

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 489/13

In the matter of :-

Mrs. Marie Annabelle Affock

Appellant

v/s

District Council of Pamplemousses

Respondent

IPO:

Mrs. G. Prosper & Ors

DETERMINATION

The present appeal is against a decision taken by the District Council of Pamplemousses (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 construction of a building to be used as a Guest House at Lot 74, Maison Blanche, Pamplemousses. The decision of the Council was communicated to the Appellant by a letter dated 2nd August 2013, which stipulated that the Council rejected the application on 2 grounds, namely:

"1. Subject site is located at about 400-500 mts away from the main road and also situated within a highly residential zone.

2. Various objections have been received against the application from the inhabitants of the locality."

The appeal was lodged before the Tribunal on the 29th August 2013. It is worthy of taking note that the delay of 21 days had expired at the time that the appeal was lodged. An averment is made in statement of case of the appellant that she was notified on or around 20 August 2013 but no evidence to prove that was provided. This could have been a good ground for

challenging the validity of this appeal. However, since the respondent and co-respondent chose not to raise the issue of delay, it is deemed that they had no objection for the appeal to proceed.

All parties were legally represented at the hearing. At the outset, counsel of the co-respondent, Me. Obeegadoo, moved to add one Mrs. Azone as a 4th co-respondent, to which there were no objections and his motion was allowed. The Appellant deponed under ~~solemn affirmation~~^{oath} and was cross-examined by Respondent's counsel. The Head Planner deponed on behalf of the Council and was also subjected to cross-examination. The co-respondents' counsel chose not to call any witness. We have duly considered all the evidence placed before us including submissions of all counsels.

CONTEXT ANALYSIS

The proposed development site is located within a residential morcellement at Maison Blanche Pamplémousses which was set up for the re-housing of former sugar factory workers of Beau Plan Sugar Estates Ltd. As per the title deed of the Appellant, i.e Doc B, there appears to be no restrictive/ prohibitive covenants on the site *in lite*. The subject site is located, as per Doc C, a few hundred metres from the Port Louis- Centre de Flacq Road that runs through the village as main road. Most of ^{the} roads within the morcellement are only 1.50 metres wide while few are 5 metres in width. The property is a bare plot of land of size 506.50 sq. metres situated at a T-junction within the morcellement.

THE PLANNING INSTRUMENTS AND THE LAW

The site being situated in Pamplémousses the applicable outline scheme is **Planning Scheme of Pamplémousses/ Riviere du Rempart** and the applicable Planning Policy Guidance is **PPG1** issued under the **Planning and Development Act 2004**.

THE ISSUES

(1) Commercial Activity

The proposed development is the construction of a one-storeyed building to be used as guest house. Evidence was adduced in cross-examination of the Appellant that she has not yet applied to the Tourism Authority for a license. The operating license 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". We pause here to comment on the stand of the Council that a guest house is meant primarily for tourists. The wording of the law is very clear and makes no such distinction. Conversely, under the same 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. We therefore do not subscribe to the views of the Council that a guest house is meant to be primarily for tourists, we believe that they are meant to shelter locals as well as tourists. Albeit, in the local context where the island is so small that one can drive around the island in one day, it would seem highly unlikely that a local would need to be sheltered in a guest house.

This being said, since the proposed activity is the provision of services against payment of a fee, it is a commercial activity. "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 and hence the proposed development is a commercial one.

(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 Pamplermousses/Riviere du Rempart Outline Scheme**, which provide for the 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.

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.

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.

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 activity that is being proposed by the appellant can gain planning acceptance in a residential area?

The starting point for any development in a country where there are planning policies in place is whether the development proposed complies with the relevant planning instruments. The Tribunal needs to assess in this case whether the proposed commercial development is acceptable in a residential morcellement and whether or not the Council was right in its decision. What we believe is more important in this case is the assessment of the development in its context, the impact of the development on 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 use that would allow the residents to enjoy a peaceful and pleasant environment and not infringe on the privacy of the residents.

(a) Subject site is located at 400-500 metres away from the main road

The appellant's version in essence is that she wishes to construct a guest house on the subject site because with regard to the location, that is where she owns a plot of land and so she wishes to put up the structure there, and with regards to the business, she wants to do her own business to generate a better income for the benefit of the family and that as per her title deed she is allowed to construct on her plot. The market that she is targeting is both locals and tourists, and according to her, her business venture is not only likely to

create employment for 5 to 6 persons but will also work due to the existence of Pamplémousses botanical gardens and the tranquility of the area. It is not denied that the only access to the morcellement is from the motorway and that the distance from the main road to the subject site is about 500 metres. The Council's stand on this issue in essence is that the subject site being nowhere near the botanical gardens in Pamplémousses, which is a tourist attraction, but rather some 500 metres far away from the motorway. This being the state of affairs, a guest house in such a locality would not lure tourists. The Council would normally grant BLUPs for guesthouses found in coastal areas which are known to attract tourists.

We have duly considered the contention of all parties on this issue and the evidence adduced. The determining point for the Tribunal to assess is whether the Appellant has been prejudiced in not being granted a BLUP simply on the fact that the subject site is 400-500 metres away from the main road?

The appellant stated that she intends to lodge both tourists and locals in the proposed guest house. As remarked earlier guest houses differ from tourist residences. A tourist residence 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 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 do not see how the question of whether the morcellement has amenities to support tourism development or whether it is 500 metres away from the main road will have any bearing on her business. At the end of the day, if she is willing to invest her money into the setting up a business in a remote locality, it is at her own risk and peril. 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 raised by the respondent therefore fails.

We now turn to the next two grounds of refusal which we will consider together as we believe them to be interrelated.

(b) Subject site situated within a highly residential zone;

(c) Various objections have been received against the application from the inhabitants of the locality

The representative of the Council described that the subject site was situated in a morcellement which is surrounded by other residential morcellements such as CHA, EDC, Morcellement VRS 1 and Morcellement VRS 2. It is the contention of counsel appearing for the appellant that the fact a guest house would offer lodging facilities that would be in line with the residential character of the locality. This was denied by the planner of the Council on account of the fact that a guest house is not considered a residential development. She stated that guest houses are meant mainly to lodge tourists who do not necessarily seek a peaceful place and that they could be seeking fun and entertainment. As for the appellant, she agreed that it is a predominantly residential area with a morcellement VRS behind the one she is living in and Cite EDC on the other side and also the roads within the morcellement are very narrow. In an attempt to illustrate that there were activities other than residential in her locality, she stated that there are is a shop in the morcellement, and at a different point she stated that activities, like zumba classes, being conducted in her locality but in the same breath she stated that there are traffic congestion problems in the afternoons which restricts access onto the road where she resides. However, when it came to questions being put to her by counsel for the co-respondent, she barely stood the test of cross-examination which resulted in her undermining her own case. She stated in cross that her notary informed her that she could construct but never stated that she could carry out a commercial development on the subject site and she agreed that the condition attached by the Ministry of Housing to the release of the plots were that "The plots will serve for the re-housing of ex-factory workers *only*". This condition was also mentioned in the title deed of the Co-respondent no.3, Mr. Lutchman, who purchased his plot directly from "La Compagnie The Beau Plan Sugar Estates Co. Ltd". She also agreed that an EIA was carried out by the Department of Environment with regard to the parceling out of the plots in favour of a residential development. She was shown the relevant documents, marked C, E and D to which she agreed and produced. She accepted during her testimony that she is seeking to put up a commercial enterprise in a locality approved by the government for residential purposes exclusively. She agreed to all the questions put to her by counsel, Me. Obeegadoo with regard to the dense traffic that her proposed business is likely to generate in such a morcellement where the roads are small and winding, noise pollution due to the commotion and air pollution and finally the potential risks to the safety of the inhabitants of the morcellement with the influx of lodgers.

In the present case, the BLUP applied for is in respect of a commercial development, that is, guest house. 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 an 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 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 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 5 to 6 people but this neither a promise that the 5 to 6 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 of counsel for the appellant that the proposed development is likely to generate work for builders and hardware shops. This argument is neither here nor there. We agree with the reasoning of the planner on this issue. She refuted the point, stating that for any type development which entails construction such work will be inevitably be created for builders and hardware shops.

It was the contention of the counsel for the appellant that the Council gave a vague reason for refusing the BLUP by stating that there were several objections from inhabitants of the locality. We do not find that any prejudice has been caused to the appellant in the preparation of her case given the clear and consistent way in which the counsel for co-respondents put questions to the appellant and the unequivocal answers given by the latter.

Quite apart from the fact that the appellant contradicted herself in cross examination thereby supporting the case for the co-respondents, we have given due consideration to the contention of the appellant that title deed of the appellant contains no restrictive covenant. We have compared Doc B and Doc E produced. Both are title deeds with respect to plots found in the same morcellement. Doc E is the title deed of co-respondent no.3. The latter is the first buyer from The Beau Plan Sugar Estates Co. Ltd. In contrast, the appellant is the second buyer as per her title deed, Doc B. It is undisputed that the morcellement permit was granted to Beau Plan Sugar Estates Co. Ltd pursuant to a governmental decision that, amongst other conditions, the plots would serve for the re-housing of ex-factory workers *only*(the stress is ours). This condition cannot in anyway be overridden or trumped by any subsequent contractual arrangement so that even if the deed of sale between the first buyer and the appellant does not expressly refer to the restriction that the land use is meant for residential purposes, the appellant cannot argue that it is tantamount to an implicit right to carry out a commercial development as the title deed makes no mention of any restrictive covenant. We therefore do not subscribe to the argument of learned counsel appearing for the appellant.

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.

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

Determination delivered on 8th December 2014 by

Mrs. J. RAMFUL

Vice President

Mrs. A. Jeewa

Assessor

Mr. P. Thandarayan

Assessor