



REPUBLIC OF BOTSWANA

IN THE LAND TRIBUNAL OF THE REPUBLIC OF BOTSWANA
HELD IN GABORONE

In the matter between

Case No. PA GLT 015/2015

MARGARET BAIKETSI

APPELLANT

And

GABORONE CITY COUNCIL

RESPONDENT

Coram

S. B Kaisara
K. Rutherford
G. Tobedza

APPEARANCES:

1. Margaret Baiketsi (Appellant)
2. Victor Baiketsi (Assisting the Appellant)
3. O. B. Diteko (In house Attorney of the Respondent)
4. L. Lesenyegile (Chief Physical Planner of the Respondent)

JUDGMENT

S.B. KAISARA

The Appellant is challenging the Respondent's decision to disapprove her application for change of land use from multi-family residential to self-catering apartments on Plot 34244, Block 8 in Gaborone. The basis of the decision is that the plot is accessed by a 15m as opposed to a 18m road as required by the Tourism Related Accommodation Guidelines.

BACKGROUND

In 2012, the Appellant obtained planning permission for multi-residential in Plot 34244, Gaborone. She proceeded to construct a duplex with 8 x two bedrooms apartments.

In January 2015, the Appellant applied for planning permission for change of land use from multi-family residential to self-catering apartments on the plot. At its meeting of the 6th May 2015, the Respondent disapproved the application citing the following ground:

“The plot is accessed by a 15m road contrary to the 18m road as stipulated in the Tourism Related Accommodation Guidelines”

The decision was communicated to the Appellant through a correspondence dated 16th April 2015. It is against this decision that the Appellant appealed to this court, as per her letter of 18th May 2015.

APPELLANT’S CASE

The Appellant informed the court that Respondent rejected her application for change of land use from multi-family residential to self-catering apartments on the basis that the proposed facility has to be accessed by a 18m road. The application was essentially a request for a waiver on the requirement, although this was not addressed to the Respondent as the Appellant never got the chance

to present the matter as such. The Appellant is against the disapproval of the application on the following grounds:

- There is an 18m road close to the plot in question on which the 15m access road joins. She pointed out that both the 15m and 18m roads in the area are not busy as traffic volumes are low.
- Furthermore there are similar facilities in the city that gain access from 15m access roads and were given planning permission. She cited examples being Regent Select Service Hotel and Tony Apartments as accessed through a 15m road and 12m road respectively.
- The guidelines are not cast in stone and a waiver can be granted in the matter at hand.
- The Tourism Department has indicated that the facility is properly located and can promote tourism; it will give impetus to the economy of the country and create jobs.
- In line with the Council requirements, neighbours were consulted and they did not object to the proposal.
- The self-catering operation has a relationship with multi residential. The self-catering would be about 60% occupation and it has less traffic generation compared to multi residential. If 8 families set in, it will have less tranquillity as opposed to the self-catering.
- The proposal would not increase traffic in the area. By its nature a self-catering service does not have facilities such as bars and swimming pools which generate a lot of traffic.

- The Appellant has strategies in place to mitigate the traffic problem e.g. a security officer will be engaged to open the gate for cars coming in and going out. A CCTV security system will be used and will enhance the security of occupants as well as the security of the neighbourhood.

The Appellant prayed that the request for waiver be positively considered.

RESPONDENT'S CASE

The Respondent's representative, Mr Lesenyegile told the court that the Appellant applied for change of land use from multi-family residential to self-catering apartments. The application was treated as a waiver request although that is not captured in the minutes. The Council has a road hierarchy requirement which provides for active commercial facilities to be along higher order roads. The proposed land use requires the plot to be accessed through a tertiary road of 18m or above whilst access for a multi-residential plot is 15m. The application was therefore disapproved since the plot gains access from a 15m road.

Mr Lesenyegile stated that the Government through Tourism Related Accommodation Guidelines agreed to accommodate other land uses within the residential land use. The guidelines provide for accommodation of developments which do not threaten the peace, tranquillity and residential character of a neighbourhood. At a lower level, a domestic guest house can be allowed which has similar characteristics as the residential land use; and can be accessed

from a 15m road. Some functions of the Council include ensuring safety to residents, controlling use of land and also ensuring there is good development in the city. The representative submitted that the Council has a duty to protect those in the neighbourhood who acquired plots as residential. He also observed that the multi-residential use maintains the character of the area but self-catering transforms it to commercial.

Mr Lesenyegile stated that granting the waiver would introduce a commercial activity into a neighbourhood with a residential character. That would create a bad precedence and render the guidelines inoperative. He stated that there are no convincing reasons to change the character of the area. He said that the Tourism Department assesses the facility for licensing purposes after it has been granted planning permission. They look at the facility's internal structure and finishes whilst the Council considers the whole character of the neighbourhood.

On why Tony's Apartments in Extension 12 is licensed as such, he stated that it is a commercial facility accessed from a 12m road instead of 18m road but it is located on an activity node where there are existing commercial facilities. Further that it would be bad to convert a residential plot to something else that does not conform to the character of the neighbourhood.

Finally, the Council's representative prayed that the application be dismissed so that the property is maintained as multi residential.

ISSUE FOR DETERMINATION

The Land Tribunal is to determine whether the decision taken by the Respondent in disapproving the Appellant's application on the basis of an access road requirement is valid.

COURT'S FINDINGS AND DETERMINATIONS

The Respondent's decision is based on the ground that the plot in question is accessed by a 15m road instead of 18m road. The court will examine the ground to test its validity.

It is common cause that Gaborone is a declared Planning Area in terms of the Town and Country Planning Act which means that the provisions of the Act apply in the area. In accordance with the Act, all the developments in the city are to be controlled in terms of the provisions of the Act and its related instruments such as the Development plan, Development Control Code and Urban Development Standards.

In terms of revised Gaborone Development Plan, the plot in question is in an area zoned residential. The neighbourhood is predominantly residential in character and defined by a tranquil set up with very low traffic. From a planning perspective, within a city roads have a hierarchy which is commensurate with the land uses as follows. At the least intense end there is a 15m road which is an access road for residential plots. Next in the hierarchy there is an 18m Tertiary collector road onto which the 15m roads feed. For

industrial zone, the Tertiary collector road is 20m. The collector roads feed into the 30m Secondary roads which in turn feed into 45m Primary roads (local) and lastly there is 60m Primary road (national). Refer to the ***Urban Development Standards (1992)***.

The purpose of the road hierarchy is to achieve a rational and systematically connected road network which yields a functional system of easy movement of traffic in all the arteries of the traffic circulation system of the city. By their nature and true to the plan, residential plots are accessed by 15m roads while more active uses such as commercial and industrial plots are accessed by tertiary or higher order roads.

The ***Development Control Code of 2013 clause 2.5.10*** refers all the requirements for tourism related facilities to the Tourism Related Accommodation Guidelines where standards of tourism related accommodation are provided. In terms of the guidelines, self-catering apartments are to be accessed through a 18m tertiary road.

In the matter at hand, the Appellant is aware of the requirement and contends that she is applying for a waiver on the requirement. The Respondent insists that this requirement cannot be waived as this will introduce a commercial activity in a residential area which will compromise the safety, tranquillity and the residential character of the area. The court finds that the introduction of the

self-catering apartments will have an impact in the traffic situation and deteriorate the peaceful character of the area. As opposed to residential properties, self-catering attract increased movement of people and vehicles into and out of the plot. Refer to the Land Tribunal case of ***Intermix Holdings (Pty) Ltd and Gaborone City Council Case No PA GLT 003/2015***).

It is noted that there are instances where waivers can be granted. The granting of the waiver however should not compromise other requirements or expose neighbouring residential plot users to the detrimental effects of increased traffic, noise and compromised safety. The court's view is that the waiver sought would lead to the residential character of the neighbourhood being negatively impacted and set a bad precedent. All in all from a planning perspective the importance of protecting and preserving the residential character of the area far outweighs the rationale of introducing commercial activities in the area with their embedded negative impacts.

The Appellant's argument that there are other similar entities accessed by a 15m road in the city is not helpful to this appeal as each application has to be assessed on its own merits. Further, assuming the planning permissions granted to the mentioned entities were erroneously done, the court would not prefer to repeat the mistake. Refer to the case of ***Intermix*** (supra). Regarding Tony's Apartments, the court observes that the fact that the facility is

located in a commercial node where most neighbouring uses are commercial reasonably justifies the granting of a waiver.

In light of the aforementioned, the court finds that the Respondent's decision to disapprove the Appellant's application is valid. Accordingly, the court orders as follows:

1. The appeal is **DISMISSED**;
2. There is no order as to costs.

The parties are hereby informed of their right to appeal to the High Court within eight (8) weeks of delivery of this judgment if any feels aggrieved.

Delivered in open Court this **4th** day of **August 2015** at Gaborone.

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S.B KAISARA
President of Land Tribunal