

IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 561/13

In the matter of:

Carbonel Car Wash Ltd

Appellant

v/s

Municipal Council of Curepipe

Respondent

RULING

The matter arises out of an appeal lodged against the decision of the Municipal Council of Curepipe for refusing a Building and Land Use Permit to the appellant for the construction of a building to be used for the washing of vehicles including the use of electric motors at Morcellement Carbonel, Forest Side.

The Council's ground for the refusal was stated in a letter to the Appellant dated 8th November 2013 as "The proposed development falls under the industrial cluster and is not acceptable as a secondary use within a predominant residential area."

The Appellant's Counsel moved for the Tribunal to give a ruling on a point in law, which in his opinion was the crux of the matter before the Tribunal. The motion was that in the Appellant's view the project ought to be considered as falling under the commercial cluster, as per the Eleventh Schedule of the Local Government Act of 2011, rather than the industrial cluster as assessed by the Council so that if successfully argued then the BLUP ought to be granted. The motion was resisted.

We have duly considered submissions of counsel from both sides. Counsel for the Appellant took the view that the enterprise of washing of cars being one of provision of services within given premises, it should fall within the Commercial Cluster. The Council on the other hand took the stand that given the wattage of the machines that will be used as per the application of the Appellant, the activity should fall in the category of Industrial cluster. In essence, we have been requested to rule on whether a car wash enterprise is a commercial enterprise or an industrial enterprise for which we intend to restrict ourselves to the applicable law, The Local Government Act 2011.

It is important to firstly identify the importance of a "cluster" under the Act. Under **s. 121 (1) Clustering of economic activities**, *every Building and Land Use Permit which has been granted in respect of an economic activity shall indicate the cluster to which the economic activity belongs, as specified in the Eleventh Schedule.*

It is therefore clear from this section that clusters relate only to economic activities and from the interpretation **section 2** an 'economic activity' is specific to the Eleventh Schedule, the relevant parts of which are reproduced below:

ELEVENTH SCHEDULE

[Sections 2 and 121]

CLUSTERS

1. Commercial cluster

(1) Commercial activities relate to the provision of goods and services within building premises, such as shops, showrooms, post offices, hairdressers' salons, undertakers' parlours, ticket and travel agencies, and cafés...

2. Industrial cluster

(1) Industrial activities relate to the manufacture or processing of goods within any premises and include light industry and general industry...

3. Services cluster (financial services- inapplicable)

Our interpretation of the Commercial cluster as defined in the Act relates to the provision of goods and services **within building premises**. The legislator clearly intended that the activities take place inside a building. When the examples cited under this cluster are analyzed, as a matter of common sense it can be interpreted that any nuisance that may be associated to the activities themselves (that is of provision of goods and services) do not escape outside the building. A shop, post office, hairdresser's salon are all enterprises which portray within an enclosed structure so that the activities therein are not intrusive to the surrounding. When

compared with the definition of the industrial cluster it can be clearly seen that a distinction has been made with regard to the accommodation. Industrial activities relate to the manufacture or processing of goods within any premises. The omission of the word "building" to this definition connotes that for industrial activities, the possibility of certain activities taking place outside an enclosed structure, depending on their nature, is an option that has been catered under the Act. The Eleventh schedule also contains a 4th set referred as Sui Generis activities, which are activities that stand alone in that they are not considered to fall within any of the 3 clusters. The relevant extract is reproduced below:

4. Sui Generis activities

The following activities are sui generis activities, which are activities standing on their own and which cannot be specifically classified within the 3 clusters specified at paragraphs (a), (b) and (c) –

(a) a fresh permit is required for any change of economic activity from or to a sui generis activity;

(b) economic activities expressly excluded from the 3 clusters referred to above are –

(i) extractive industry;

(ii) special industry (polluting and noxious industry);

(iii) builders' yard;

(iv) scrap yard;

(v) petrol filling station;

(vi) hypermarket;

(vii) theatre;

(viii) amusement centre; and

(ix) nightclub.

It can be noted from the exhaustive list of sui generis activities that they do relate to the provision of goods or services but the legislator has chosen to exclude these from the commercial cluster. The distinction being that these activities are mostly not confined to "within building premises" and they have some element of intrusion with their surrounding environment, either visual or audio or both, the moreso that the flow of traffic associated with these enterprises is rather bulky and dynamic. We are therefore of the view that the washing of vehicles is not an activity that falls within the commercial cluster.

"Industrial activities" as provided under the Act relate to the manufacture or processing of goods. If we go strictly by this definition, we fail to see in what way the activity of washing of vehicles can possibly amount to "the manufacture or processing of goods" from any angle. We, therefore, reject the submission of Council on this issue. Even if we were to take this supposition as being valid, the Council's argument that the machines used are of rather high

wattage hence it is in line with industrial activity, does not hold. If the question is one of noise, then the relevant consideration should have been the decibel level of noise that it releases. The wattage of an appliance in layman's terms is simply the amount of electricity it uses to start operating. Whether in the process some electricity is used to produce heat, noise or vibrations in the appliance is an ancillary issue.

While common sense dictates that the activity of washing of vehicles is one which relates to the provision of services, typically the provision of such services would be in open space having a certain dynamic flow of traffic, and therefore is more akin to the activities of a petrol station, which has been listed in the Eleventh Schedule as a Sui Generis activity, standing alone. It can be noted however from wording of this category that the sui generis activities is not a "catch-all" provision. The law uses the words "The **following** activities are sui generis activities..." thereby clearly setting out an exhaustive list. We cannot unfortunately read more into the law than what has been clearly stipulated. Could it be that the business of washing of vehicles being a rather new enterprise as Counsel for the Appellant submitted, the law may not have catered for it? A close inspection of the Twelfth schedule demonstrates the contrary. "Washing of vehicles" has been enlisted under Part A. The Twelfth schedule refers to **sections 2 and 122 of the Act. Section 122** which in essence provide for fees in respect of classified trades as specified under the *Twelfth schedule*. Working backwards, **Section 2**, the interpretation section, defines a "classified trade" as meaning *a business specified in the Twelfth Schedule*. Therefore, the washing of vehicles is a "classified trade" within the Twelfth Schedule of the Act. Our reading of the law as it stands is that when **sections 117 and 122** are read in conjunction and applied to the trade of washing of vehicles, a person who intends to develop his land for the purposes of carrying out this classified trade must apply for a BLUP for which the relevant regulations will provide the specified fees payable for that particular activity, in this case, the washing of vehicles. In other words, washing of vehicles is a classified trade but cannot be allocated to any cluster as per the wording of the Local Government Act 2011.

Ruling delivered on 12th May 2015 by

Mrs. J. RAMFUL

Mr. S. Karupudayyan

Mr. Seetohul

Vice Chairperson

Assessor

Assessor