

ELAT 128/12

In the matter of :-

Abdool Motallib Beelut

Appellant

v/s

The Municipal Council of Quatre Bornes

Respondent

IPO

1. R. M. Teeroovengadum
2. J.P Michael Pierney
3. Ahmed Luttoo
4. Payendee Mooken
5. Moonsamy Mooken
6. Armand Noel
7. Roshan Hurlall

Co-respondents

DETERMINATION

1. The present appeal is against a decision taken by the Council for having refused the application for a Building and Land Use Permit ["BLUP"] to the Appellant for the conversion of an existing building into a Multipurpose Hall including wedding hall at 109, Victoria Avenue, Quatre Bornes. The Appellant was informed of the decision of the Council by way of a letter dated 28.02.12. The reasons for refusal set out in the letter are as follows:

- “1. There is no buffer zone between the residential development and the subject site.*
- 2. The proposed development is viewed to create nuisance and disturbance to the inhabitants of the residential area adjoining the site.*
- 3. Objections have been received from immediate neighbours.”*

2. Both the Appellant and the Respondent were legally represented. The co-respondents elected to have Mr. Roshan Hurlall, one of the co-respondents to represent them at the hearing. The Appellant, was represented by his proxy, Mr. Hassam Shamtally and 2 witnesses deponed in support of the Appellant's case: Mr. V. Gopauloo, as the noise expert and Mr. J. Foondun, as the planner. The Respondent was represented by its Senior Building Inspector, Mr. J. Veder and Mr. H. Bhugwandass, Senior Health Engineering officer from the Ministry was also called upon by the Respondent to depone in order to enlighten the Tribunal regarding the issue of noise nuisance following an order by the Tribunal to conduct a noise survey. By way of background to this case, this matter was lodged before the Town and Country Planning Board and was subsequently transferred to this Tribunal. Following the stepping down of a member, the matter had to be started before a newly constituted division of the Tribunal. In the course of the hearing, the Counsel and instructing attorney changed which also led to a change in the conduct of the case with new documents and reports being filed. There were finally 7 objectors, some having dropped out of the case. The Tribunal, upon motion of the Appellant went for a site visit on the locus on 13th September 2017.

3. There were initially 13 grounds of appeal but in the course of proceedings of the 30th January 2015, it was agreed by the parties that the only live issue before the Tribunal would be the issue of noise nuisance. Mr. Hamid Jagoo, Counsel for the Appellant, made a statement to that effect which is found at page 2 of the additional brief and that for those purposes a noise expert and a planner were to testify on behalf of the Appellant. An amended statement of case was filed by the Appellant's attorney on 10th March 2015 wherein it is averred at paragraph 4 that the appeal is against the second and third grounds of refusal (as stipulated in the refusal letter dated 28.02.12) regarding noise, nuisance and disturbance to the inhabitants of the residential area adjoining the site. At paragraph 10 of the amended statement of case, it is averred *"The Appellant avers that the Respondent was wrong and unreasonable in rejecting the application of the Appellant on the grounds of noise and nuisance, when the objectors have failed to adduce admissible expert evidenced on Noise/Nuisance to substantiate their objections."*

4. We will therefore deal with the ground of appeal alongside the grounds of refusal since they are all connected. The only issue is whether the proposed development is likely to have any impact on the inhabitants of the neighbourhood as per the second ground of refusal contained in the refusal letter sent by the Council and hence whether the objections received are justified. We have duly considered the evidence before us as well as submissions of both counsel but we shall disregard all evidence adduced on the issues which are no longer live before us.

I. **CONTEXT ANALYSIS**

5. The uncontested evidence is that the subject site lies within the settlement boundary in a residential locality, along a classified road, Victoria Avenue, Quatre Bornes. Evidence was adduced to the effect that the area generally is a mixed-use one and the zoning was an industrial one as per the Outline Planning Scheme of Quatre Bornes ["OPS"] of 2015. This is substantiated by the evidence on record such as the documents produced by the appellant marked Docs L at page 3, and Docs T3 which are areal maps and map as per the OPS respectively. Mr. Foondun testified that the region is a transitional zone from residential to a commercial one. Mr. Veder explained it was now an industrial zone as designated under the OPS of 2015 although it is within the settlement boundary. The subject site as well as the building thereon can be described as being trapezium shaped bordered by two parallel lanes, on one side by a private one and on the other side by a public one and having its frontage on a main road with high traffic density, Victoria Avenue, classified B-road, as can be gathered from the evidence of Mr. Veder from the Council and at page 10 (b) of the planning report of Mr. Foondun, marked Doc L. There is no setback between the boundary wall of the subject property and each of the parallel lanes, as can be noted from photographs, plates 1 and 2 of Doc L and the site visit. There is a setback of more than 5 metres between the building *in lite* and Victoria Avenue. The rear boundary of the building adjoins a residential property, as was noted in the course of the site visit and in Doc L. It can be gleaned from the same document, Avenue Sir Celicourt Antelme, another main road, also joins Victoria Avenue barely some ten metres away from the subject

site where the building as well as the plot have an oblique frontage. There are residential buildings found in the immediate vicinity of the subject site within a radius of 50 metres from the site.

II. THE PLANNING INSTRUMENTS AND THE LAW

6. The site being in Quatre Bornes, the applicable outline scheme is the **Outline Planning Scheme for Quatre Bornes ['OPS']** issued under the **Planning and Development Act 2004** and **The Planning Policy Guidance**. The **Environmental Guideline on Multi-purpose Hall including wedding hall [No.7]** issued by the Ministry of Environment will also be referred to.

III. THE ISSUES

7. As per the grounds of refusal by the Council
 - *"The proposed development is viewed to create nuisance and disturbance to the inhabitants of the residential area adjoining the site.*
 - *Objections have been received from immediate neighbours."*

The contention of the Appellant is that

- *"the Respondent was wrong and unreasonable in rejecting the application of the Appellant on the grounds of noise and nuisance, when the objectors have failed to adduce admissible expert evidenced on Noise/Nuisance to substantiate their objections."*
8. The **Environmental Guideline No.7**, issued by the Ministry of Environment, which regulates Multi-purpose Hall recommends that as far as the location of such developments are concerned "the multipurpose hall shall be away from residential areas". This can be gathered from the report of Mr. Foondun at Page 10 (b) of Doc L which shows a list of resident objectors and the list of non-resident objectors. This in itself is evidence of the fact that the immediate surrounding of the subject site is highly

residential with at least 15 families living contiguous to the site within a 50 metres radius. This not only corroborates the evidence of Mr. Bhugwandass but is also substantiated by the photographs marked Doc V1, V2 and V3 put in by Mr. Veder and was noted in the course of the site visit. Mr. Bhugwandass from the Ministry gave evidence that the vicinity of the subject site is highly residential and that the proposed activity will create a nuisance for the inhabitants of the local neighbourhood. Mr. Hurlall's house is on Victoria Avenue, facing the subject site. The houses of the other objectors are to be found on the opposite side of the rather narrow public lane found on one side of the subject property, as per page 10 (b) of Doc L. There is also sufficient evidence on record to show that the Council has received a number of objections with most of them coming from within the 50 metre radius from the proposed development site, although a few of them dropped their objections. We have addressed our mind to the contention of the Appellant that the area contains some commercial developments such as a furniture workshop and a petrol station. We are therefore ready to accept that even though broadly speaking it is a mixed-use area, as mentioned earlier, the vicinity of the subject site is highly residential. From the testimony of the co-respondent, these residents have been living there since a long time ago and this was not contested. Therefore, as per the Environmental Guideline no.7, such areas are not suitable in the first place to accommodate a multipurpose hall and we believe that the activities to be carried out therein will be incompatible with the residential character of that cluster of habitation surrounding the subject site.

9. It is the contention of the co-respondent that a multipurpose hall will create noise pollution and that having such a development in that area, which is highly residential, will result in a marked rise in traffic and involve activities unusual in a residential area therefore create dust, fumes or pollution and unpleasant odours. The Appellant's representative, Mr. Shamtally, stated that there would be employees and Police officers to guide people coming to the hall so that they park their cars in the parking area and not on the road. It cannot be denied that there will be a marked rise in traffic, be it human or vehicular, with the activities that will be carried out therein. As a consequence, noise associated with vehicles and people and music, waste water management, housekeeping, catering, disposal of wastes are all factors to be

considered as they would contribute to added nuisance if not managed properly as highlighted in the **Environmental Guideline**. Even if measures to mitigate are to be taken by the Appellant, the subject site is rather small compared to areas usually allocated for multipurpose halls. As a matter of common sense, the risk of escape of effluents, smell and noise is therefore very likely due to the small setback.

10. The parking requirements for Wedding Halls, as per the PPG 1 under the *General Guidelines in the Design Guidance-Commercial Development* is 1 car parking space per 4 sq.m public floor area for wedding halls. This issue was not disputed by the Respondent and we therefore do not deem it necessary to go into any analysis of the matter but to accept that the appellant has made provision for the required parking space.

11. We do not believe the fact that some of the objectors are no longer objecting makes the development proposal acceptable within the area nor that it strengthens the case of the appellant in anyway. In an area having a concentration of residential development, what should prevail is its character and amenity as one needs to be able to have a peaceful enjoyment of one's property at any given point. This is also the spirit of **Policy ID4 of the OPS on Bad Neighbour Development**, that in all cases of bad neighbour development applications should ensure that *"the development would not adversely impact other employment uses nor prejudice the future expansion of growth zones, or existing development especially sensitive uses such as housing, schools and health facilities and tourism sites and complexes"* [stress is ours]. The rule is to preserve the residential amenity of an area and exceptionally some types of developments may be allowed which will not cause disruption. It therefore stands to reason that simply on the basis that some people have no objections to a "bad neighbour development" being within a residential area, does not render the proposed development conducive to such an environment. For any type of development to be allowed in a residential area, it has to be on small scale and serve the needs of the locality and it has to blend with the character and amenity of the area.

12. It is the contention of the appellant's expert that the building will be made soundproof so that this would mitigate any escape of noise when the hall is occupied. This is in fact one of the conditions proposed by the Appellant is to have all the openings of the building which face main Victoria Avenue closed with concrete with a view to render it more sound proof. Mr. Bhugwandass who also conducted a noise survey produced his report, Doc E, and stated that as per his observation, even if the building is rendered soundproof noise will still be a nuisance to those living in the vicinity as he believed that such noise cannot be contained within the building. It was put to him in cross-examination that the measures and materials suggested by Mr. Gopauloo for soundproofing would reduce the noise. He agreed to the fact that they would be noise absorbent but maintained that there would still be nuisance since there would be activities outside the building when there are people.
13. Having considered the evidence, even if the appellant were to incorporate such changes, we do not believe that such a measure will reduce the associated noise pollution. The flow of human traffic in and out of the hall cannot be controlled. People attending functions would most likely be not only talking, but also laughing, clapping, dancing, singing, moving in and out of the hall. It is expected there will be loud music, generators and people gathered around the premises of the hall to be walking and shouting. People attending gatherings do not normally stay cooped up in the hall for hours. Mr. Shamtally, was cross-examined on the state of the building and he conceded that the building as it is presently, is not conducive to be used as multipurpose hall. In fact, both Mr. Foondun and Mr. Gopauloo agreed that the building as it was at the time of the application and at the time hearing was not suitable nor adapted to host the proposed activity. We are alive to the fact that such buildings since they have to accommodate gatherings amenities such as kitchen, store, changing rooms, lobby, stage, dancing floor and toilets will have to be provided. Although these will be incorporated within the existing structure of the building, the space left for seating would be only some 70 sq.metres with a seating capacity of a maximum of 125 guests, as per the deposition of Mr. Foondun, planner, the rest being space for the toilets, the kitchen and the stage as per annex 5 of Doc L. This will automatically entail people wanting to move out of such a restricted space.

14. From the photographs produced it can be seen that one side of the building already has high walls with just a few ventilators. Having a hall with two sides of it having walls from bottom all the way up to the ceiling will also not be conducive to a small building where people will be packed in for a celebration. In our view, given the environment where the development is being proposed especially its proximity to habitation, it would be unrealistic to adopt such measures and call it a soundproof hall or that such measures will in reality be mitigative. It has been proposed by the Appellant to have soundproof doors and that the big bay windows in the front of the building, the building having been originally designed to be a showroom, will be filled up with bricks, will further create an enclosed space where people therein, including those with small kids, would want to move out causing gathering outside the hall.
15. The traffic implications related to vehicular movement as well as accessibility issues and the honking of vehicles in and out of the parking area during functions are factors that have to be taken into account. The development needs to be looked at holistically. The noise pollution that will be generated as a direct consequence of having a noise generating activity within a residential area has to be assessed. In our assessment, even with the sound proof doors, nuisance especially in terms of noise will imperatively affect the surrounding environment. A multipurpose hall will not be a conducive development within a residential area and the disruption that will be caused to the people living in the vicinity will deprive them of their right to a peaceful enjoyment of their property. They are likely to be prejudiced by the nuisance associated with the noise and traffic. In planning, it is important to consider how it is being impacted upon in the neighbourhood. It will also raise serious safety issues.
16. The appellant's case is that the Council had previously granted a conditional BLUP to the Appellant provided clearances were obtained from the TMRSU and RDA, which were not obtained and consequently the BLUP lapsed. We believe that there could have been several reasons why the BLUP was granted which may not necessarily mean that it was a good decision by the Council as even that decision could have been contested. This in itself cannot be a ground in favour of the Appellant's present

application. In any event the application before us must be assessed on its own planning merits without being influenced by any previous decision of the Council.

17. The contention of the Appellant is that the objectors have failed to adduce expert evidenced on noise and nuisance to substantiate their objections. Infact the Appellant's counsel sought to call as noise expert, Mr. Vishwamber Gopauloo who put in a report of the noise survey he carried out around the subject site to show that the noise that will be generated will not constitute a nuisance to the neighbourhood. Upon motion of Appellant's counsel, the Tribunal allowed this witness to put in a new report in the hope that a better report would enlighten the Tribunal and help us in the adjudication of the Appellant's case. The previous report and its annexes were expunged from the record.

18. Having thoroughly considered the testimony of this witness, we have found it to be riddled with inconsistencies and contradictions and as a consequence, we have decided it will be unsafe to rely on such evidence and therefore we will reject his evidence as a whole. At the outset, we noted that the report of Mr V. Gopauloo was not signed before it was produced to the Tribunal. Since there was no direction and cardinal points on the map that the witness produced, this led to some confusion as to how the map should be read. Both counsel for the respondent and the representative of the co-respondents objected to the production of any evidence from Mr. Gopauloo as regards a noise survey he had allegedly conducted at two gathering places namely Lacaz at Cascavelle and Le Suffren in order to have a comparative review being given that the proposed multipurpose hall is going to hold similar gatherings, on the ground that none of them were present at the time that survey was conducted. This part of his evidence had to be expunged. It also came out during cross examination that the reading taken as per the personal notes of Mr. Gopauloo, Doc K, did not match with the readings in his report. The witness was confused as to whether his notes consist-of instant reading or cumulative reading.

19. The witness stated that the area surrounding the appellant's site is a mixed-use area and it is situated on a very busy road, that is, Avenue Victoria which is dominated by

traffic. He stated that he carried out a survey at two intervals on the 2nd of February 2016 and there was no difference in traffic noise in the afternoon during which the first survey was conducted and the evening during which the second noise survey was conducted. He explained that he proceeded with the survey by recording the level of noise at different strategic points from 14 00 hrs till 15 24 hours and subsequently from 20 00 hours till 21 47 hours. He added that the recording varies from 5 to 15 minutes and whenever the sound level was quite low they took the recording for only 5 minutes, following which the Tribunal questioned the witness as to why he had not in the interest of justice kept the same time frame at the strategic points for the noise survey. He then changed his version and stated that almost all the recordings are for a period of 5 minutes and added incoherently that the 15 minutes recording was for his own benefit. He was unclear about what he meant by his own benefit/use despite having been asked for clarification on this point by the bench. He was further questioned by the Tribunal to distinguish at which points he recorded the noise for 15 minutes and at which point he took a 5-minute recording. At this point he further contradicted himself by stating that he made a 5-minute recording at all the strategic points he earmarked.

20. Another major inconsistency cropped up in the testimony of Mr. Gopauloo as regards the noise level in terms of decibels with and without a source of noise. Mr. Gopauloo stated he had made use of a musical instrument with the capacity of 22,000 watts. He based himself on the standards of noise in Government Notice 113 of 2003. In reply to a question from the bench he stated that the highest decibel reading when no music was being played was at points A and K with 71.6 and 71.9 decibels, respectively. Surprisingly however, the witness stated that when there was no music at point A the sound level was higher, that is, 79.1 decibels and whenever music was being played at the same point the level of noise was only 70.9 decibels during the day. The scenario was similar even during the evening with a lower noise level when music was being played as opposed to a higher one when no music was being played.

21. The Tribunal, in vain, sought clarification from the witness as to the fact that if without the music, there is a particular amount of noise level being emitted, now with the

music on, the noise level can either be slightly higher or it remains the same with the music getting lost in the traffic noise. Infact, the Counsel appearing for the Respondent also put it to the witness as to how can the level of noise decrease when music was being played. The witness tried to justify that such can certainly be the case. However, we are not convinced at all that the level of noise can be lower as the witness is trying to convey to the Tribunal. An added source of noise may either raise the noise level or it may merge with the ambient noise but it cannot lower it.

22. Mr. Gopauloo produced as addendum to his report which is a plan with points. The addendum was meant to clarify matters. It was noted that some of the points on the addendum did not match the points on his report thus creating more confusion. When the witness was questioned on these inconsistencies, he failed to give a plausible explanation other than the fact that he is not good at manipulating computers which caused the points to shift.

23. He stated that when he was conducting the survey during the day only two officers of the Municipality of Quatre Bornes were present. In his examination in chief he stated that Mr. Bhugwandass was on the locus at around 8.15pm and stayed there for only around 10 minutes and that the latter came with a sound level meter and took measurements at 2 points, one being inside the hall and the other being outside the hall with music on. However, when The Tribunal questioned him on another issue and brought it to his attention that the level of noise recorded by him at 21 00 hours was above the permissible level, the witness confusingly replied that he did not take any measurement after 21 00 hours, to which he was then confronted with the fact that he had recordings in his report at 21 00 hours. He then replied that Mr. Bhugwandass said that the noise level recorded was above permissible level at 2100 hours. He, thus, further contradicted himself since he had earlier stated that Mr. Bhugwandass was present at 8.15 pm and for only 10 minutes.

24. Mr. Servansing, counsel for the Respondent, put it to the witness that in view of his qualifications he can at best be an expert in noise within the workplace since there is no documentary evidence to suggest that either he or his colleague, Mr. Ravinash

Gopauloo whose help was solicited in the preparation of the report, has the required expertise to assess environmental noise. The witness at first agreed with counsel but later changed his views. When put to him that the Tribunal is having difficulty in understanding the report which was produced by the witness, the latter agreed that the report was presented in a very confusing manner when it was so put to him. Moreover, Mr. Servansing put it to the witness that as per the addendum produced by the latter, nearly all the readings exceed the prescribed limit. The witness agreed to this statement reluctantly and stated that such excess of noise is caused by external factors such as barking of dogs. At a subsequent sitting, Mr. Gopauloo attempted to justify the discrepancies in his readings by making reference to an extract of the book of Christopher Penn. Such evidence is disregarded because as rightly brought out in the cross-examination of the witness by Counsel for the respondent, the witness was unable to state anything as regards the qualification and competence of the said author and as such it would be unsafe for the Tribunal to rely on an incomplete extract.

25. A multipurpose hall by its very nature is a source of noise pollution in terms of the noise associated with music played, human traffic, human interaction, vehicular traffic, disturbance being caused due to long hours of operation as well as late hours, sometimes both. A multipurpose hall can accommodate various activities such as wedding ceremonies, receptions, social gatherings, religious activities and workshops amongst others. These are recognized in the **Environmental Guideline No.7**. Having a multipurpose hall in an area surrounded by residences would be, in our view, a serious misfit in siting being given that the associated noise and disturbances would have an adverse impact on the character, environment and traffic on the surrounding neighbourhood if allowed. For such types of development, the design, construction and maintenance of buildings have a tremendous impact. The selection of the site for a multipurpose hall is not appropriate in the present case on the basis of the associated activities that will be done such as gatherings, catering, the size of the hall, number of persons to be accommodated and the existing development context of the site.

26. For all the reasons set out above, we find that the appeal is devoid of merit and is accordingly set aside. No order as to costs.

Determination delivered on 17th August 2020 by

Mrs. J. RAMFUL

Me. A. JEEWA

Mr. M. BUSAWON

Vice Chairperson

Member

Member