IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1648/18

In the matter of:

Fine Crush Ltd

Appellant

v/s

Minister of Environment, Solid Waste Management and Climate Change.

Respondent

DETERMINATION

1. The present appeal is against the decision of the Respondent for having refused the granting of an Environment Impact Assessment Licence ["EIA Licence"] for the setting up of a proposed Dry Mix Plant in La Tour Koenig Industrial Zone, La Tour Koenig, Pointe aux Sables. The letter of refusal dated 19th June 2018 under the signature of Mrs. Ng Yun Wing, the Director of Environment, stipulates that following the examination of the application by the EIA Committee *"...this is to inform you that in accordance with section 23 (2) b of the Environment Protection Act, the application **has been rejected** in view of site not satisfying locational criteria and being a potential source of pollution by way of dust and noise"*.

2. Both parties were legally represented. A representative of the Appellant company, Mrs. Hurkoo, and an environment officer from Vyyaass Consulting Engineer Ltd who prepared the EIA Licence for the Appellant, Mr. Mehideen, deponed on behalf of the Appellant. The Respondent called one witness, Mr. Gareeboo, Environment Officer at the Ministry of Environment, Solid Waste Management and Climate Change, hereinafter referred to as "the Ministry of Environment". We have duly considered the evidence on record as well as the submissions of both Counsel.

3. The Appellant's statement of case contains 3 grounds of appeal, which are as follows:

(1) The Minister's decision is wholly unreasonable in as much as:

a. it fails to identify which 'locational criteria' were allegedly failed to satisfy; and

b. there are operations of a similar nature taking place near the site in question.

(2) The Minister's decision to reject the application for the EIA licence on the ground that the project was a potential source of pollution by way of dust is unjustified in as much as:

a. adequate measures were identified and communicated in the Appellant's letter dated 28 March 2018 regarding the use of cleaner production techniques in view of enhancing the sustainability aspect of the plant;

b. adequate measures were identified and communicated in the Appellant's letter dated 28 March 2018 in order to mitigate any nuisances that may [be] caused by dust generation from break open of the special cement packaging at delivery of final products.

(3) The Minister's decision to reject the application for the EIA licence on the ground that the project was a potential source of pollution by noise is unjustified in as much as the Appellant had informed the Respondent that the expected noise emissions at source would reach 75db (a) leq and that several mitigation measures for noise level were contemplated and set out in the Appellant's letter dated 28 March 2018.

(i) Under Ground 1: Site does not satisfy the locational criteria

4. The first ground of appeal relates to the first reason provided in the letter of refusal, that is that the site does not satisfy the locational criteria. It is the contention of the Respondent as per their statement of defence that a buffer of 1km similar to that of a stone crushing plant should be observed as per the Planning Policy Guidance of the Ministry of Housing and Lands, given that the environmental nuisances by way of noise and dust are similar in nature and that the site lies in an area with mixed sensitive land uses such as residential, educational and industrial activities. We understand that in fact there are no Environmental Guidelines that has been issued by the Department of Environment with respect to the setting up of a dry mix plant. The Department of Environment acts under the aegis of the Ministry of Environment.

5. Mr. Gareeboo, Environment Officer at the Ministry, explained that Respondent has applied environmental guidelines which was thought to be for developments bearing similarity in terms of the activities being undertaken and the generation of pollution. In this respect he elaborated on the process within the dry mix plant which would entail the rock sand, which would be obtained from the adjacent stone crushing plant, being sieved and the residual coarse rock sand would then be crushed to finer particles and will be mixed with cement to form a dry product. Mr. Gareeboo made a comparison with the asphalt plant and the concrete batching plant to justify the position adopted by the Respondent that the guidelines of the Stone Crushing Plant and Asphalt Plant and Concrete Batching Plant should be applied to the extent that they provide for a 1km buffer from settlement boundaries and sensitive land uses.

6. The Design Sheet of the **Planning Policy Guidance 1 ['PPG']** makes provisions for "Industry adjacent to sensitive uses" and provides up to 1 km as an acceptable distance of sensitive land uses from the boundary of a "Quarry, Stone Crushing Plant, Asphalt Mix Plant, Concrete Batching Plant". We note that this list is exhaustive and that the indicative buffer distance of up to 1 km will be accepted. It can be less than 1km. There is undisputed evidence that the proposed development is on the Industrial Zone of La Tour Koenig. This gives a clear indication as to the nature of the occupation of the site; it is an industrial zone. It is also borne out in the evidence that the stone crushing plant and some of the other industries have been in operation from before the existence of Outline Planning Scheme. This also speaks volumes about the planning history of the site. If a stone crushing plant has been in existence on the locus for several decades, in what way will the construction of a dry mix plant within a confined warehouse on that site cause any greater prejudice. This is not clearly borne out in the evidence. The dry mix plant is not a stand-alone type of development. Apart from there being a stone crushing plant, the promoter also has a block making plant on the locus. The development proposal has to be looked at in its context. This being said, we firmly believe that developments have to be regulated and the law must be applied but it must be applied correctly. The PPG, a planning tool, is qualified as soft law which needs to be applied where applicable. In this context there is no clear provision in the PPG nor in the EPA regulating the setting up for a Dry mix plant.

7. It is apposite to note that **Section 15 of the Environment Protection Act 2002 ["EPA"] provides**

"(1) Subject to subsection (2) and section 17, no person shall be required to provide a PER or an EIA in respect of any activity or project other than an undertaking."

s. 15 (2) (b) EPA provides that any proposed new undertaking as specified in Part B of the Fifth Schedule should only be started or proceeded with provided an EIA licence is granted. 'Dry mix plant' is not listed in the exhaustive list of activities requiring an EIA licence. We note that **Section 17 of the EPA** provides that the relevant Minister has the power to request for the submission of an EIA for a non-listed listed activity under certain circumstances but no evidence was ushered by Mr. Gareeboo on this issue. It may well be that there are lacunae or a lack of provisions in the law and the soft laws, in that both the EPA and the PPG, specific refences to which have been made above, provide for an exhaustive list of activities. But the documents have to be read as they are. One cannot read more into the law more than what has actually been provided.

8. In **Beau Songe Development Limited *v* The United Basalt Products Limited and Anor[2018]UKPC 1**, their Lordships, disagreeing with the overreliance placed by the Tribunal on the testimony of the technical experts over the wording of the policy document, observed at paragraph 37,

"However, the Tribunal were wrong, with respect, to regard the interpretation of the approved policy documents in that light. It is not clear whether they were referred to the guidance in the Tesco case. It would or should have led them to understand that their first task was one of legal interpretation of the planning documents to be decided by reference to "the language used, read as always in its proper context", not on a choice (as they put it) between the approaches of lawyers and planning practitioners. It seems clear that they allowed themselves to be unduly influenced by the evidence of Miss Koo and others as to the supposed thinking within the Ministry, rather than the analysis of the documents themselves."

9. In the present context, we are unable to accept the evidence of Mr. Gareeboo that the development proposal will not satisfy the locational criterion in that there has to

be a 1km buffer since the proposed development falls in the category of "Quarry, Stone Crushing Plant, Asphalt Mix Plant, Concrete Batching Plant". A reading of this policy shows that it is an exhaustive list. We cannot read more into it to say that Dry mix plant should fall in that category. The proposed development may be differentiated on other scores in that it will be taking place not in the open air where the wind will facilitate the dispersal of dust, but within the confines of a warehouse having concrete walls and iron sheet roof where any industrial pollution generated will be primarily self-contained. This is a major difference.

10. Furthermore, **Policy ID4 of the OPS** deals with the location of "Bad Neighbour Development". It is defined as including stone crushing plants. Preference is given to proposals which enable such developments to be "clustered to share a buffer zone". Looking at the land use aspect of the environment, on a site where there are existing but comparatively more polluting activities being carried out in open air, the stone crushing plant, we believe makes better planning sense to accommodate it within the same site the dry mix plant where there will be optimal utilization of the available land since there is an existing stone crushing and block making plant. Mr. Mehideen explained how in the proposed Dry mix plant, the by-product from the adjacent stone crushing plant will be used with other additives to produce a special type of cement, the final product. This will not only enhance industrial symbiosis through the use of the by-product from a polluting industry, but this co-location will also mitigate any potential environmental harm in that rather than the rock sand, which is the byproduct, being stored or transported to a dry mix plant elsewhere, it will be used and processed in a closely-situated enclosed warehouse. Mrs. Hurkoo gave evidence that added mitigative measures will be taken within the warehouse and otherwise as per the Appellant's letter dated 28th March 2018 addressed to the Ministry of Environment. In fact, in our view, this would be a sustainable site development with minimal disturbance and sustainable transportation since vehicular movement will be less compared to a dry mix plant located on its own where vehicles will drive the raw materials in and the end products out. In the present context, there will be less vehicle emissions and better use of locally available materials, hence enhancing environmental management as well as sustainable development, a standard which

this country has been striving to achieve ever since the conceptualization of "Ile Maurice Ile Durable".

11. The Design Sheet *supra* also provides guidelines as regards the amount and type of buffer which are likely to depend *"upon several characteristics including the land use and type of operation (nature of potential nuisance-noise, smoke, fumes, odour, dust etc), visibility between the uses, existing topography, natural features and vegetation, building size and layout, amount if buffer provided by adjacent uses etc."* It also provides that special consideration should be given to the particular requirements for buffer zones between sensitive land uses and bad neighbour industries and that in such cases *"Buffer zones may need to extend upto 1 km distance"*. In fact even the "justification" under **Policy ID4** *supra* indicates that facilities such as stone crushers should "where practicable be planned up to 1km distant from sensitive land uses". The flexibility in the drafting language used in these guidelines fortifies our view that in environmental cases as the present matter, one cannot and should not take a "blinkered" view regarding a development proposal. A wholistic approach needs to be taken where the context so demands. Coupled with the fact that there is no set guidelines for Ready Mix Concrete Plants and that the Respondent seems to be proceeding by way of analogy with other plants, we have not been satisfied as to why the Respondent is applying the buffer of 1 km where this buffer has not been applicable for more polluting industries or industries which generate pollution due to activities ancillary to their main ones. In the present case, with a fully established industrial zone at La Tour Koenig, how did all the development having sensitive uses come about in the periphery, no one is able to explain. From the evidence of Mr. Gareeboo, this could have been the result of some wrong decisions taken, presumably by certain institutions. While we will not surmise on which development came first or whether the residential units found a few hundreds of metres away from the Industrial zone have a BLUP to construct, we have to look at existing context and the nature of the locality to see if there will be an unreasonable inference with the nature of the locality and the land use rights of the inhabitants living in the outskirts of the industrial zone.

12. The purpose of having a buffer zone is so that a certain distance is kept to enhance the protection of an area having a conservation value. The Design Sheet provides that the amount and type of buffer depends upon several characteristics including the land use and type of operation. The Respondent is of the stand that there should be a 1 km buffer. It is important to have a context analysis in this situation. That part of La Tour Koenig where the development is being proposed is a designated Industrial Zone as per the Outline Scheme of Port-Louis ["OPS"]. From the EIA report, marked as Doc A, it can be gathered that the land leased to Fine Crush Ltd by DBM is of the extent of 2.5342 hectares, out of which the proposed development is meant to take place on land of an extent of approximately 2084.36 sq.m. The subject site is accessed by a tarred road. There is an existing stone crushing plant belonging to Betonix Ltd on the same premises which is owned by the same the promoter. The latter also has his own block making plant on the premises. As per the EIA report and evidence of witness Mehideen, the subject site is surrounded by other heavy-duty industries such as Metal Sheet Industries Ltd, other construction industries such as Super Construction Ltd, Galvanising Ltd amongst others and a ready mix concrete plant which is only some 80 metres away from the subject site.

13. The Respondent's representative has not enlightened the Tribunal on any eco-friendly practices or policies being adopted to abate any pollution in the area that may be generated by the existing industries in the area to justify the stringent application of the 1 km buffer rule in this case. No evidence has been placed before the Tribunal as regards any reasonably suited policy or guideline that it can appreciate as to any measures being adopted to serve the purpose redressing any harm to the environment or nuisance to the recipients living in the sensitive areas although there is evidence on record that the closest residential unit is 343 metres away and the University of Technology is some 400 metres away from the site. Therefore, given the present context, where there is already an integration of industrial zone with mixed land use and apart from our analysis and conclusion that there are no set guidelines applicable to a Dry Mix plant and hence no justification on the strict imposition of the buffer of 1 km from sensitive land uses, we believe that in no justification for rejecting the application on the basis that it does not meet the locational criterion.

14. The clustering of industrial activities which generate pollution be it through its activities or vehicular movement or both is a sound zoning practice which allows for land not to be wasted as buffer as well as optimizing energy efficiency and encouraging industrial symbiosis for the utilization of materials and byproducts. The EIA report mentions at Page 15 of the existing infrastructure, such as security post, office, workshop, toilet, store and weigh bridge and existing water drainage system which already exist due to the stone crushing plant and will be common amenities. Hence when all considered, it will not lead to much pre-construction pollution as the site is already well-equipped as opposed to the proposed development being done on a new site. The preferred view is that when all factors are weighed up, it would be more sustainable environmentally to have such a development in an industrial zone where there is already an established buffer rather than having such a project in a new location where possibly there may not be much pollution, hence to the detriment of the environment and which would result is more wasted land to be served as buffer.

(ii) Ground 2: Potential source of pollution by way of dust

15. The issue of pollution is also linked to the locational issue which has been considered, and references will be made to it where we deem it fit to do so. On the point of pollution by dust, it is the contention of the Respondent that dust will be generated by 3 ways namely fugitive dust, accidental spillage and some slight amount of residual dust on every cement packet. Counsel for the Respondent interrogated the witness with regards to the ambient air quality. Mr. Gareeboo stated as regards the standard for ambient air quality it is 10 micrograms per meter cube, that is, PM10 but that the Ministry intends to amend the Regulation to bring it to the standard of PM2.5. He did not give any indication of the time frame as regards to the amendment. As regards the stand of the Respondent, Mr. Gareeboo stated in cross-examination that within the warehouse the pollution due to dust can be mitigated but that one source of air pollution is the residual which remains on the packet of cement, the second source is fugitive dust while opening and closing the door of the warehouse which would allow for dust to escape and the third source would be in case of an accident, cement being very airborne, the particles can easily be blown by the wind and affect the residential area.

16. We do not subscribe to any of these 3 reasons provided by Mr. Gareeboo. Accidental spillage can happen in any circumstances but normally one cannot legislate for these scenarios since they are accidents. There is nothing that has been highlighted to show that in the present case, the Appellant's development proposal is any more accident-prone than the others or that if the dry mix plant were to be located elsewhere. As far as the residual cement that stays on the pack, this is the case with all cement bags so the ones that will be taken from the dry mix plant will not be any different but in our opinion it would be a fallacy to describe the residual cement on the cement bags as a source of dust pollution. All cement bags carry some residual cement which is bound to escape. It is part of the daily nuisances that one has to put up with, and so is accidental spillage. They cannot be said to have adverse impact on the environment. To ensure that it is effectively managed certain measures can be implemented by the Appellant such as having the cement put in plastified packs to reduce the risk of package breaking in case of accidents but these cannot be qualified as sources of dust pollution as such, in our view.

17. As for the fugitive dust although Mr. Gareeboo testified that even if the packets of cement were plastified the fugitive dust will be present but reduced, we do not believe that the fugitive dust from the dry mix plant will go beyond the buffer zone into the residential area. There is no evidence of this which has been produced. It is a possibility just as the source of dust being elsewhere is another possibility. We are therefore not convinced that through mitigating measures, some of which have already been proposed by the Appellant, any dust generated cannot be kept at bay. The Respondent's witness stated there was a lot of objections received as the residents were already facing a problem of dust pollution. He produced a photograph, marked Doc G, of which he is not the maker nor was it taken in his presence and we have decided not to attach any weight to it. The witness did not produce any evidence to show that for the type of development that is being proposed, there would be a consequential alteration in the air quality. Mr. Mehideen, on the other hand, testified that as matters stand both for air quality and noise, they are clearly within the standard. He stated that the stone crushing plant is already complying with the current standard of PM10.

18. We believe, as stated earlier, that the proposed development will be an environmentally sustainable one not only because of the mitigating measures proposed but also as an integral part of the processing within the dry mix plant, the rejected or oversized rock sand will be recycled back to the ball mill to minimize the waste, per the EIA report and the Appellant's letter dated 28th March 2018 sent to the relevant Ministry. The main type of solid waste, which is slurry from the fabric filter and considered non-hazardous, once dried, will be sold as backfilling material and any captured dust in the filters will be recycled as raw material to the process.

19. Mr. Mehideen testified, as per the EIA report, that the warehouse which will house the dry mix plant will be fitted with fabric filters for the prevention of escape of dust. The two silos where the final product is meant to be stored will be equipped with bag filters. The dedusting filters will be connected to the bagging machine, scales and additives hopper to prevent dust emissions. Sensors will be placed to ensure that there is no leakage. A fabric filter will also be used following combustion using diesel to bring the air quality back to the required standard. The bucket conveyors will be fully closed. These are some of the measures which the Appellant intends to take. According to the witness the impacts of dust and noise will thus be negligible.

20. As regards any dust pollution that may be generated by vehicles, true it is that Mrs. Hurkoo stated that there are likely to be an additional 20 trucks that will be transporting the materials, but we maintain our view that when all is considered and weighed on a balance, it tips in favour of such opportunities for industrial symbiosis improve resource efficiency through the use of byproduct without the need for transportation. Whereas if the development were to be situated away from the stone crushing plant, it would have entailed more lorry trips and hence more resultant pollution of our environment. In fact, here not only does the site have the necessary amenities based on the existing onsite infrastructure that can be shared with the stone crushing plant but no pre-construction activities will be involved as such like land clearing, site preparation or relocating people as is often the case. We believe therefore that this ground of refusal is not meritorious.

(ii) Ground 3: Potential source of pollution by way of noise

21. Mr. Gareeboo testified that there will be noise pollution during the drying, crushing and mixing process of the rock sand and that noise will also be generated when the cement will be filled in silos for storage purposes. In cross-examination however he agreed with the views of the consultant that at source the plant will be emitting a noise level of 70 decibels and in the re-dusting filler the noise level is going to be 75 decibels, which implies that the noise level on these scores will not offend the environmental standards for noise in industrial zones. At Annex 9 of the EIA report the results of the noise monitoring assessment have been provided. It can be gathered that although the scale is logarithmic, the average noise level recorded during the day was 63.2dB (A) Leq at the nearest dwelling house by Vyyaass Consulting Engineering Ltd, and that exercise was done with other noise generating industries in operation at the time, that is the metal industries such as Super Construction and CMT as well as birds chirping, as per the report.

22. The survey near the warehouse which is meant for housing the dry mix plant showed that the average noise level recorded was 70.3dB(A)Leq. In the course of each survey, the peaks in the reading showed the passing of vehicles especially lorries. It is interesting to note that within 15 minutes, not less than 13 lorries passed by. This is indicative of the type of vehicular activity that is always ongoing and typical of such industrial zones. As stated earlier, the proposed development will not be a stand-alone type. Thus, the noise generated by the dry mix plant cannot be segregated from that of the stone crushing plant, by metal industries, by other industries and by the vehicular traffic.

23. In **Halsey v Esso Petroleum Co. Ltd [1961] 1 WLR 638**, the plaintiff brought an action claiming nuisance due to the emissions from an oil depot. Justice Veale at pages 691-692 stated "The character of the neighbourhood is very relevant and all the relevant circumstances have to be taken into account. What might be a nuisance in one area is by no means necessarily so in another. In an urban area, everyone must put up with a certain amount of discomfort and annoyance from the activities of neighbours, and

the law must strike a fair and reasonable balance between the right of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other hand to use his property for his own lawful enjoyment." He also observes "The standard in respect of discomfort and inconvenience from noise and smell which I have to apply is that of the ordinary reasonable and responsible person who lives in this particular area of Fulham. This is not necessarily the same as the standard which the plaintiff chooses to set up for himself. It is the standard of the ordinary man, and the ordinary man who may well like peace and quiet, will not complain, for instance, of the noise of traffic if he chooses to live on a main street in an urban centre, nor of the reasonable noises of industry, if he chooses to live alongside a factory."

24. Mr. Gareeboo stated that there can be a rise of one or two decibels with the proposed development which will then take the noise level beyond the acceptable standards We do not agree with that proposition as it is not based on facts placed before us. Mr. Gareeboo did not show in what way he has expertise in noise monitoring in industrial zones to come up with this proposition nor did he adduce any evidence to that effect apart from his *viva voce* evidence. In an industrial zone it is illogical not to expect a cacophony of noise associated with machinery and industrial activities. Any intensification in industrial activity in an industrial zone may cause a rise in the noise level by a couple of decibels. It could be due to more lorries accessing the area or noisier machinery, even if they are light industrial activities. The fluctuation in noise level depends on several factors and cannot be ascribed to one particular activity in an industrial zone. That is why the OPS makes provisions for designated Industrial zones for the clustering of similar industrial activities. The noise survey report by an Occupational Noise Consultant, Mr. Kauvilen Cunee shows the existing noise level in the neighbourhood of the subject site which ranges from 52.8 dB (A) Leq to 97.8 (A) Leq. Mr. Gareeboo stated that light industrial activities may be considered in such zones rather than heavy industrial. We fail to appreciate in what way it can be said with certainty that the operation of light industrial activities will not raise the noise level or that the operation of the ready mix plant will necessarily raise the noise level or that there will be an unreasonable inference with the nature of the locality.

25. We bear in mind the evidence of Mr. Mehideen as regards the propagation of noise at the boundaries. He explained that if the noise generated by the proposed dry mix plant is combined with the existing noise level in the industrial zone which is already higher, the resultant increase in noise level is negligible. We also bear in mind the mitigating measures the Appellant is willing to provide as well as on the basis of surveys undertaken and report filed in the EIA report. We are comforted by the fact that the noise levels are within the norm acceptable in industrial zones, the proposed development will be taking place within the confines of a warehouse having concrete walls on a site and since the Respondent's stand appears to be based on speculation, and not on any solid evidence, we find this ground of refusal of the Respondent has not been justified and we accordingly reject it.

26. The Appellant has proposed, apart from the series of mitigating measures suggested in the EIA report, in its letter dated 28th March 2018, further mitigative measures which we find to be implementable and sustainable. The measures which have been suggested include enclosure for all machines, use of sound proofing panels of the sandwich type, some equipment will have rubber mats as ground gear for less noisy operations, the choice of equipment is based on their energy efficiency and have less noise emissions, final products would be on pallets to minimize the chances of cement packages breaking open, bagging units will be situated inside the warehouse so that in case of breakage of the package the dust will be contained within the warehouse, and some rather stringent measures have been suggested for the trucks and truckdrivers transporting the materials, amongst others. A spill procedure has also been suggested in case of accidental spill and there will be monitoring of the process.

27. For all the reasons set out above, we find that the appeal to be a meritorious one. While there is always a balance to be struck between the need to preserve the environment and to need to have development, it is important to have sustainable development which does not affect a clean environment. It is desirable for the relevant Ministry to review their guidelines so that clearer guidance is available to applicants as regards the standards that have to be met for each category of activity. It is only then that enforcement can be effectively done. The application of policies

should not have to be challenged for lack of clarity nor due to uncertainty over what the "right" standard should be. The appeal is therefore allowed. No order as to costs.

Determination delivered on 4th November 2020 by

Mrs. J. RAMFUL-JHOWRY	**Dr. Y. MIHILALL**	**Mr. H . MEETOO**
Vice Chairperson	**Member**	**Member**