

IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 589/14

In the matter of:

Redmond Hart de Keating

Appellant

v/s

District Council of Riviere du Rempart

Respondent

IPO:

- 1. Mooness Nemdharry**
- 2. Ramanand Sagar Nemdharry**

Co-Respondents

DETERMINATION

The present appeal, lodged on 20th January 2014, is against the decision of the Riviere du Rempart District Council for having issued a Building and Land Use Permit to the co-respondents for the construction of a building to be used as a supermarket at Roches Noires.

The appellant has raised several grounds of appeal which are broadly set out below:

- 1) Proposed development is not in line with the principles advocated by the Outline Planning Scheme North

(a) in that it breaches the clustering and sequential approach principles

- (b) In assessing BLUP applications strategic principles should take precedence over detailed policies, this has not been done in the present case
- (c) in that it breaches Policy CR1 in terms of gross floor space and it has direct access onto the main road
- 2) The design of the proposed development in terms of parking, loading and unloading areas and manoeuvring spaces are not in line with the prescribed norms and standards as set out in the PPG for commercial development thereby rendering the parking dimensions and aisle width inappropriate to manoeuvre.
 - 3) Proposed development does not respond to the conditions of the TMRSU
 - 4) Social issues associated with the granting of the BLUP
 - 5) Non-compliance with the title deed.

We have duly considered all the evidence placed before us as well as submissions of all learned counsel. The co-respondents chose not give any oral evidence, nor did they solemnly affirm as to the veracity of their statement of defence. The contents of their statement of defence are therefore disregarded. It does not need reminding that this being a civil case, we are guided by the principle "He who avers must prove." This being said, counsel appearing for the co-respondents did, however, challenge the grounds of appeal raised by the Appellant.

In order to decide whether the Council's decision was right or wrong, we must make an assessment on whether the Council took into account all the relevant considerations in coming to the decision that the proposed development should gain planning acceptance. We will deal with the grounds raised by the Appellant under the three subheadings as submitted by his counsel.

A. STRATEGIC PRINCIPLES AND LEGAL FRAMEWORK

I. CONTEXT ANALYSIS

As a starting point, we believe an analysis of the context is important. It is borne out in evidence, which is uncontested, that the proposed development site is located along the coastal road in the outskirts of Roches Noires village, some 2 kilometres from the centre of the

village. The site is of an extent of 20 perches and has a road frontage of 26 metres. The proposed supermarket has a gross floor area of 154 m². Nine parking slots are to be provided for the development and an area measuring 4 metres by 20 metres for loading and unloading activities. The proposed development would also have separate entrance and exit points. The Appellant's property is adjacent to the proposed development site with his residential building having a 90 feet access onto the main road. The locality contains some residential developments, a church and some bungalows on the *Pas Géométriques* are located opposite to the site and the Appellant's bungalow.

It was made a live issue that the area lies within the Eastern Touristic Zone. Although this was disputed by the appellant only in submission, we believe that the evidence of the respondent's representative on this to be right. As per the Outline Planning Scheme of the North, the area is within the Eastern Touristic Zone (Roche Noire via Poste de Flacq to Trou d' Eau Douce). This being established, we need to consider the applicable policies and planning instruments.

II. THE INSTRUMENTS AND THE LAW

The site being in Roches Noires, the applicable outline scheme is **Outline Planning Scheme for Pamplermousses/ Riviere du Rempart** issued under the **Planning and Development Act 2004** and the applicable Planning Policy Guidance for this type of development is found in **PPG1**.

1. Eastern Tourism Zone

As per the Outline Scheme, the **Eastern Tourism Zone** forms part of the growth zone and of the strategic development pattern for the coastal areas. It is important to note that the reason for the creation of these tourism zones is that they are regarded as important for the economy and economic growth, where development would be encouraged in relation to tourism with the promotion of more sophisticated and attractive tourism products like type of lodging /accommodation offered, leisure/recreational facilities made available, entertainment and brand shopping amongst others. These are places with quality design which are attractive and where tourists will want to live, relax and enjoy the surroundings. There correspondingly arises a need for conservation and protection of such areas. It was argued by counsel for the respondents that since the site is found in the Eastern Touristic Zone, which is meant to be highly commercial, commercial development will follow in the near future and he drew a parallel with the situation in Trou aux Biches and Grand Baie where there were several commercial developments such as restaurants and supermarkets along the road. It should be borne in mind that the developments referred to in places such as Grand Baie may have already taken place prior to the **PPG** coming into existence in 2004 under the **Planning and Development Act 2004**. This being said, we believe that every locality has to be looked at in its

own context. The site of the co-respondents lies some 2 kms away from the village centre in an area where with the exception of a few bungalows, some being by the beach and a church, there isn't much development. A google map was produced to show an aerial view of the locus from which it can be noted that the habitation in the vicinity of the site looks rather sparse. It depicts an imagery of a place typical of *campements* site development along the coast, of the kind which has a quiet and peaceful environment. This being the context, what is of prime importance is the impact of the proposed development on the surrounding neighbourhood. Relevant assessment factors are whether the activity of a supermarket will significantly increase traffic flow and considering that development is on the outskirts with potential clients being local people and passersby, the amenity and character of the area including the presence of the church, whether the development of a supermarket located along the coast road facing *campement* sites and located in a touristic zone be the most appropriated use for the site? Would the development hamper the comprehensive development of land in the vicinity and affect land value? In planning, assessing the land use of a development site is as important for the present as it is for the future. Planning is always for the future. It is therefore very important to promote the efficient and prudent use of the land and to determine the most appropriate use of the site. The question that we fall back on is whether the Council was right in assessing that a supermarket would add value to the character of the area in the given context. The answer, in our view, is in the negative.

2. Policy CR1

We now turn to **Policy CR 1 (Commercial and Retail development)** which is a detail development policy that regulates a particular land use activity, that is, commercial developments. The basic principle is the clustering and sequential approach as outlined in the Strategic Development policies. The policy advocates a clustering of commercial developments in existing commercial centres, around town and village centres and allows small commercial developments (upto 60 m²) that serve the basic needs of the local people in a residential neighbourhood. This policy seeks to enhance and preserve the vitality of those centres and to limit the proliferation of commercial development in a dispersed manner which would dilute the centre. Under this policy, any new local shops with direct access onto highways and main roads would not normally be permitted. It is the contention of the Appellant that under the planning instruments such commercial developments should be in the village centre on the basis of this policy. Any departure from the principle thereby allowing such developments to move onto the outskirts is justified on basis of the infill of centre and sequential approach. In layman's terms, once the centre is saturated, development can be allowed to make its way towards the outskirts provided it is done one after the other geographically. Mr. Manoruth,

building inspector at the Council, stated that he carried out a site visit and made a 'constat' that the village centre was saturated. One would have thought that it would be within the competence of a planning officer rather than a building inspector to give evidence on this issue. However, since no planner was called by the Appellant and hence no evidence to the contrary was adduced, we take it that this has not been successfully contested. Another contention of the Appellant is that the proposed development being recommended on a gross floor area of 154 sq. m, it would again defeat the objectives of this policy. It will no longer be a small retail outlet which only caters for the needs of the local neighbourhood contrary to this policy which dictates that development in the outskirts should be small corner shops. Here it will be on a much larger scale for a wider population. This being said, no reason was given by the Council for not adhering to the sequential approach under this policy bearing in mind that the site is located as far as approximately 2 kms from the village centre. Similarly, no justification was given by the Council's representative in determining what circumstances the Council deemed it fit to derogate from this policy to allow a supermarket to have a direct access onto the main road. He simply stated that the PPG gives guidance and nothing more. We do not subscribe fully to this reasoning. It is called **Planning Policy Guidance**, because it is practically impossible to include all the possible design solutions considering the numerous site characteristics at various locations. For want of consistency in determining applications, the Council has to abide as a general rule to the PPG and other planning instruments. We believe that some flexibility is allowed in the application depending on the situation provided any variance from the guidance is justified by the Council. In this case this was not done in this case.

3. The PPG: Parking, visibility, curb radii, loading and unloading

The PPG sets out a number of design guidance based on good design practices to cover some key land use type which promote and explain quality design practices. It was considered that in the past there have been developments with poor design quality which were not sound and attractive and not in line with sustainable development practices. The design guidance sets out some criteria to be taken into account in various contexts and locations bearing in mind site constraints and opportunities. It was the contention of the Appellant that the letter emanating from the Road Development Authority which gave its clearance for the proposed development should be disregarded on the ground of hearsay. The Appellant also raised several grounds based on the Council's non-compliance with the conditions laid down by the TMRSU regarding the project. These relate mainly to the substandard parking slots, the undesirable parking arrangement, poor visibility due to mislocation, small curb radii, insufficient space and bad location of the loading/unloading bay. The question that we need to answer is whether the

Council was right to have ignored conditions on traffic and safety issues imposed by experts on traffic and road safety issues?

Clearance from the RDA is normally required for development that might impact on traffic and on the road infrastructure during construction phase. In the present case, since there are only a few bungalows, as a matter of common sense, it can be assumed that the traffic density of the road is rather low. It is therefore rather foreseeable that the RDA would give its clearance.

The views of the Traffic Management and Road safety Unit are required to assess the road safety when it is foreseeable that a proposed development may have significant traffic implications. It emerged in evidence that the parking arrangements were such that 9 parking slots would be required. The Appellant contended that with the slots being substandard, and the arrangement being parallel, it would create traffic problems. For parallel parking the PPG recommends a parking space of 2.5 x 6 metres and for the perpendicular parking an aisle of 6 metres is required. Parking dimensions is a technical issue, they cannot in our view be altered unless some expert evidence was ushered in on this technical aspect. The standard was after all derived to allow vehicles to manoeuvre easily to enter and exit a parking slot. We believe that as a matter of common sense, the size of parking slots have standard application to all developments though they appear under the heading of residential roads in the PPG. However, we do not believe that having parallel parking would cause much problem in this case. The Tribunal can take judicial notice of the parking arrangements in major shopping centres such a Jumbo and Trianon Shopping Centre where parallel parking arrangements exist on a much larger scale without any disruption being caused. It is the case for the Appellant that the Council failed to consider two conditions imposed by the TMRSU, one in relation to visibility splay and one for the provision of pedestrian way. The Council's representative gave evidence that in order to meet the requirement of the visibility splay as recommended by the TMRSU, it would have required part of the land of the neighbour. The 10 metre radii is normally meant to allow long vehicles to manoeuvre properly. In this case since it would be mostly cars entering the premises we believe a relaxation can be justified and a slightly smaller radius would suffice. The bigger lorries for goods delivery and refuse collection will most likely be parked on the loading/ unloading bay. We are satisfied that the risk of poor visibility is rather minimal based on the evidence adduced. On the other hand, since safety is a matter of utmost importance, we are of the view that the Council should have considered the construction of a pedestrian way in this locality as imperative. With the coastal road running in front of the subject site being a classified road, the presence of a church and the public beach in the vicinity it can be seen from the layout plan that the rise in traffic can be a serious safety hazard for pedestrians. The Council has a duty to ensure that all safety measures are taken with regard to the development proposal and that it respects the amenity and character of an area with minimum negative impact on the neighbourhood.

B. SOCIAL IMPLICATIONS

The Appellant, being an elderly person, expressed his fear of the risk of anti-social behaviour due to customers purchasing and drinking alcoholic outside or close to the premises of the proposed supermarket. He feared that in addition to the disruption being caused to him, he will be deprived of his right to a peaceful enjoyment of his property and would be prejudiced by the nuisance associated with the noise and anti-social behaviour. It was submitted by the Appellant that these situations are regulated by law enforcement agencies. While we do understand the point raised by the Appellant, and in planning, it is important to consider how it is being impacted upon in the neighbourhood, we believe these are hypothetical situations which may or may not arise. It is not a likely outcome of allowing the development.

The last ground of appeal was that as per the title deed the land is a residential one and cannot therefore be converted to commercial. We believe that the Council, unlike the parties, is not bound by the provisions of the title deed. The Council uses planning law principles to determine the merits of applications in contrast to the parties, whose rights are safeguarded under contract law.

For the reasons given above, namely the presence of a supermarket that will destroy the character and amenity of the locality, the traffic and safety of pedestrians, we allow the appeal. No order as to costs.

Determination delivered on 23rd April 2015 by

Mrs. J. RAMFUL

Vice President

Mr. P. Thandarayen

Assessor

Mr.S.Karupudayyen

Assessor