

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1731/18

In the matter of :-

Abdool Tariq Hussain Moos

Appellant

v/s

Municipal Council of Vacoas-Phoenix

Respondent

IPO

Indiren Govindanair

Co-respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having granted a Building and Land Use Permit ["BLUP"] to the co-respondent for the conversion of part of the ground floor of a building to be used for electrical repair of motor vehicles (employing less than 10 persons) at Avenue Des Vergues, Hollyrood, Vacoas. The appellant was informed of the decision of the Council by way of a letter dated 12th November 2018, when infact the decision was taken on 31 October 2018. The letter states at the third paragraph, "*The Council has found that the proposed development complies with the requirements of the Council*" and it sets out some of the conditions imposed upon the applicant to "*mitigate the apprehension expressed by*" the applicant.

2. The Appellant, legally unrepresented, deponed under solemn affirmation and was cross-examined by the Respondent's Counsel and the representative of the Council, Mrs Juwaheer, Planning and Development Inspector, also deponed and was cross examined by the Appellant. The Appellant called his wife as supporting witness. We have duly considered the evidence placed before us.

I. **APPEAL OUTSIDE TIME FRAME**

3. It is worth noting that although the letter of refusal is dated 12th November 2018, the Appellant only lodged his appeal at the registry of the Tribunal on the 5th December 2018. This suggests that the appeal may have been lodged outside the delay of 21 days prescribed under s. 117(14) of the Local Government Act 2011 as amended. However, in view of the fact that this matter was not argued, it will be difficult for the Tribunal to come to a conclusion on the date of notification / date of receipt of the letter, for lack of evidence.

II. **APPELLANT'S CASE**

4. The Appellant has lodged a notice of appeal with two main grounds of appeal and also annexing 11 Grounds of Appeal to it, before the Tribunal with two main grounds of appeal as follows:

*“ -It is a purely residential area;
-It is causing lots of nuisance, disturbance, noise pollution as well as various environmental issues to the residents; ”*

The 11 Grounds of Appeal are as follows

- “ 1. To start with, the invitation letter was very short notice and I believe one week would have been reasonable for necessary preparation.*

2. *The area where the permit is being granted is purely a residential area and a garage will inevitably cause lots of nuisances, disturbances, noise pollutions as well as various environments matters to my family and neighborhood as all houses are very close to each other. Even for testing a car horn will cause nuisances to the habitants.*
3. *To be noted that the Applicants has been since the last five years operating as a panel beater illegally. This was causing lots of inconveniences and I was forced had to make several complaints to the MCVP. My last complaint dates back to 30 July 2018.*
4. *No parking facilities are available and the proposed workshop activities is found along a no through road, all vehicles which have got assess to the compound of the Applicant, have to drive backward and reverse in front of my house for exit. This activity stars early in the morning to evening and causing lots of disturbance when reversing in front of my house, this affects considerably my kids who are of 3 years old and 14 months age.*
5. *The proposed conversion of part of the ground floor for electrical repairs of motor vehicles is the porch (terrace) of the Applicant's house, which is not more than 12 Meter Square.*
6. *No letters were sent to the immediate neighbors and no notice board was displaced as per required by laws and part of the permit process.*
7. *Not a single person in the neighborhood was aware of the application and after questioning, they are of the same views as me and they strongly objects to this decision made by the MCVP and they would have gladly attended the hearing to give reasons for their objections.*

8. *I am of the opinion that the Applicant is misleading the MCVP as he is a panel beater while the application for permit was made as electrical repairs.*
9. *Another negligence from the MCVP side, is that the address where the permit was granted is misleading and possibly considered as void. The address where the terrace/workshop is held is known as 'Begue Road, Hollyood No. 1 Vacoas' while the permit makes reference to a completely different address which is 'Avenue Deverge, Hollyood Vacoas'. To be noted that there is more than 1 kilometer between these 2 addresses. The MCVP has not even bothered to check the correct address before issuing the permit.*
10. *I believe that there has been influenced by the personnel of the MCVP and have made a Declaration at ICAC in that respect.*
11. *On the 1st November, I also made a Precautionary Mesures (PM) at the Vacoas Police Station against the malpractice of the MCVP concerning the delivery of the invitation letter received after the hearing. ”*
5. We believe that apart from the Ground of Appeal no.1, which relates to the Hearing at the Council, Ground of Appeal no.2 relates to the issue of residential area as set out in the Notice of Appeal and Grounds of Appeal nos. 3,4 and 5 relate to the nuisance issue which can be addressed together. Grounds of Appeal nos. 6 and 7 relate to neighbours who are not parties to the case and are therefore disregarded by the Tribunal. Grounds of Appeal nos. 8, 10 and 11 do not amount to grounds of appeal and are disregarded by the Tribunal for being simple averments which do not seek any intervention by the Tribunal. Ground of Appeal no.9 has been canvassed and it has transpired from the Council that there was some confusion regarding the appellation of the street but that the Council had no difficulty in identifying the subject site *in lite* and no prejudice has been caused to any party since there was no dispute regarding the locus before us.

6. The Appellant's case was essentially based on the fact that he resides in a house with his wife and two children of very young age on a no through road which culminates in the subject site, which is where the co-respondent's residential property which he is also currently operating as a workshop. He claims that the co-respondent had been operating a panel beating workshop illegally for five years and that recently the latter has obtained a BLUP from the Council for the operation of an electrical repair workshop for motor vehicles but that in fact the workshop is not being used for electrical repairs only, but also as a panel beating workshop for motor vehicles. In any event, he objects to the proposed development on account of the fact that it is causing him and his family, including his children, nuisance in their daily lives.

7. The Appellant has given several examples on the type of nuisance he has been and is suffering. He stated that his house was very close to that of the co-respondent and in fact this was confirmed by the representative of the Respondent that the Appellant's house is within 25 metres from the co-respondent's house. The photographs produced by the appellant offers as supports the evidence of proximity. He testified that there is no proper parking facilities and that the co-respondent used to park his car in the access road near his gate since the co-respondent's house is found in a cul-de-sac and he has produced photographs annexed to his statement of case to show that the co-respondent does leave his car on the road at times. The Appellant explained that he has made several complaints for years at the level of the Council and at the Police Station in connection with this case which he felt kept falling on deaf ears. He produced documents in support of the fact that he made complaints to the Council and also acknowledgment receipts from the Council. These were not disputed by the Council. The Appellant testified on the disturbance aspect, and essentially stated that not only there is a nuisance due to the flow of vehicular traffic to the subject site and out of it, but there is also the fact that since the co-respondent's property is in a cul de sac, very often the vehicles have to enter the road and reverse out and at times vehicles try to turn around on a plot of land opposite the property of the Appellant.

III. RESPONDENT'S CASE

8. The position of the Council was far from clear to us. The representative of the Council at no point gave to us any indication as to which policy or policies it was relying on to substantiate the ground set out in its letter to the Appellant to justify its stand that *"The Council has found that the proposed development complies with the requirements of the Council"*[stress is ours]. The Statement of Defence of Respondent was totally silent on the issue, infact the Statement of Defence did not in anyway show the position of the Respondent regarding its justification for having granted the BLUP, thereby hampering the Tribunal from taking stock of reasons which have motivated the decision-maker to take the decision that is subject to challenge.

IV. APPLICABLE PLANNING INSTRUMENTS

9. However, one aspect which was clearly established and confirmed by the Respondent is that the subject site and the house of the Appellant are found, within the settlement boundary which favours residential development. This being established coupled with the fact that the proposed development would consist of carrying out electrical repairs of motor vehicles which is categorized as an industrial activity and would be regulated by **Policy ID 2** of the **Outline Planning Scheme** and *Section 2.13 –Industrial Use (PPG 1)*.
10. **Policy ID 2 of the Outline Scheme** regulates such type of development (small scale enterprise) and actually permits these developments only if the use is ancillary to the principal use as residential. However, a number of criteria have to be observed including:
 - Premises are of a suitable size and design to accommodate the additional activity and all its ancillary requirements such as parking, loading area and adequate set backs from neighboring properties.*
 - No neighbours' objection within a radius of 50 metres.*

-No serious/adverse impact on residential occupiers in the area or the character of the neighbourhood particularly in regard to noise, fumes, smells, dust nor excessive vehicle movements or loading and unloading of goods and products;

-Sufficient parking space within the cartilage of the property available to accommodate any staff or visitors;

-Safe access from the roadway;

-Storage of materials should be able to be contained within the cartilage

-The operator of the office/business or small scale enterprise should remain at the premises.

V. DECISION

11. We propose to deal with the issues together because from a planning perspective they are all connected. From the evidence on record, the subject site is in a residential area. The proposed development, as per evidence, is to be carried out in the veranda of the co-respondent's house, which is basically an open space in that it has no walls on three sides but has a roof. The representative of the Council stated that she went on the site for a visit but since the co-respondent was not there, she peeped through the opening of the gate and looked over the gate to make a "constat" that there were no activities being carried out there. We do not believe that we can rely on such evidence, which in our view, does not amount to a site visit, to come to the conclusion that the co-respondent was not operating his business. Infact the Council's representative stated that the co-respondent does not have a trading licence yet as he has not paid for it and according to the record of the Council, he is at the moment not operating. We are

unable to accept this contention in the light of the evidence of the Appellant. His complaints on the disturbance and prejudice that is being caused to him and his family have been numerous and he has explained in detail, with evidence, his grievance regarding how he and his family are unable to have a peaceful enjoyment of their residential property. The questions put in cross-examination by the co-respondent to the Appellant's witness, were rather telling, especially when he put to the witness a question as to how is it that the appellant's children are unable to sleep due to all the noise generated by the workshop but that his own baby is not disturbed by it.

12. We believe the Council was wrong to have granted a BLUP for an industrial activity in a residential area, the moreso as there has been constant complaint of nuisance and disturbance from a neighbour who lives within a radius of less than 50 metres, as provided in the vicinity. We agree that both **Policy ID 2** of the **Outline Planning Scheme Of Vacoas-Phoenix** and **Section 2.13 –Industrial Use [PPG 1]** classify vehicle repairs as being not normally suitable in residential areas but electrical repairs may be allowed but the circumstances under which these may be allowed are very specific and clear. One of the criteria is that there should be no objection from neighbours. Since there were several complaints from one neighbour in this case, the Council ought to have at least enlightened the Tribunal on how it looked into the complaint and assessed it and disregarded. But there is no such evidence not on record. The Council ought to have analyzed the planning issues such as the vehicular traffic along the no-through road that accesses the property of the co-respondent through that of the Appellant, external factors such as noise, which is the Appellant's main grievance, and vibrations when testing horns and checking other electrical aspects of vehicles, on-street parking or vehicles reversing out of the road. True it is, the Council has imposed certain conditions to mitigate disturbance, the fact remains that the Council should have taken on board the Planning Policies and not granted the permit for an industrial activity within a residential area especially if there is such strong objection from a neighbour. The appellant not being present at the Hearing, as raised in Ground of Appeal no.1, does not

absolve the Council of its duty to consider the objections, the more so as the Appellant had been complaining against the activities of the co-respondent.

13. From the photographs produced and explanation given by the Appellant, the workshop that the Appellant has been operating, albeit illegally, is part of his residence and is basically under an open veranda. It is also not contested that the appellant, who is objecting, is the neighbour. We have taken on board the fact that the neighbour has objected to the development and we believe that the Council was wrong to have taken on board the reasons advanced by the objector which was basically due to the nuisance of noise, due to the activities being carried out and the traffic generated and the deprivation of the appellant's right to a peaceful enjoyment of his property, the more so as he is legitimately residing in a house within a residential area found within settlement boundary, after all it is important, in our opinion, to consider how residents in the neighbourhood are impacted by the development.

14. We are therefore of the view that when all considered such "bad neighbour" developments, as termed in planning jargon, should not be allowed in residential areas to the detriment of other residents, the more so as the neighbour has objected and the reasons advanced is that it will have an adverse impact on the character of the neighbourhood which the objector is not willing to put up with. We believe that the Council's decision is flawed for not having considered the essence of the objections of the Appellant, the more so as he has repeatedly done so and through various avenues. Eventhough the Appellant failed to attend the Hearing of the Council, we believe that since the Council received several complaints from the appellant, it should have looked into the matter to ascertain the genuineness of the objections. Having such a workshop in such close proximity to the residences of people is a misallocation. It may generate further issues in future if the business expands in terms of human and vehicular traffic. Due diligence must be exercised when carrying out development which is likely to have an impact on the neighbourhood because a residential area is meant to be such where one can enjoy ones' property peacefully.

15. For all the reasons set out above, the appeal is allowed and the Council is called upon to cancel the BLUP granted to the co-respondent. No order as to costs.

Determination delivered on 18th June 2019 by

Mrs. J. RAMFUL

Vice Chairperson

Mrs. RAWOTEEA

Member

Mr. MONAFF

Member