

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 304/12

In the matter of :-

Randhir Deokeenanand Deelawon

Appellant

v/s

Municipality of Vacoas-Phoenix

Respondent

DETERMINATION

The Appellant had previously applied for a distraction of lot 337 in the morcellement of Les Plaines de L'Hermitage, Highlands. It was rejected by the Council on the ground that the surplus land will not be able to accommodate the leaching field as per the requirement of the EIA of the morcellement. The application was renewed by the Appellant for the same lot but this time with a proposal for a common leaching field. This was rejected by the Council and subsequently by the Town and Country Planning Board ("TCPB") on three grounds. The Council produced the letter emanating from the TCPB, marked Document H, with the reasons for refusal. The appeal was rejected on the grounds that the area was permeable, the river which would supply water to Bagatelle Dam might be polluted and finally, an overdevelopment of the sites would put pressure on infrastructure, environment and on the wastewater disposal system.

The Appellant subsequently made a fresh application for the same lot to be distracted into 2 portions but this time he proposed to have 2 separate leaching fields of 20 sq m attached to their respective septic tanks and which respects all the required setbacks. This was also rejected by the Council on the basis that a similar application was previously rejected and for the reasons set out in a decision given by the Town and Country Planning Board, hence the present appeal.

For ease of reference the reasons given by the Council for the refusal as set out in their letter dated 21st November 2012 is reproduced below:

“(i) a similar application was turned down by the Council in the past given that the surplus lot will not be able to accommodate a leaching field connected to a septic tank whilst observing the required setbacks.

(ii) the Town and Country Planning Board had confirmed the decision of the Council on appeal, particularly in view of the fact that:

- the area is permeable.
- the river which would supply water to Bagatelle Dam might be polluted.
- overdevelopment of the sites would put pressure on infrastructure, environment and on wastewater disposal system.”

We have duly considered all evidence before us as well as submissions of Mr. Gunesh, attorney, appearing for the appellant. The evidence of the appellant was not challenged as Miss Ramroop, planner for the respondent, chose not to cross examine him. We shall deal with each ground of refusal of the Council.

1. The surplus lot will not accommodate the leaching field and will not observe the setbacks

It is not disputed that there is no bar to the appellant’s land being subdivided as per his title deed. In support of his case, he produced a copy of the title deed of lot 337. He also gave evidence that the Council had previously allowed him to subdivide for another lot (lot 179) that he had purchased in the same morcellement. He explained that he failed to understand the Council’s reasoning because in fact for that lot (lot 179) he had proposed a common leaching field which was accepted by the respondent. The representative of the Council, whilst agreeing that the Council used to grant such BLUPs previously, stated that this was no longer the case. She readily admitted that there are lots which have been approved for 2 or more storeyed buildings but that there were 2 leaching fields and septic tanks to be provided along with them. She explained that disputes arose between co-owners, or between sellers and subsequent buyers as to who should bear the responsibility for the maintenance of the leaching fields and septic tanks. Thereafter, the Council’s policy was not to allow subdivision. Since then all applications for subdivision were turned down. She explained that the Council’s decision was motivated on the basis of whose responsibility it would be to maintain the leaching field and septic tank. Hence when the 2nd application was made to the Council, it was considered and the same reasons were advanced as previously by the Council but they also added the reasons given by the Town and Country Planning Board.

The application, as per Doc C, was previously for the excision of 222 sq.m of land from a bigger lot of 444sq.m such that there would be 2 lots of the same size and there would be a common leaching field of 20 sq.m to serve both. One of the conditions attached to the title deed is that "individual septic tanks and leaching field should be used for the disposal of domestic wastewater." A leaching field of 20 sq.m was recommended per lot. We have unfortunately not been favoured by any expert evidence by either party to enlighten us on the dynamics of a leaching field. The Council gave as reason that the leaching field connected to the septic tank cannot be accommodated whilst observing the required setbacks but failed to substantiate this reasoning. There was no evidence whatsoever adduced by the Council to demonstrate to the Tribunal the importance of a leaching field, a septic tank and the importance of their size or location, any correlation between the size of these structures to the size of the land or the any building thereon, nor the importance of respecting the setbacks. It is of utmost importance to know how a leaching field works. We therefore pause here to make an analysis of the system.

A common definition of a leaching field is a network of perforated pipes that are laid in the underground gravel-filled trenches to dissipate the effluent from contaminated liquid. In layman's terms, a leaching field is a system connected to a septic tank so that the sewage water from a building is treated to a certain extent before it is released to be absorbed by the soil. This is done to ensure that sewage is treated to minimize any risk of damage to the environment. The Planning Policy Guidance (PPG) gives some guidance on Plot Sewage Disposal including septic tank designs, leaching fields and setbacks. From the technical sheet of the PPG an indication has been given as to the factors that affect the size of an absorption pit / leaching field. These are the permeability of the soil, the location of the site and the level of the groundwater table. It also gives an illustration of a house with 5 occupants could either require a leaching field of the extent of 20 sq.m or even upto 100 sq.m, if one of the above factors is not favourable. The Technical sheet also provides for certain minimum setbacks between the various structures such as between the house and the septic tank, the house and the leaching field, the septic tank and the boundary wall, and leaching field and the boundary wall.

One of the conditions to the title deed of the appellant, which has been lifted from the EIA as borne out in evidence, is that the area of the leaching field should be 20 sq.m. It can be assumed that the Environment Impact Assessment has been made on the basis of the amount of sewage water that will be produced by a standard- sized family in a standard-sized house bearing all other factors in mind. Therefore, it stands to reason it would ~~be~~ pose an environmental risk if a leaching field designed to serve one household is "overburdened" by getting it to accommodate twice the amount of sewage than that for which it was initially meant. Therefore, we do agree that a common leaching field would not be appropriate. However, with the fresh application for BLUP, the applicant gave evidence that he proposed two separate leaching fields which would be attached to their respective septic tanks whilst

observing the required setbacks. Doc D produced contains his proposed development and plan of a separate leaching field for each proposed subdivided lot. The Council did not challenge this evidence and in fact conceded that the second application was different. We fail to see in what way this application can be assessed as a "similar" application and how the Council motivated its decision. The appellant's proposal of 2 leaching fields, in our view, meets the requirements of the Environment Impact Assessment so that for every proposed subdivided lot there would be an adequate leaching field to ensure good absorption so that the effluent is effectively dissipated. It would also thus comply with the relevant conditions of the title deed. While no evidence was given as to the required setbacks, we believe that this reason given by the Council to reject the application was wrong.

2. The area is permeable

The Council also included the other reasons given by the Town and Country Planning Board in the previous appeal for rejecting the present application. This ground was not substantiated as no evidence whatsoever was adduced on this issue. It therefore fails.

3. The river supplying water to Bagatelle Dam might be polluted

In support of his case, the appellant gave evidence disputing that the river which would supply water to Bagatelle Dam might get polluted. The previous lot he purchased which was subdivided (lot 179) is located even closer to the river so it cannot possibly pollute the river since there are 2 big morcellement (morcellement SIT which is in 3 phases and morcellement Highland Rose) that are coming up in the vicinity. They are equally close to Bagatelle Dam. When confronted by this in cross the Council's stand was that the new morcellements will not put pressure on the Bagatelle Dam as they have got their EIA licence and no subdivision will be allowed. As far as the Council is concerned, it is responsible only for the zoning. The other stakeholders would also have to look at the project. The representative could not answer if subdivision of lots in the new morcellements will affect the rivers and Bagatelle Dam nor could she say whether applications for further morcellement developments should be set aside. She stated however that the letter from TCPB is binding on the Council but disagreed that this will preclude further development in the vicinity of the river and bagatelle dam. Finally she revised her answer and stated that the Council is bound by the decision of TCPB but it is only for subdivision in this morcellement Les Plaines de L'Hermitage, not for the others.

The Council did not call any expert evidence to support this contention. As such it would appear that the Council simply copied and pasted the decision of the TCPB without considering the merits of the new application. Although the way the ground was drafted gives the impression that the TCPB considered a hypothetical situation, it is possible that it could in fact have a solid basis. On the face of it, it would appear that the first two reasons of the TCPB are related. If the soil in the area is permeable, any leakage from a septic tank or poor drainage from leaching field may likely cause the water in the surrounding area to be contaminated. Since there is a river in the vicinity it is reasonably foreseeable that such a situation may arise if there is a danger of poor drainage due to an overburdened septic tank and/or leaching field. These could all be based on the fact that the TCPB was faced with a proposal for a common leaching field to serve two lots. But as rightly pointed out by the Council, the letter emanating from the TCPB (which was filed before the Tribunal) does not mention that the application was rejected on the ground that there was a common leaching field. At any rate in the absence of expert evidence which, we deem crucial in this case, we are not willing to surmise on the issue. The waste water management would have probably been able to enlighten the Tribunal where as the Council simply seemed to give an overview on the state of affairs. While we do appreciate that the Council is not the only stakeholder involved, it is not sufficient for the respondent who is defending its case to simply state that it is only concerned with the zoning. We do not subscribe to the contention of the Council that it is only responsible for the zoning aspect. As the local authority, it is responsible not just for controlling development within its jurisdiction but also has responsibility for related matters such as protection and preservation of the locality and this also includes waste disposal matters where it meant to take an active part. At any rate the Tribunal is not satisfied that there is enough evidence before it to accept Council's contention that the river which would supply water to Bagatelle Dam might be polluted. Under this ground we are of the view that the Council failed to prove its averment.

4. Overdevelopment

The Appellant disagrees that a subdivision of his land will put pressure on the Council to improve infrastructure, the waste water management or that it will spoil the environment. Miss Ramroop explained that all morcellement applications should go through the EIA process to gain an EIA licence. In this morcellement an EIA Licence has been granted after an Environment Impact Assessment has been done. The plot size allocated had been taken into account when working out the EIA. Further subdivision will result in the existing infrastructure not being able to cater for the residents if the number of residences doubles. The point the Council seeks to be making is that allowing one subdivision might open the floodgates. The issue as we understand

it to be is more of an environmental one and sustainability of many developments within the morcellement. As a matter of common sense, a morcellement which has been planned and designed to accommodate a specific number of lots would have infrastructure and waste disposal system worked out on the basis of that information. Further subdivision if allowed for many other cases, may result in the morcellement being overcrowded, the roads being saturated with the excess traffic, the disposal system being inadequate to serve many more households. These in turn could lead to rapid degradation of the amenity of the morcellement and the environment. As stated above, the Council has responsibility for housing, general development control, waste disposal, environmental and public health and related matters. On the other hand, it is not a given that every lot on the morcellement will be subdivided so that the number of residences will double. Such speculation will lead to a wrong assessment. In the absence of evidence, we cannot speculate on the extent to which morcellement Les Plaines de L'Hermitage has already been developed. The Tribunal is unable to make an assessment on whether by allowing the present application it will lead to overdevelopment of the sites and will put pressure on the infrastructure, environment and on the waste water disposal system.

Therefore in the absence of such crucial evidence, a final conclusion cannot be reached by this Tribunal. We accordingly find that in order to meet the ends of justice the matter be remitted back to the Council to make an assessment on the last ground having regards to the requirements of EIA licence and after effective analysis of the matters that are raised. The Tribunal has on several occasions stressed on the importance for the Councils to assess applications comprehensively and in the event that applications are rejected that clear and precise motivations are therefore given.

Determination delivered on 15th May 2015 by

Mrs. J. RAMFUL
Vice Chairperson

Me. V. Reddi
Assessor

M. H. B...
Mr. S. Karuppudayan
Assessor