

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 677/14

In the matter of:

Mr. Mr. PREMCHAND PEM

Appellant

v.

DISTRICT COUNCIL OF GRAND PORT

Respondent

In presence of:

TEXPULL LIMITED

Co-Respondent

DETERMINATION

The Co-Respondent (Texpull Ltd.) had initially been granted a BLUP in 2009 to transfer its textile factory operating at New Grove to its premises at Royal Road Mare d'Albert, where it is presently operating. In 2014, the District Council of Grand Port has granted another Building and Land Use Permit to Texpull Ltd for the addition of a first floor to be used as textile industry. This addition is an extension to its textile plant which is operational since the BLUP granted in 2009. The present appeal is in respect of this addition, for which the Appellant listed its grounds of appeal as being:

1. Pollution in the vicinity and in the Appellant's own house.
2. Disturbance in the area and nuisance.
3. Other reasons which the Appellant wishes to add afterwards.

The statement of case elaborates on the nuisance faced by him and his family due to the operation of Texpull Ltd., which is adjacent to his property. This includes constant noise and dust emanating from the operation of the factory, use of electric machines

and generator, noxious odour and unbearable smell. The appellant explained in his testimony that his house is less than ten feet from the factory and is already exposed to these inconveniences since the transfer of the factory to the premises presently occupied by the Co-Respondent. Noise is also caused by the functioning of a generator and the constant activities of the workers. This causes serious nuisance to his family, the more so that his wife is of ill health (evidenced by Documents A to A3).

The Appellant added in the course of the hearing that he had made several complaints to the health authorities, police and local authorities respectively and all of these bodies had effected site visits. The expansion or extension of the factory's activities to a first floor adjacent to his house will cause even more inconvenience and nuisance to him and his family. His prayer is for the revocation of the BLUP granted to Texpull Ltd. in the interest of the health and safety of his family as well as the residents living in the vicinity, in particular due to the nature of the factory found in a densely residential area. Two witnesses deponed on behalf of the Appellant, who are the immediate neighbours of Texpull Ltd. They explained in a very picturesque language the hardships that they face in their day to day life due to pollution caused by the activities of Texpull Ltd.

The statement of defence of the Respondent (The District Council of Grand Port) did not address any of the issues raised by the Appellant, save that it annexed the plan submitted by the Co-Respondent and the minutes of proceedings of the Permits and Business Monitoring Committee of July 2012, as well as that of the Executive Committee. These minutes indicate that the PBMC took note of the decision of the Town and Country Planning Board in respect of an appeal lodged before it. No decision was reached and at the Executive Committee meeting of the 9th August 2012, the application of the Co-Respondent was recommended subject to modifications and clarifications. The Respondent did not rebut any of the issues put by the Appellant in his statement of case, nor explained the rationale for its decision.

The Co-Respondent's statement of defence is to the effect that the BLUP was granted after all the relevant bodies had duly considered the representations made by the Appellant and that it abides by all the conditions of the permit. It denied that the machines used at the factory produce any dust or noise and added that no other complaint had been received from any person in the surrounding neighbourhood. The Co-Respondent also averred that grounds 3 and 4 are novel ones which had not been raised at all.

In evidence, Mr. Gopee, the representative of the Co-Respondent, highlighted that the building is soundproof and that no toxic chemical is used in its process. As regards the extension at the first floor, which is the subject matter of the appeal, his version is that the use of the generator is occasional and happens when there is an interruption in power supply. It is proposed to house the generator in a soundproof container. He

conceded that the factory operates until 8,00 p.m. and that it operates on Saturdays and Sundays when there are urgent orders. One section operates by an electronic machine on a 24 hour basis. This operates with minimal sound yet it this is housed in a soundproof room. He denied that there is any emission of dust or odour from his production. In his cross examination it came out that he proposes to shift the sections that are not machine-operated on the first floor. He has submitted a plan to show that the organization of the work will be spread upstairs and there is no opening that is envisaged on the side of the neighbours' houses.

At this juncture it is important to highlight that in order to assess the merits of the case, the Tribunal takes a fresh look at the application in context. It makes a re-assessment of the proposed development and, in this process it looks into the planning and other considerations that have guided the Respondent in its decision. It is in this context that the evidence adduced by the parties and their respective witnesses is assessed.

We note that the Appellant and the witnesses who are the immediate neighbours have been strongly complaining about the nuisance caused by the existing phase of Texpull Ltd. Similarly, the submissions made on behalf of the Respondent are in relation to the nuisance allegedly caused. We are here concerned with BLUP for the addition of a first floor where the activities are going to spread (or extend) to that first floor. The complaints in relation to the first phase of operation are relevant, although the BLUP in respect of that first phase is not the subject-matter of the present appeal.

The Appellant has tried to explain that he has kept complaining to the relevant authorities about the hardship faced by him by the activities of Texpull Ltd. but to no avail. Despite several site visits, nothing changed. On the nuisance aspect, the representative of the Ministry of health produced Document B showing that the noise level generated by Texpull Ltd. was within permissible as per Environment Protection (Standards for noise) Regulations 1997. No assessment of the noise emanating from the generator had been effected, the representative of the Ministry, not having found it necessary being given that the generator operated only occasionally. The witness added that the noise level could not be measured properly because there were other sources of noise coming from the traffic. Nonetheless he concluded that the noise was within the permissible and was thus not defined as nuisance.

The representative of the Environment Unit explained that the role of this unit falling under the Ministry of Environment was to coordinate the issues raised by a complaint made to the Environment. According to his testimony, issues relating to odour and noise fall under the purview of the Ministry of Health and the conditions in which the permit had been given fall within the jurisdiction of the District Council.

The representative of the District Council was tendered for cross examination and stated that a site visit had been conducted with the Ministry of Health. She had not noticed any noise, odour nor activities being conducted outside the building of the factory. At any rate the monitoring of these fall under the Ministries of Health and Environment respectively.

The Planning aspect

The Outline Planning Scheme for the district of Grand Port (dated 2006 and as modified in 2011) lays down the basis for development in various zones. Policy ID 1 provides that: "*Within existing industrial estates and zones within settlement boundaries and identified on the Development Management Map there should be a presumption in favour of light industry, small factories and workshops (including Small and Medium Enterprises SMEs) and those industries not causing a nuisance to nearby residential and other sensitive uses by reason of smoke, fumes, dust, noise, excessive vehicular movements and loading issues....*". It is clear that this policy sets out limitations to the types of industrial activity that can develop within settlement boundaries. There is nothing on record that suggests that Texpull Ltd. qualifies in one of those categories that can be accommodated within settlement boundary. There is also nothing on record to show that the District Council has considered the policies listed under Outline Planning Scheme in its decision to grant the BLUP for the addition of a first floor to the existing factory.

A site visit effected by the Tribunal has enabled us to have a 'constat de visu' of the immediate proximity of the factory to the Appellant's house. As it is, the operation of the activities of the factory up to 8 p.m. and even on week-ends in case of urgent orders (as stated by the representative of Texpull Ltd) is a likely source of nuisance to such immediate neighbours. The evidence of the representative of the Ministry of Health on the permissible limit of the noise is questionable given the lack of accuracy in measurement, as conceded by the witness himself. The extension of the activities of the factory to a first floor can accentuate the difficulties already encountered by the immediate neighbours. Our site visit has also unveiled the fact that although the frontage of the factory is along the main road, this building is a long one which stretches back along a side road which is in a residential area. We fail to understand the stand of the representative of the Respondent who described the spot as being a 'mixed use' one. The presence of commercial activities on the frontage of a main road cannot render the area commercial whilst disregarding the residential nature of the surrounding.

The potential nuisance, although undetected by the representatives of the authorities, has been described at length in the testimonies of the two witnesses, Mrs. Daworaz and Mrs. Kamalia. Although they contain inaccuracies in their description of facts, they were

consistent on one thing: they both faced nuisance in their day to day lives due to the operations of the factory next door. On this aspect, their evidence calls for attention.

We also fail to understand the reason why the generator, which is conceded to be a potential source of noise nuisance to the neighbours, has not been housed in soundproof premises as stated by the representative of Texpull Ltd.

In the face of a call for attention of the authorities from people living in the surrounding of the factory, we are of the view that the District Council had a duty to enlist such complaints in its decision making. There is nothing in the minutes of the PBMC to show that this has even been considered. The Council cannot rely on the fact that the monitoring of noise and odour lies within the jurisdiction of the Ministries of Environment and Health respectively, to grant permits without considering such factors. These are considerations that also fall within their jurisdiction being part of policy ID 1 of their Outline Planning Scheme.

We have taken note of the economic considerations highlighted by counsel for the Co-Respondent, namely the economic benefits of the operation of the factory. We do concur with the fact that such economic activities have to be encouraged for the benefit of the country. Nonetheless, land use and planning policies for such activities to operate are vital for the environment and for a better health of all. It is the role of this Tribunal to ensure that decisions taken by the local authorities are within the parameters of the planning instruments put into place for this purpose.

We have also been convinced and are sensitive to the plight of the persons living in the surrounding environment of the Co-Respondent's activities and their apprehensions. For these reasons, we find that there is merit in the grounds of appeal (grounds 1 and 2 of the notice of appeal, we note that no other ground of appeal was added by the Appellant).

We accordingly allow the appeal and refer the matter to the Respondent to take appropriate action in the light of the present determination.

Delivered on 17th March 2017 by:

Mrs. V. Bhadain
Chairperson

Mrs B. Kaniah
Assessor

Mr. S. Karupudayan
Assessor