their home. We therefore find the refusal of the Council, given the present

circumstances are valid. Our reasoning here also addresses the issues raised under the fourth and fifty grounds of appeal as per the Notice of Appeal of the Appellant.

(II) Grounds of Appeal

- 14.** As far as the first ground of appeal as per the notice of appeal is concerned, it is not denied by the Respondent that it was a typing mistake as regards the date when the application was received. In any event this issue is not a live issue since the respondent has reconsidered the application of the appellant on the basis that the proposed development is for Guest House as opposed to Tourist Residence.
- 15.** As regards the second and third grounds of appeal as per the notice of appeal, which do not actually amount to grounds of appeal for lack of conciseness and precision, these are therefore set aside. We simply wish to state however that if there is no restrictive covenant on the title deed of the plot and the mere fact that there is a building on the plot since 1994, does not as of right qualify the development proposal for planning acceptance. The local authority has the prerogative to assess every application on its own merits.
- 16.** The fourth and fifth grounds of appeal as per the notice of appeal are that the activity of guest house is not a source of noise pollution, water pollution and traffic congestion and adequate parking facilities have been provided and that there are many guest houses located in highly residential areas without affecting the peaceful environment. These grounds have already been addressed, as stated earlier. The Appellant testified that he is about to retire and the proposed development which the appellant intends to manage with his wife will be a source of revenue. He stated that although the morcellement is a residential one, there are commercial developments as well as two other guest houses in the vicinity. The Council's stand was that one of the guest houses mentioned by the Appellant is in fact a boarding house which has been in operation since 2004 and for which no objections or complaints has ever been received. The morcellement is a residential one, albeit having a number of tourist residences and a handful of guest houses, as admitted by the witness for the Respondent with some

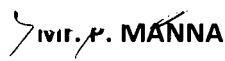
possibly operating illegally. In this present context, it is important to look at the immediate vicinity of the subject site, which happens to be a residential one where the inhabitants have objected. The disturbances complained by the inhabitants of the vicinity were of a different nature, that is, mostly nuisances associated with noise pollution due to loud music being played for parties, and fights amongst people who attended the premises at the time that the Appellant's property was operating as guest house without a valid BLUP. With such previous history of social disturbance, it appears that such a development will not be compatible or sustainable in that neighbourhood. Therefore, these grounds fail.

17. The sixth ground of appeal is about the existence of enforcement agencies having the power to ensure that there are no violations. The simple logic applies here that prevention is better than cure. The building of the appellant had served as guest house for a number of years prior to the application for BLUP. The council's representative and the witness for the council also testified as to the consequences that the inhabitants in the vicinity had to face as a result of the activities. This is proof that the activities of the guest house were clearly incompatible with the residential character of the area. It is known that the key objectives of the planning instruments whilst acknowledging the socio-economic development of the citizens, is also to respect, preserve and enhance the quality of life especially in residential areas and to ensure compatibility of land uses that would allow the residents to enjoy a peaceful and pleasant environment and not infringe on the privacy of the residents. We find no reason to allow a development which has clearly not been sustainable, which in turn will result in unnecessary pressure being put on the authorities.

18. For all the reasons set out above, we find that the decision of the Council was well taken. The appeal is set aside. No order as to costs.

Determination delivered on 2nd June 2020 by

Mrs. J. RAMFUL
Vice Chairperson


Member


Member