

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 291/12

In the matter of :-

Mrs Koomaravallee Chinasamy

Appellant

v/s

District Council of Grand Port/ Savanne

Respondent

DETERMINATION

The present appeal is against a decision taken by the District Council of Grand Port /Savanne (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (BLUP) for the conversion of part of an existing residential building into a residential Guest House at Lot 119, Morcellement VRS, Union Park. The decision of the Council was communicated to the Appellant by a letter dated 7th November 2012, which stipulated that the Council rejected the application on 2 grounds, namely:

- "1. Morcellement VRS has not been set up with amenities to support a tourism development.
2. Guest house is not an activity that will serve the local neighbourhood needs."

The appeal was lodged before the Tribunal on the 12th November 2012. Both parties were legally represented at the hearing. The Appellant deposed under solemn affirmation and was cross-examined by Respondent's Attorney. The Head Planner deposed on behalf of the Council and was also subjected to cross-examination by Appellant's counsel.

We have duly considered all the evidence placed before us including submissions of both counsel and attorney. The Appellant's statement of case contains five grounds of appeal essentially relating to breach of the Local Government Act 2011 in processing and determining the Appellant's application, as well as breach of the Planning Instruments and bad faith on the part of the Respondent.

CONTEXT ANALYSIS

The proposed development site is located within a residential morcellement at Union Park which was set up under the Voluntary Retirement Scheme for the former Sugar Estate workers. As per the title deed, the morcellement has been designed with no commercial areas or residential/ commercial areas and has no cahier de charges or restrictive/ prohibitive covenants attached. The property *in lite* is located a few hundred metres from the Phoenix- Mahebourg Road that runs through the village as main road and is within walking distance from La Vigie Motorway. The property is a one-storeyed residential building within the morcellement and the Appellant intends to convert the ground floor into a Guest House. Parking spaces for 6 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.

THE PLANNING INSTRUMENTS AND THE LAW

The site being situated in Union Park the applicable outline scheme is **Planning Scheme of Grand Port/ Savanne** and the applicable Planning Policy Guidance is **PPG1** issued under the **Planning and Development Act 2004**.

THE ISSUES

(I) Commercial Activity

The proposed development is the conversion of the ground floor of a one storeyed residential 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 as 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". This being said, evidence was adduced in the course of the hearing that the Appellant holds a Business Registration Card wherein the Nature of Business has been stipulated as "Tourist Residences". 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.*"

Although "Tourist Residence" falls under the category of "Tourist Enterprise" which is an establishment or activity specified in the First Schedule of the Act as amended by Act no.14 of 2009 as does "Guest House", a distinction has been clearly made between the two types of

enterprise. Therefore, it is clear that the Appellant does not at this point hold a valid licence to operate a Guest House.

This being said the application made by the Appellant is for conversion of part of a residential development into a commercial development. The Council assessed the development as a commercial one falling in the "commercial cluster" as per the Application Form for BLUP for All Local Authorities submitted by the Respondent as an annexure to its Statement of Defence and was unchallenged by the Appellant.

"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's 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.

(II) Applicable Law/Policy for Commercial activities

The above being established, the two relevant policies to be consulted for commercial development within a residential area are **Policies CR1 and ID2 of the Grand-Port Savanne Outline Scheme**, which provide for the various types of development including commercial development that can be allowed within a residential area having regard to the inherent nature of the activity being proposed and the PPG 1.

It appears that the Council has assessed the application and rejected it for non-compliance with **Policy CR1 and ID2 of the Outline Scheme**.

Policy CR1 essentially states that small retail commercial developments which serve the local neighbourhood can be allowed within residential areas provided that the gross floor space does not exceed 60sqmetres and that the development does not negatively impact on the area in terms of traffic and pedestrian movement and on the overall amenity of the residential neighbourhood. Development should also conform to the design practices as provided for in **Policy SD5** for commercial development.

Policy ID2: Small Scale Enterprises and Home Working. In essence, Small Scale Enterprises, home working, small commercial and retail developments are allowed within residential areas so long as it doesn't disrupt the amenities of the residential areas and that the use of the proposed development remains ancillary to the principal use as residential. Much emphasis is laid on the fact that the development should NOT be disruptive to amenity of the surrounding

neighborhood. Examples cited under Policy ID2 of developments allowed are small scale enterprises such as cooking of sweets and food preparation, sewing amongst others. It is further stated "For both use of home as office and for small scale enterprises the key decision is whether the overall character of the dwelling and surrounding amenity will change as a result of the business or enterprise."

PPG1: Design Guidance for Commercial Developments. Paragraph 3.2.2 deals with *Edge-of-Centre and Out-of-Town Locations*. Certain considerations are set out to determine under what circumstances such commercial developments are allowed. One of the considerations is "*Sites surrounded by housing are unlikely to gain planning acceptance.*"

(III) THE QUESTION TO BE DETERMINED

The question that has to be determined is whether the development proposed is in line with **Policies CR1 AND ID2 of the Outline Planning Scheme** and whether it conforms to **Policy SD5** in terms of design quality and **PPG1**.

From the layout plan submitted by the Appellant and the evidence adduced at trial, the Council could not successfully challenge that the site *in lite* complies with the general provisions of the PPG1 in terms of parking requirements, set back which in fact have been observed and that the access roads within the morcellement have adequate width and good visibility.

Although the development satisfies the PPG1 for commercial development, more important is the assessment of the development in its context, the impact of the development in its surrounding environment and compatibility of land uses. Besides, 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.

(a) Morcellement VRS has not been set up with amenities to support a tourism development

A Guest House serves to accommodate lodgers whether they are tourists or locals. The Council's contention is the Morcellement VRS has not been set up with amenities to support a tourism development. The Respondent's witness stated that the Morcellement VRS is a private residential morcellement which should be developed for private residential use, not for commercial use and that it has not been planned in a way to include facilities for tourism

development. She gave examples to illustrate amenities which should be provided for tourism development such as facilities, services, leisure, entertainment. In cross-examination she conceded that a Morcellement VRS is not any different from another residential morcellement in terms of prescribed norms, standards and guidelines as approved by the Morcellement Board. The Appellant deponed to the effect that she could not understand what the Council meant by the fact that the site did not have the required amenities. The roads in the morcellement were tarred, wide, there was green space and that there was sufficient space for 6 parking slots on the premises. She produced several photographs to show that guest houses operate in residential areas such as Mahebourg, Rose Belle, Riambel, Gris Gris. Her contention is if there are Guest Houses operating in these areas, why has the Council refused her application. She also stated that her brother in law runs a travel agency and that he would provide her foreign customers. The said brother in law was not called as a witness.

We have duly considered the contention of both parties on this issue and the evidence adduced. The photographs produced by the Appellant simply show pictures of houses with a board of "Guest House" whilst other photos merely show houses but the issue for the Tribunal to appreciate is whether any local authority has granted the relevant BLUP to operate as Guest House on any of these properties. This is the determining point for the Tribunal to assess, namely whether the Appellant has been prejudiced in not being granted a BLUP whilst others having properties within residential morcellements may have been granted a BLUP to operate a Guest House.

We pause here to address the issue of VRS Morcellement as opposed to any other residential morcellement. **The Housing Policy H3 of the Outline Scheme** talks of sites for Morcellement and that general design principles of the *Residential Design Guidance* and **SD5** should be broadly followed. It sets out how VRS Morcellements end up being in remotely located sites which often means that provision of services and utilities become expensive with knock-on effects on the costs of construction and delivery to the consumer. We are of the view that although the project started out initially as VRS, over the years with the rise in property prices and the property passing from hand to hand a VRS Morcellement neither comprises of low cost housing nor is it in essence different from any other residential morcellement. It may differ only in that it has not been designed with commercial areas or residential/ commercial areas and has no cahier de charges or restrictive/ prohibitive covenants attached, as is the current trend. Otherwise, we agree with the submissions of the Appellant's counsel that in the present context the VRS Morcellement is essentially the same as any other residential morcellement.

Coming back to the application, although it is in relation to permit for a Guest House, the Appellant has consistently deponed with regards to tourist lodgers which seems to be her target area yet no evidence was adduced nor any witnesses called to depone in her favour as to how she would get tourist customers. She even stated in cross-examination that her business could provide lodging for middle class tourists who could not afford to stay in hotels. Tourist residences should normally be within tourism zone. As stated in the **National Development Strategy** the way tourism zone has been defined it depicts an imagery of attraction sites for tourists, activities for tourists such as restaurants, nightclubs, water sports and the like. It is to be noted that the location of the proposed development site is far from any tourist attraction such as the beach, the waterfront, the museum which exist in places like Mahebourg, Gris Gris, Riambel and has no facilities nearby available to serve needs for tourists in terms of shopping malls, food courts and other amenities that allows for a pleasant stay. This of course only becomes relevant if the Appellant intends to provide lodging only for tourists. On the other hand, should the Appellant also be accommodating locals, then we don't not see how the whether the Morcellement has amenities to support tourism development or not will have any bearing on her business. Since the BLUP application is one for Guest House which can also allow accommodation for locals, we are ready to give the benefit of the doubt to the Appellant. This ground therefore fails.

We now turn to the next ground of refusal.

(b) Guest house is not an activity that will serve the local neighbourhood needs

The Appellant stated that she expects to generate employment for 2 people with the proposed development and that there are other commercial developments that are coming up such as cabinet-making, a pre-primary school, a dormitory and some shops. She also stated that some of the basic provisions shopping to cater for the daily needs of the lodgers in the Guest House can be done in the shop found in the vicinity of her premises so that this also improves and benefits the business prospects of the shops in the locality. In cross-examination she stated that she wants to generate some income as her husband is the sole bread winner and there is a loan to be paid on the house and that she has already invested a lot of money in the construction. But she subsequently conceded that infact for the proposed development no investment had been done because she was awaiting the BLUP. When put to her that a Guest House cannot subsist in a residential morcellement, she stated that it is not mentioned in the title deed that a Guest House cannot operate in a VRS Morcellement. The Planner deponed to the effect that this development will not bring anything to the residents of the Morcellement and that it will not be a facility for them. She also stated that if such a development is allowed in a residential morcellement, it will in essence open the door for a multitude of application such as car wash

and workshops. In cross-examination she stated that within the VRS Morcellement *in lite* the only commercial development that has been approved by the Council so far was for general retailer having a floor area not exceeding 60 sq.metres. It also came to light that the cabinet-making workshop is not found within the Morcellement. She maintained that Policy CR1 also states that development within a residential area is allowed provided it does not disturb the residential neighbourhood. She also stated that developments for Guest Houses are controlled by the Tourism Authority.

In the present case, the BLUP applied for is in respect of a whole floor to be converted into a commercial development, that is, Guest house and the Appellant stated that she intends to live upstairs with her family. This is indicative that the premises will no longer be used mainly (the stress is ours) as a private residence as stipulated under **Policy ID2**. Furthermore, the nature of the business of Guest House involves human traffic in other words “outsiders” calling in and going out of the Appellant’s 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 a Morcellement where the inhabitants have a expectation to live in peaceful enjoyment of their property.

Policy CR 1 of the Outline Planning Scheme only allows for small retail commercial development which would serve the basic needs of the local neighborhood as already stated above. This depicts a scenario of a commercial development which would bring an added value, an asset that would cater for the real needs of the residents of the morcellement. For example, general retailer or corner shop within a residential area would provide facilities for basic grocery shopping without the need for the residents to either walk to or to travel to the village centre for the purchase of a bottle of oil or a match box for instance. Such developments are also minimized to a gross floor area of 60 sq.metres or less, the underlying reasoning seems to be that a small scale development will not create disruption with the type of human and vehicular traffic as is the case where supermarkets or hypermarkets are located. In the present case, we fail to see in what way having a Guest House will bring added value to the residents of the morcellement or cater for their needs. In the best case scenario, this development may only benefit the Appellant. The Appellant stated that she is expecting to provide employment to 2 people but this neither a promise that the 2 people will be residents of this morcellement nor does it fall, in our reasoning, within the meaning of serving the “local neighbourhoods needs”. We also believe the same reasoning applies to the contention that the lodgers and the Appellant will bring business to the local general retailer by occasionally shopping there. We believe this argument is neither here nor there. The Appellant and the lodgers may or may not shop there. It does not fall within the ambit of what would constitute service to the local neighbourhoods needs.

We are alive to the fact that the planning instruments should be applied with some flexibility, but 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 so that there is a proper structure and planning for the various types of developments within a country to avoid haphazard developments. Due diligence must be exercised when carrying out development which is likely to have an impact on the neighbourhood. We agree with the Planner of the Council that in the present case, allowing such a development would open the floodgates to other types of commercial developments which would be against the amenity of the residential nature of the area. This reason, we find, has therefore been validly raised as a ground for rejecting the application without any evidence of bad faith, as alleged in the Appellant's statement of case.

(IV) Proper Quorum

Section 117 (7) of the Local Government Act 2011 states that for an application of a Building and Land Use Permit, the Permits and Business Monitoring Committee shall within 14 days of its effective date of receipt and after approval of the Executive Committee either issue the permit or notify the applicant that his application for a permit has not been approved and state the reasons for it. Two points have been made by the Appellant here. One is whether the Permits and Business Monitoring Committee has flouted the provisions of the law by not informing the Appellant of the outcome of her application for a BLUP within that time frame. Second point made is **section 47 Local Government Act 2011** provides that the Executive committee shall comprise of a quorum of 7 persons such as the Lord Mayor, Mayor or Chairperson, Deputy Lord Mayor, Deputy Mayor or Vice-Chairperson and 5 other councilors. In the case of the Appellant, the minutes of proceedings show that only 4 persons were present to constitute the quorum when deciding on her application hence the decision taken is null as the proper quorum was not constituted to entertain the application.

In reply to the second point, we refer to the **7th Schedule under Part A, section 15 of the Local Government Act 2011** which stipulates "*No business shall be transacted at a meeting of a local authority unless there are present not less than half the number of members.*" Therefore, we find that there has been no breach in the legal requirement to constitute the proper quorum.

On the first point made, there is a legal requirement to notify the Appellant that her application has been accepted or rejected, as the case maybe, within 14 days after approval of the Executive Committee. We have gone through the statement of case as well as submissions of counsel. Nowhere has a legal argument been put forward nor has a motion been made for the Tribunal to make a finding on the consequence or effect of failure to notify within 14 days. In

the absence of such motion we cannot read more into what has been put before us. At any rate, if counsel is making a point of procedural irregularity then the way to proceed is by judicial review before another forum. Since there is nothing in the Act that stipulates that failure to comply with the statutory delay of 14 days would invalidate the decision of the Council, we find that this point lacks merit.

For all the reasons set out above, the Tribunal finds that this appeal is devoid of merit. Appeal is set aside.

Determination delivered on 17th September 2013 by

Mrs. J. RAMFUL
Acting President

Me.R.Ramdewar
Assessor

Me. V. Reddi
Assessor