

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No.: ELAT 1370/17

In the matter of:

MR. BOODHEEA MOOTOOSAMY

Appellant

v.

BLACK RIVER DISTRICT COUNCIL

Respondent

DETERMINATION

1. The Appellant applied to the Respondent for a building and land use permit to be issued for the conversion of an existing building into a tourist residence at ground floor and first floor at Lot 267, Morcellement Sagitaire, Pointe aux Sables. The Respondent refused to grant the permit in a letter dated 9 March 2017, on the ground that "*The site is located in an exclusively residential morcellement. Given the character of the area, the proposed development is likely to give rise to nuisances for the neighbourhood*".
2. In the course of the hearing, much emphasis was put on the ground of refusal as drafted: the contention of the Appellant being that there was no basis, nor documentary evidence, to show that the site was exclusively for residential purposes.
3. On the other hand, the Appellant adduced documentary evidence showing that there was no exclusivity clause contained in her title deed, namely there was no restrictive covenant to the effect that the site is in an exclusively residential area. The Appellant furthermore annexed a letter dated 21 December 2007 from the Ministry of Housing and lands addressed to the property developer whereby it is stated that the morcellement permit for the said morcellement was being granted for the subdivision of the land into 438 lots for residential and commercial purposes. The plan enclosed with the letter did not specifically lay down which of the 438 lots were restricted to commercial use or residential use. The

representative of the Respondent was lengthily cross-examined on the basis for the recommendation made by the head planner to the Permits and Business Monitoring Committee that the site was located in an exclusively residential area. No reliable information was put forward to support this.

4. The decision of the Respondent was also based on the complaints that were purported to have been made by residents of Morcellement Sagittaire, Pointe aux Sables. Copies of letters of complaint together with the list of signatories were annexed to the statement of defence by the Respondent. The gist of the complaint was against the noise pollution that they were subjected to generally, and also that caused by roadside parking nuisance and music caused by the renting of the premises of the Appellant. The concern against noise pollution was included in the recommendations of the head planner and endorsed by the Respondent. Counsel for the Appellant stressed on the fact that the ground of refusal is drafted in such a way that the nuisance is a potential and not actual one, whereas the recommendation made to the committee was based on actual complaints. Be that as it may, what is relevant for us is that the nuisance that such an activity can cause is a planning consideration when assessing such an application.
5. The Appellant attempted to show a long list of developments which had obtained permits from the Respondent for tourist residents, these were clearly not in the morcellement. The representative of the Council explained that these permits had been given in areas known as tourist development areas, namely in Flic en Flac, Le Morne among others. The present morcellement is qualified as one given under the Voluntary Retirement Scheme one.
6. The Appellant has explained that she had not been informed of any complaint that had been made against the proposed development, nor had she been called for a hearing in relation to those complaints. We note also the version of the Appellant that her property is surrounded by bare land, with no immediate neighbours as such.
7. The respondent has annexed to its statement of defence copy of a complaint letter dated 25 November 2016 sent to several authorities, namely the District Council, the Commissioner of Police and the Ministry of Environment (dated 25 November 2016), with the list of the complainants annexed and copy of letter dated 2 February 2017 sent to the Council again objecting to the proposed development. Particulars of the nuisance have been described therein. The representative of the Respondent has explained that the Council has "based its assessment on the context and on the previous complaints that it had received against the activities related to the subject site".
8. We have considered the evidence adduced by the parties. We observe that the Respondent has placed reliance on the noise pollution that had been complained of as far back as the year 2016. We are alive to the fact that this is a matter for the

Ministry of Health and Ministry of Environment to monitor, yet, the Respondent is the authority that issues Building and Land Use Permits. The Respondent cannot be faulted for having considered these parameters which are part and parcel of planning criteria. We do not subscribe to the position taken by the Appellant that the complainants may not be adjacent neighbours as she is surrounded by bare land. This is a morcellement approved under the Voluntary Retirement Scheme. The neighbourhood would certainly not be limited to the immediate vicinity, especially if the occupancy is a matter that is likely evolve.

9. Questions have been raised by counsel for the Appellant on the description of the land as being 'exclusively residential' in the recommendations approved by the Council. This was rightly highlighted. Yet, the absence of a restrictive covenant in the title deed is not a blanket clearance for any type of activity. The Respondent is justified in not turning a blind eye to the already existing nuisance as pointed out by the letters of complaint addressed to it. The fact that there is the element of protest from other owners within the morcellement, the Respondent is bound to assess the impact of the proposed development on the surrounding environment and the compatibility of land uses. In this process, it is noteworthy that the holding of a hearing is not mandatory. The recommendation of the planner to weigh in the balance the nuisance complained of cannot be said to be faulted.
10. For the above reasons, we shall not interfere with the decision of the Respondent for having declined the application, despite the fact that it has inaccurately qualified the morcellement as being 'exclusively residential' in the absence of such an exclusivity provision. The morcellement is residential and commercial as shown in the documents adduced. The proposed commercial use still has to be compatible with the residential character.
11. We accordingly set aside the present appeal.

Delivered on 21st January 2020 hv.

Mrs. Vedalini Phoolchund-Bhadain, Chairperson

Mr. Pravin Manna, Member

Mr. Gerard Marie Lepoigneur, Member