BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 556/13

In the matter of:

STEPHANE GERALD GAETAN JACQUETTE

Appellant

v.

DISTRICT COUNCIL OF BLACK RIVER

Respondent

In presence of :

MRS. LUTCHMEE DEVI KEENOO

Co-Respondent

DETERMINATION

1. The Appeal

The present appeal is against the decision of the District Council of Balck River (the Respondent) for having granted a Building and Land Use Permit (BLUP) to the Co-Respondent, Mrs. Keenoo. The BLUP was issued on the 4th November 2013 for the conversion of an existing ground floor into a 'General Retailer Shop – Foodstuffs, excluding liquor and non-foodstuffs)', with several conditions listed in the permit.

The Appellant had lodged an objection to the Respondent against this proposed activity. By way of letter dated 13th November 2013, the Appellant was informed by the Respondent that the application had been approved by the Executive Committee on the 17th October 2013. The Appellant lodged a notice of appeal on the 29th November 2013, wherein the grounds of appeal are listed as follows:

(a) The subject site lies within a residential zone meant for residential purposes only.
(b) The width of the road is too narrow for commercial purposes and it will create nuisance and other traffic hazards to other residents and to the Appellant himself.
(c) No provision has been made for parking facilities.
(d) The General Retailer shop, where it is situated represents a serious hazard and will significantly compromise the safety of road users having regard to the layout of the road.
(e) The applicant has failed to comply with the guidelines in that no publication has been made in the newspapers.

We note that grounds (b), (c) and (d) can be taken together, both relate to layout of the road, its narrowness and the hazard that the proposed activity will allegedly cause, the more so that it is averred that there is no provision for parking facility.

2. The status of the property

The Appellant explained that he had purchased from his parents part of a plot referred to as Lot 224 in Morcellement SLDC, Pointe aux Sables. The plot opposite his premises is the property of the Co-Respondent's husband and she had applied and obtained a BLUP to run a retailer shop in those premises, against which he had objected.

The Appellant laid emphasis in a letter emanating from the Ministry of Housing and Lands (Document C), which granted approval for the 'Morcellement' for residential and commercial purposes under the Voluntary Retirement Scheme. This approval was subject to strict compliance with the conditions of the EIA licence dated 7 October 2005 (Document C1) and the variation to the EIA licence approved on the 19 December 2007 (Document C2).

A perusal of these two documents shows that initially, the EIA licence had provided that the lots forming part of the Morcellement were for residential purposes. The variation contained in Document C2 relates to some specific lots (namely lots number 193 to 201) which can be developed for residential and/or commercial purposes. The Appellant added that Document C (above) gives the covering approval in respect of the EIA licence and its variation. Thus, he submitted that only lots 193 to 201 could contain commercial undertakings. This was in support of the first ground of appeal.

On this score, we agree with the submission that the Council had to consider parameters as contained in the title deed being given that the variation in the EIA licence addresses the specific lots 193 to 201 and is silent on the exact use of other

lots, including lot 116 belonging to the Co-Respondent. The title deed contains no restrictive covenant, namely the prohibition of commercial use of the owner's property.

Furthermore, even if, as suggested by the Appellant, the conditions of the EIA licence and its variation are strictly adhered to, we take a broader view in assessing the planning merits of the development: namely, the Outline Planning Scheme in its Policy CR1 which provides that: "***Shops including tabagie, small groceries and snack foods premises which serve local neighborhood needs any be located within settlement boundaries and within predominantly residential areas provided the gross floorspace does not exceed 60 square metres and such developments have due regard to traffic and pedestrian safety...***". Furthermore, the location and requirements for small shops should not exceed sixty square metres as per the *Design Guidance for Commercial Development (PPG 1).* The rationale for such policy is that the definition of 'residential use' includes such amenities that are compatible with a residential area, a corner shop being one of them. It is on record that the shop run by the Co-Respondent is not a large scale store but is a small shop that sells bread and small items that serves the local community and characterizes a corner shop. This is by all means compatible with the character of a 'residential area'. As such, we find that ground of appeal (a) cannot be supported and it fails.

3. **The Traffic hazards**

The Appellant deposed lengthily of the fact that the position of the property of the Co-Respondent is at a distance of eighteen metres from a round about located along the road. Persons who attend the general retailer shop as from early hours of the morning, namely to deliver bread and subsequently to purchase bread and other items, park their vehicles on the road, as shown on the photographs produced by him (Documents F to F18). There is no parking facility for customers as the only two parking areas provided in front of the house are occupied by the vehicles owned by the Co-Respondent (Documents H to H 14). This coupled with the fact that the poor visibility for traffic coming from the round about creates a hazard for road users (Documents J to J2).

The version of Mr. Jacquette is that delivery vans create a lot of hooting sounds as from 5.30 in the morning when they deliver bread. This is coupled with the traffic noise emanating from the clients of the retail shop that start early in the morning. The presence of this trade near his premises is a hurdle to his peaceful enjoyment of his property, which he had purchased as the lots in the 'morcellement' had been depicted by the promoters as offering a residential and quiet environment.

We have heard evidence adduced from officers of the Traffic Management and Road Safety Unit (TMRSU), the authority that has the responsibility to assess the presence of road traffic hazards. It came out that both the Road Development Authority and the TMRSU have no objection to the activity of the Co-Respondent. The officer highlighted that no study had been carried out on traffic movement. There was as such no expert analysis to support the traffic nuisance complained of. We do take into account the photographs produced by the Appellant on the status of traffic at peak hours. This is an issue that can be addressed by an ex post monitoring of conditions imposed by the Council.

There was also no evidence of road accident on the spot and that the roundabout has been technically designed so that there is safety for the road users from the roundabout towards the shop. The proximity of this roundabout being a hazard has remained hypothetical. In addition, it is on record that the Co-Respondent has taken measures to comply with condition 6 of the BLUP by providing two parking slots on the premises.

4. **Noise nuisance**

No evidence has been adduced to establish that the activity is creating noise that is above the threshold of what is acceptable when one lives in a 'morcellement'. What the Appellant complains of has not been established to be beyond the threshold of what is described as 'les inconvenients normaux du voisinage'. As stated in Copamootoo v Karrimbocus 1995 SCJ 418, evidence must be adduced to enable the Court to reach the conclusion that we have moved from 'les genes moderes du voisinage' (*moderate inconvenience*) to a severe degree of disturbance to reach the threshold of nuisance. In the present case, the version of the Appellant has not convinced us that such a threshold has been reached. We are far from being convinced that the delivery of bread to such a small corner shop and the buying of same by the inhabitants, mostly from the local neighbourhood, can cause the level of disturbance as described by the Appellant in his testimony.

On the basis of the above, we therefore find that grounds (b), (c) and (d) cannot be upheld.

5. **Failure to comply with Guidelines**

The evidence of Mr. Dunputh, the representative of the Council is to the effect that the parking provided by the Co-Respondent is more than adequate for the intensity of the activity run by the corner shop. The issue of the hazard caused by the movement of vehicles in and out of the parking space has been addressed by the representative of the TMRSU. We are of the view that such hazard would be present in all circumstances where vehicles accede to a main road from a parking space. There is a need for caution

to be exercised by all drivers at all times. Similarly, observance of road traffic regulations as regards the parking of their vehicles and the use of the road rest on drivers. Misuse of parking cannot be imputed to other parties.

On the basis of the evidence of the representative of the TMRSU and the representative of the Respondent as regards the compliance with the PPG provisions (re- parking and other criteria), we do not find that the activities of the corner shop run by the Co-Respondent are in breach of the planning guidelines. At any rate, the onus is on the Respondent to exercise ex post control on the compliance of the conditions on which the BLUP has been issued and take appropriate action in the event of any breach thereof. We find no reason to intervene in so far as the propriety of the decision of the Respondent to issue the BLUP.

For all the reasons given above, we set aside the appeal.

Delivered by:

Mrs. V. Bhadain, Chairperson

Mrs. B. Kaniah, Assessor

Mr. M. A. Busawon, Assessor

Date: 30th June 2016