BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 681/14

In the matter of :-

Louis Wesley Maxwell Valere

Appellant

v/s

The Municipal Council of Beau Bassin-Rose Hill

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Municipal Council (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (BLUP) for the construction of building to be used as an automotive workshop, employing less than 10 persons at Lot 51, Residences St Daniel, Roche Brunes. The decision of the Council was communicated to the Appellant by a letter dated 25th April 2014 which stated that the Council rejected the application on the ground that

   "As per the title deed no activity other than residential uses is allowed within the morcellement. However you may, if you wish, request for reconsideration of your application for residential use. You will be required to submit a written request and amended plans accordingly."

2. We have duly considered the evidence placed before us including documents produced and the depositions of all witnesses as well as submission of counsel. The appellant deponed and was cross-examined by counsel for the respondent. Mr. Baurhoo, the Acting Planning and Development Officer of the Council deponed on behalf of the respondent and was cross-examined by the appellant's counsel.

I. CONTEXT ANALYSIS

3. The undisputed evidence reveals that the proposed development site, owned by the Appellant, is located along Arianne Street within Morcellement Residence St. Daniel, Roches Brunes. The Appellant in fact currently operates an automotive workshop, which is his own business, for which he holds a valid BLUP along Arianne Street Roches Brunes, opposite the proposed development site but which falls outside the Morcellement. It is also not disputed that the proposed development site is currently being used by the Appellant as parking ground for vehicles awaiting to be repaired at the Appellant's current workshop. The Appellant intends to use the site for his workshop due to the larger available space. As per evidence produced, the subject site is enclosed but there are bare plots of land on two sides and on one side there are the houses of the objectors.

II. THE INSTRUMENTS AND THE LAW

4. The site being in Roche Brunes, the applicable outline scheme is **Outline Planning Scheme for Beau Bassin- Rose Hill ['OPS']** issued under the **Planning and Development Act 2004** and **The Planning Policy Guidance 1 ["PPG 1"]**which also regulates **Industrial Activities within residential areas.**

III. THE ISSUES

5. The Appellant has in essence lodged six grounds of appeal which are reproduced hereunder:

"

(a) *"Lot 51 Residences St Daniel, Roches Brunes" is located in a Commercial position and right in front of the Appellant's existing and operational automotive garage;*

(b) *The Tribunal shall in relation to the clause contained in the Title Deed of " Lot 51 Residences St Daniel, Roches Brunes", "No activity other than residential uses is allowed within the morcellement", declare and/or make an order that same be unenforceable and/or is contrary to the notion of free competition and trade;*

(c) *The clause contained in the Title deed of " Lot 51 Residence St Daniel, Roches Brunes" that " No activity other than residential uses is allowed within the morcellement" is prima facie unenforceable as being in restraint of trade and shall be disregarded by the Tribunal and/ or the Municipal Council of Beau Bassin/Rose Hill as it will be fair to the public interest and within the spirit of free completion;*

(d) *" Lot 51 Residence St Daniel, Roches Brunes" was acquired by appellant for a commercial purpose and in a commercial context;*

(e) *" Lot 51 Residence St Daniel, Roches Brunes" was acquired through a bank commercial loan for which a project plan was required and submitted for approval of the said loan;*

(f) *The appellant contends that ultimate consequence of non-obtention of the said Building and Land use Permit may result in the Appellant's losing "Lot 51 Residences St Daniel, Roches Brunes" as per the foregoing and for evident reasons. "*

These grounds of appeal were reproduced in the Statement of Case of the Appellant. Counsel for the Appellant however made submissions regarding whether the Council was bound by the restrictive covenant found in the title deed of the Appellant as regards the subject site, which we will address.

6. **Under the ground of appeal (a)**

It is the contention of the appellant that "Lot 51 Residences St Daniel, Roches Brunes" is located in a Commercial position and is in front of the Appellant's existing and operational automotive garage. On the other hand, the evidence that came from the Council's witness is that the Council based itself solely on the conditions contained in the title deed to reject the Appellant's application and therefore its stand is that condition to the title deed, is that the morcellement where the subject site is found is meant for residential use only. The Appellant took the converse view that the site in lite is located in a commercial area given that his own current automotive garage is just across the site. It is not denied by the Appellant that in this case objections were received.

7. The jurisdiction of this Tribunal is to decide upon whether the Council was right or wrong to have rejected the application based on whether the Council did take all relevant criteria into account. In order to reach an informed decision on the issue at hand, it may be relevant for us to address our minds to the following questions. Firstly, whether the Council was right to have taken into account the title deed in order to determine the application? The answer to this is in the affirmative. When deciding whether to grant a BLUP, most inevitably the Council has to consider the title deed of the owner of the property. The next question that follows suit is whether the Council should take into account the title deed in its totality, in other words, any attached conditions also. The answer is again in the affirmative. The question that arises then is whether the Council is right to have come to the conclusion that it is ***bound*** by the conditions or any restrictive covenant attached, in this case, the restrictive covenant being that it allows the usage of the land to be restricted to residential use only.We believe the Council is not ***bound***.

8. It is important to know that the parties to the *'contrat de vente'* are the promoter of the morcellement and the buyers, that is, the *co-proprietaires*, so that their rights are safeguarded under the law of contract. The Council, being the local authority, is not a party to the contract. Yet, in view of the wide powers vested upon it by law, has a supervisory and regulatory jurisdiction over all the development whether private or public. The Council thus decides on applications using planning law. It is borne out from the record that there is an objection by one of the *co-proprietaires* of the morcellement, the issue then steps out of the realm of contractual agreement between 2 private parties. It now involves wider questions of planning and the public interest which the Council is bound to take into account, since one of the parties is choosing to challenge that development by invoking his legal right under the contract. There are a number of authorities under English Law where planning permission has been granted despite the existence of a restrictive covenant namely **Re Martins's Application (1989) 57 P &CR 119**. The analogy we seek to draw here is that in certain jurisdictions, it has been clearly set out that the local authority is not bound by such restrictions found in the title deed. Similarly in **Zenios v/s Hamstead Garden Suburb Trust (2011) EWCA Civ 1645**, planning permission was granted by the local authority contrary to the covenant.In our country, each local authority has a planning department whose function is to assess whether a development proposal can gain planning acceptance based on Planning Instruments. There are Outline Schemes in this country which favour a pro-active as opposed to restrictive approach towards development.

9. We do not wish to go beyond our jurisdiction here. Since Counsel for the Appellant raised the issue, our view is that we do not believe that the Council should fetter its discretion in coming to the conclusion that it is bound by the conditions attached to a title deed. Irrespective of what may have seemed from the ground of refusal set out in the refusal letter, in the Statement of defence of the Respondent which was filed several months before the hearingand from the evidence of the Respondent's witness (to which no objection was taken to both from the Appellant's side) it appears that the

local authority, has in fact gone on to assess the planning merits of the application after having taken into account all other relevant factors, instead of limiting itself solely to the restriction in the title deed as a ground for rejecting the application. It has taken on board the objectors whose rights to the peaceful enjoyment of their property may be affected as well as the provisions of the OPS which shows that the site *in lite* falls within a residential area. This is clearly borne out by the record, more specifically at paragraphs 9, 11 and 12 of the Statement of Defence as well as Doc 4 annexed thereto and objection of the neighbours vide letter dated 1st April 2014 sent to the Chief Executive of the Council.

10. The Council has assessed that the site lies within a residential zone as per the Development Management Mapof the **OPS of Beau Bassin/ Rose Hill** and the proposed development as an industrial one, not commercial. On this issue,the Council's witness was never cross-examined by Counsel appearing for the Appellant. The witness for the Council also produced extracts of the **OPS** regarding **Policy ID3** which regulates industrial developments. This is also clear evidence that proposal has been assessed by the Respondent as an industrial development, and we believe, rightly so because vehicle repairs involve not only the use of appliances and instruments which cause pollution due to noise, smoke and dust but also odour due to chemical substances being used amongst others which can have harmful effects on the environment.The Appellant argued that the area is a commercial zone as there were other commercial outlets such as a small shop and a gym not too far from the subject site. While we take on board that the Appellant is already operating his current workshop opposite the proposed development site, this does not make the area a commercial zone. The Council disputes this contention and its witness explained that the BLUP granted to the Appellant for his current workshop dates back to 2005, when the OPS was not in force and that Morcellement Residence St Daniel, where the subject site lies, now is a residential area as per the OPS. The witness also explained that the gym does not generate the type of change in the character of a residential area as an automotive workshop would.

11. The Appellant, for his part, has not produced any evidence in support of the contention that the area is a commercial zone. We are not ready to surmise on the issue in the absence of any evidence. On the other hand, from the photographs and plans produced, we are ready to accept the evidence of the Council that the area is a residential one, the moreso as site visits were carried out by the representatives of the Council.

12. **Under the grounds of appeal (b)-(f)**

Under **Section 4 of the Environment and Land Use Appeal Tribunal Act 2012**, the jurisdiction of this Tribunal has been set out and is reproduced below:

"(1) The Tribunal shall –

(a) hear and determine appeals –

(i) under section 54 of the Environment Protection Act;

(ii) from a decision of a Municipal City Council, Municipal Town Council or District Council under section 117(14) of the Local Government Act 2011;

(iii) under section 7B of the Morcellement Act; and

(iv) under sections 7 and 25 of the Town and Country Planning Act; and

(b) exercise such other jurisdiction as may be prescribed in any relevant Act."

In view of the clearly set out provision of the law, this Tribunal has no jurisdiction to adjudicate upon the issues raised under those grounds of appeal. None of them involves issues of planning. The present appeal has been lodged before the Tribunal by virtue of **s. 117 (14) of the Local Government Act 2011**. This implies that the Tribunal will have not only to assess whether the Council has come to right or wrong assessment taking into account planning instruments but also if it has not been done, the Tribunal is entitled to make a planning assessment of the matter and determine the planning merits of the proposed development on the basis of the evidence presented.

IV. PLANNING MERITS

13. **Under Policy ID 3 of the OPS of Beau Bassin/ Rose Hill** which was used by the Council to assess the planning merits of the case, no encouragement is given to new industrial proposals. The rationale behind not allowing industrial development in non-industrial zones as can be gathered from the outline scheme when read in conjunction with the other policies on industrial development of the OPS, is that it would create bad neighbour impact on residential occupiers living in the area, or the character of the neighbourhood particularly as regards noise, smoke, fumes, smell, dust, fire risk and disposal of toxic material.The **Policy ID3** is reproduced hereunder

"There should be a general presumption against applications for new industrial (development) outside existing industrial sites, estates or zones unless the activity is classified as bad neighbour development or has site-specific locational requirements, and there is no other site available or suitable following the sequential approach or the activity is in the national interest.

In these cases clustering of similar industrial uses on a single site should be considered to make efficient use of existing transport and utility infrastructure."

14. Under the **OPS of Beau-Bassin/ Rose-Hill**, an extract put in by the Council's representative, *Table 4.1* sets out the secondary uses that are allowed within predominant use zones. As per the table, it appears that in residential areas, planning acceptance will be given to any use or activity **other than** bad neighbour uses/activities; light, medium, heavy and extractive industries and warehousing; major commercial (i.e other than corner shops and small scale retail outlets); public facilities such as government administration, educational, religious or cultural facilities serving catchments larger than the local neighbourhood; major transport and utility structure.

15. Now in fairness to the Appellant's case, we have also looked at the provisions of the**PPG1, section 2.13 on Small Industrial Workshops and Home Working,** which regulates small scale enterprises within residential areas. This section provides guidance namely that light industry, small factories and workshops (SMEs) may be allowed in residential areas but provided that these industries do not cause nuisance to nearby residential and other sensitive uses by reason of smoke, dust, noise, excessive vehicular movements and loading/unloading issues. From the testimony of the Appellant himself, it appears that he intends to intensify his business and the subject site is currently being used for stationary cars in need of repairs. Vehicular movement is to be expected. Vehicles will also be serviced, and therefore the noise and smoke and dust of motor engines revving up are inevitable. Therefore, we believe it will not suitable for such a development within a residential area.

16. For all the reasons set out above, we believe that this appeal is devoid of merit. The appeal is accordingly dismissed. No order as to costs.

Determination delivered on 12th June 2017 by

Mrs. J. RAMFUL	**Mrs. B. Kaniah**	**Mr. M. Busawon**
Vice Chairperson	**Assessor**	**Assessor**