

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

**Cause No.: ELAT 1397/17**

**In the matter of:**

**MR. SIWAH VELLIN BHURTUN**

**Appellant**

**v.**

**DISTRICT COUNCIL OF PAMPLEMOUSSES**

**Respondent**

**DETERMINATION**

The Appellant applied for a Building and Land Use Permit (BLUP) for the conversion of an existing ground floor building to be used as diving centre at Mont Choisy Coast Road B38, Trou aux Biches. This was declined by the Respondent on the following grounds:

1. The access to the site is by way of a 0.9 metre right of way only
2. No parking space has been provided for the clients/customers.
3. A compressor would be used and no mention of same has been made or any application submitted.
4. The site is within a residential settlement and the activity contravenes the Outline Planning Scheme.
5. Objections have been received.

The Appellant appealed under section 117 of the Local Government Act 2011 (as amended) on the following grounds:

1. The 0.9 metre right of way is a pedestrian way. There is no official minimum length or width of a passage.
2. For twenty years while operating his previous diving centre which was next door, customers have always used a nearby public parking.

3. The compressor is placed in a soundproof room. There will be no vibration or noise pollution to disturb anybody. For twenty years he has used the same compressor and has never disturbed anyone.
4. Many diving centers in Mauritius are situated in residential areas and in hotels.
5. More than fifty people live in his area and did not complain. The only complaints and objections are from two families living on the side of the right of way. It is not true that they are being disturbed by his customers and himself.

Evidence was adduced by the respective parties in support of their positions. The Appellant conducted his own case. It came out in the course of the hearing before the Tribunal that the first ground of refusal has in fact been wrongly drafted. What came out is that there is an ongoing dispute before the Intermediate Court between the neighbours (objectors to the proposed development) and the Appellant on the use of a "droit de passage" on this 0.9 metre right of way. This has not been resolved before that jurisdiction, and it came out that what is of concern to the objectors is the use of the passage by the clients of the Appellant leading to a loss of their privacy, the more so that it is 0.9 metre wide. The ground of refusal, as drafted, is not a ground per se and the Appellant was right to raise that there is no regulatory limitation to the size of a pedestrian way. The underlying litigation that was only unveiled in the course of the hearing is not at all addressed in this ground of refusal. The first ground of appeal is rightly raised and is allowed.

The absence of provision of parking for clients and customers is the second ground of refusal. The planning consideration contained in the Design Guidance for commercial development requires that parking and delivery areas should generally be adequate to cater for traffic that is likely to be generated by the development. The reality on the ground, as rightly conceded by counsel for the Respondent, is that consideration can be given to the existing parking that is not on site, the more so that the Appellant has been operating on the frontage of the road a few metres away for twenty years and has for all this period used that parking. We find no reason to disrupt this acquired practice that has never been objected to by the Respondent before the present application. The second ground of appeal is allowed.

The third ground of refusal is the absence of specific application for the use of compressors. Despite raising that the compressor will not cause any disturbance to the surrounding, having been housed in soundproof room, the Appellant conceded that he had not applied specifically for that and would now comply with this requirement by making an application to that effect. We recommend that this be made. In view of this, the third ground of appeal does not stand. The third ground of appeal is accordingly set aside.

The fourth ground of appeal is that "Many diving centres in Mauritius are situated in residential areas and in hotels". This ground is raised in response to the ground of refusal that the site is within residential settlement and the activity contravenes the outline planning scheme. No evidence was adduced by the Respondent to establish this. The only reference that we have is the site plan annexed to the statement of case of the Appellant (Annex I). This shows that the whole frontage of the road in front of the site is a commercial one. The site is situated twenty-six metres behind a busy commercial road and which, as per the evidence of the representative of the Respondent, comprises of residential settlement. To what extent this can be described as a purely residential area is questionable, and has not been amply established by the Respondent. On the other hand however, the fourth ground raised can barely be said to be a ground of appeal as it is merely as statement of fact made by the Appellant. We cannot support this "ground" despite the observations made above on the status of the site.

The fifth ground of refusal is that objections have been received by the Council. The Appellant raises the ground of appeal that only two families have raised objection despite the fact that there are more than fifty people living in the surrounding. We have considered the evidence in relation to this point. There is a background of dispute on the status of the site, namely how the site became an enclaved one and whether the ones occupying the land in front had the authority to do so and, more importantly, the loss of business caused to the objectors by the relocation of the Appellant to the present site. All this, although not being matters within the jurisdiction of this Tribunal, goes to establish a background of bad blood between the complainants and the appellant. The onus is on the Respondent to assess the genuineness of the complaints. The Respondent simply stated that there are complaints against the proposed development. No information transpired on whether a hearing had been conducted to assess same. The fifth ground of appeal is upheld, and the Respondent should hold a hearing to assess the genuineness of those objections in the light of the ongoing disputes between the parties.

We are of the view that the application for BLUP made by the Appellant requires a fresh assessment in the light of all our above-mentioned observations, taking into account that grounds 1, 2 and 5 have been upheld, ground 3 has been set aside for proper application to be made by the Appellant and ground 4 has been set aside for having been technically not well drafted, despite our observations made above.

The application is remitted back to the Respondent for this purpose.

Delivered by:

**Mrs. Vedalini Phoolchund-Bhadain, Chairperson**

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**Miss Roovisha Seetohul, Member**

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**Mr. Marc Reynolds Guiton, Member**

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**Date:**

6<sup>th</sup> February 2020

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