

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 994/15

In the matter of :-

Victoire Pierre Christophe Hensley

Appellant

v/s

District Council of Grand-Port

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having refused the application for a Building and Land Use Permit ["BLUP"] to the Appellant for the conversion of the ground floor of a building to be used as a metalworkshop at Lot A 63, Morcellement VRS, Grand Bel Air. The appellant was informed of the decision of the Council by way of a letter dated 11th September 2015. The reasons for refusal set out in the letter are as follows:

"1. The proposed activity is located in a residential morcellement (Morc. VRS). According to Policy CR1 of the Outline Planning Scheme, only a small commercial activity (Tobacco shop, shop and snack shop) can be allowed in predominantly residential areas.

2. The proposed activity will have serious adverse impact on residential occupiers in the area with regards to noise, smells and excessive vehicular movement."

2. Both the appellant and the respondent were legally represented. We have duly considered the evidence before us as well as submissions of both counsel.

I. **CONTEXT ANALYSIS**

3. The proposed development is an enclosed room with several ventilator-type openings which is within a residential building found in a residential morcellement at Morcellement VRS, Grand Bel Air. It is to be used as a Turner and Fitter workshop for vehicles. As per the photographs produced by the Appellant, the workshop is made of mainly glass paneling set in aluminium frames and the roof of the workshop is made of corrugated iron sheets. As per the application for submitted by the Appellant to the Council, he intends to operate 8 hours a day everyday and have two machines working for reparation of vehicles and the number of vehicles expected is 3 per day.

II. **THE EVIDENCE**

4. One aspect which is clearly established and confirmed by the Respondent and Appellant is that the house of the Appellant is found within a residential morcellement VRS where there obviously exist many residential buildings. The proposed development would consist of the operation of "industrial engines" as per the statement of case of the Appellant. The Appellant stated in cross-examination that a turner's job entails using materials such as metals, fiber, wood, rubber. He gave several versions regarding the level of noise that will be generated by the operation of such machinery. He finally stated that it will generate the same level of noise as the engine of a car. He was confronted with his notice of appeal wherein it was averred that the latest model of the engine will be installed which will be soundless. His main bone of contention is that the Council did not give him a hearing. He was not given the opportunity to explain his project and the Council was wrong in its assessment of the noise level that will be generated by the development he proposes and also that the Council assessed his application under the wrong policy.

5. On the other hand, the evidence of the Council's witness is that the Council based itself solely on the **Policy CR1** and **ID2** which were not satisfied in the present case since the type of development sought to be done was more in line with an industrial one and this would not be compatible in a residential environment and that the type of nuisance that would be resulting from the development would be disruptive to the amenity of a residential area. She also testified to the effect that the Council is not legally bound to hear the Appellant if the planning merits of the case are obvious.

III. APPLICABLE PLANNING INSTRUMENTS

6. The proposed development being the operation of industrial machinery, which is categorized as an industrial activity, within a residential area will be regulated by **Policy ID 2** of the **Outline Planning Scheme["OPS"] of Grand Port. 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 smallscale enterprise should remain at the premises.

7. The witness for the Council also produced extracts of the **OPS** regarding **Policy CR1** which regulates commercial and retail developments. The policy is reproduced in part hereunder:

“CR 1

Proposals for commercial and retail development including shops, offices and restaurants should conform to the clustering principle and sequential approach outlined in the Strategic Development policies such that areas within settlement boundaries particularly sites in Urban Renaissance Zones, Rural Regeneration Zones and village centres should be explored before sites on the edge of settlements are considered. The design of retail, office, commercial and business development should generally be in accordance with the Commercial Design Guidance and SD 5.”

8. This is also clear evidence that proposal has been assessed by the Respondent as an industrial development, and we believe, rightly so because repairs involve not only the use of instruments and machinery which cause pollution due to noise and dust but the amount of vehicular movement within the residential morcellement will be on the rise as the Appellant starts operating his business. The Appellant argued that the development is not a commercial one and that the **Policy CR 1** does not apply. We agree. There is nothing that suggests that the type of development is a commercial one except that he would be offering his services. However, the use and operation of the machinery would be more in line with an industrial use. Other than this, the Council not having granted any type of BLUP other than for residential use within that morcellement, the parameters used by the Respondent and its assessment do not appear to be flawed.

9. Now in fairness to the Appellant's case, we have also looked at the provisions of the **Policy ID2 on Small Industrial Workshops and Home Working**, which regulates small scale enterprises within residential areas. This section provides guidance namely that light industry, amongst others, 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 is aware that the machinery he intends to use will generate noise. He may have given different versions of the level of noise that the machines are likely to generate but the fact of the matter is such heavy-duty machinery while in use will cause noise which would normally not exist in a residential morcellement. Even if we have to consider a noise level which is relatively low, as per the Appellant's version, but a noise which is constant, we believe that it can constitute a nuisance. There is no report on record to show the level of noise that the 2 machines are likely to generate therefore we will not surmise on the issue.
10. The fact that the Appellant intends to set up a business whereby he is offering his services, an increase in vehicular traffic is to be expected within the residential morcellement. The evidence from the representative of the respondent is that no BLUP has been granted within that morcellement VRS for any development other than for residential use.
11. Furthermore, we need to also address our minds to the fact that in addition to the actual metal parts being made or repaired, they will need to be fitted. This would necessarily entail the use of hammers and other tools. The use of other tools which are likely to be used as ancillary to the main turning activity likely to generate noise. We do not believe that it will be a suitable a development to be encouraged within a residential area. The reason being that by allowing industrial development in non-industrial zones as can be gathered from the outline scheme, is that it would create bad neighbour impact on residential occupiers living in the area, or negatively impact the character of

the neighbourhood particularly as regards noise, smoke, fumes, smell, dust, fire risk and disposal of toxic material.

12. The Appellant argued that there is nothing found in his title deed that precludes him from undertaking a development other than residential on his property. We believe that the Council is not bound by the conditions of the title deed when deciding not to grant an application. The Council has to decide the application based on its planning merits as per the applications of the Outline Planning Scheme and other planning instruments.

13. 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 the 12th February 2020 by

Mrs. J. RAMFUL
Vice Chairperson

Mr. IMRIT
Member

Mr. GUITON
Member