

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1451/17

In the matter of :

1. **Mohammad Ali Khan MujahiddiAnnoowar**
2. **Bibi NawsheenChineaSaib**

Appellants

v.

City Council of Port Louis

Respondent

Determination:

1. The Appellants have lodged the present appeal against the decision of the Respondent for having on the 17th July 2017 refused to grant a BLUP for the conversion of an existing building at ground floor to be used as automotive workshop, maintenance and repair of motor vehicles at Avenue Dodo No.1, Morcellement Raffray, Les Guibies, Port Louis.
2. The background of the case, as per the statement of case of the Appellant, unfolds that an application for a BLUP for the conversion of an existing building at ground to be used as automotive workshop and maintenance and repair of motor vehicles (employing less than 10 persons) at Part of No. 91 (A), Latanier street, Sainte Croix, Port Louis, had been refused as far back as 20 July 2016.
3. In or about July 2017, the application for BLUP for similar activities was made to the Respondent. The Appellants were convened to a hearing before the Permits and Business Monitoring Committee in July 2017. The grounds of refusal as contained in the letter of the Respondent dated 17 July 2017 are:
 - (a) The proposed development is not a compatible use as per the provisions of the Outline Planning Scheme.
 - (b) The proposed development may be a source of nuisance.
 - (c) Objection had been received.
4. A Notice of Appeal dated 25 July 2017 was lodged at the Tribunal against the decision of the 17th July 2017 and it sets out six grounds of appeal:
 - Ground 1: That there already exist three mechanical workshops in the vicinity;
 - Ground 2: That there is an industrial plant, namely Livestock Feed Ltd;
 - Ground 3: That the Respondent failed to take into consideration the following matters hereunder mentioned whilst assessing the application: (a) the building where the Appellant intends to operate his activities is spacious, offers security

and also has a parking space, (b)the Appellant is the holder of a Business Registration bearing No. 116004726 for maintenance and repair of motor vehicles, (c) the Appellants have undertaken to conduct the business activity manually such that no electrical machines will be used. (This ground was amended on the 10th April 2019 upon motion of the Appellant)

Ground 4:That the Appellant was not disclosed the grounds on which the hearing was to be heard.

Ground 5: That the call for hearing did not state that the Appellant should be represented/legally represented according to law.

Ground 6: That the decision of the Respondent is unfair, biased and wrong, and should be quashed, reversed and/or modified as justice of the case may require in as much as the notification of the decision has been wrongly given.

5. The Respondent denied the averments contained in the statement of case and moved that the appeal be set aside as it has no merit.
6. Evidence adduced by Appellant No.2 (on behalf of both Appellants) is to the effect that in the second application for BLUP it was specifically stated that there will be manual operation of the maintenance and repairs. As opposed to that, other automotive workshops in the vicinity are operating by making use of heavy machinery, causing noise pollution, fumes and vibrations. She averred that there has been no consistency in the application of the policies by the Respondent. In spite of the environmental hazards, the other automotive workshops are operating, as evidenced by the photographs produced as Documents A and A1 to A. In addition, except for two persons who have objected, no such objection has been made by other surrounding neighbours nor owners/occupiers. She thus found no justification for the decision of the Respondent, the more so that it was the second application that they had made.
7. In cross examination Appellant No.2 strongly maintained that she had been unable to express her views at the hearing held at the Council, which, as per her version, appeared to be biased. She stated that she had not been informed that she could be legally represented at the hearing, and that she felt she had not had a fair hearing.
8. The Head Planner of the City Council deposed on behalf of the Respondent.
9. We have considered the evidence adduced by the parties. The Appellant has laid emphasis on the fact that the hearing at the level of the Council had not been fairly conducted and she had not been represented by counsel as she had not been informed of this option when she was convened to attend. These contentions are listed in the Notice of appeal as the fourth, fifth and sixth grounds of appeal. The Appellant has conceded in cross examination that she had been allowed to put her case during the hearing. The perception of bias that she had by reason of the fact that she had seen the inspector talking to the complainant, and the lack of information given to her on her legal representation are matters that raise questions on the decision-making process before the Permits and business Monitoring Committee. The last three grounds of appeal amount to a challenge of

the process of the decision. These issues fall within the realm of judicial review, for which this Tribunal has no jurisdiction. The remedy for the unfair process as raised should be sought before the proper jurisdiction. We find that the fourth, fifth and sixth grounds of appeal do not fall within the jurisdiction of this Tribunal and are therefore set aside.

10. This Tribunal has to look into the planning merits of the decision. The planning merits are assessed in the light of the planning instruments that govern such an application. The relevant provisions are firstly, the Outline Planning Scheme (OPS) of 2015 and secondly, the Planning Policy Guidance.
11. The Outline Planning shows in the "Development Management Map" the detailed spatial planning policies. This map shows the predominant land use zones and the purpose of the OPS is to apply relevant policies to manage and guide development in a consistent manner across areas that have similar characteristics (as per Paragraph 4.2.1 of the OPS).

The OPS (Table 4.1) sets down that where the predominant land use zone is residential, the permitted secondary developments within such zones are '*any use/activity other than:*

1. *Bad neighbour uses /activities*
2. *Light, medium, heavy and extractive industries and warehousing...*
3. *Major commercial (i.e. other than corner shops and small scale retail outlets)*
4. *Public facilities such as government administration...*
5. *Major transport and utility infrastructure.*

Policy ID 2 of the Outline Planning Scheme however allows for certain small scale enterprises that are carried out in the home without modification of the dwelling. In this respect, Section 2.13 of the Planning Policy Guidance 1 (Design Guidance Industrial Development) provides that: "*Small scale enterprises that are carried out in the home without modification of the dwelling may in some locations be acceptable, but stringent criteria are necessary to ensure that the surrounding residential amenity is not compromised. Industrial uses such as panel beating and spray painting, manufacture of furniture and vehicle repairs are not normally acceptable uses within residential areas due to dust, noise, fumes, vibration and other adverse environmental effects.*"

12. The proposed development is of the type that would generate nuisance as envisaged in the abovementioned policy. The fact that the Appellant proposes to operate manually and not to make use of electrical machines can constitute a mitigating factor but does not ensure elimination of all adverse environmental impacts and traffic hazards. The adverse impacts on the neighbourhood is not negligible as the proposed development is close to residential houses, and, in addition, it is on record that there have been objections raised against this development.
13. We have taken note of the evidence adduced by the Appellant on the existence of similar developments approved by the Respondent and the presence of another bad

neighbour development nearby, namely the 'Livestock Feed Limited'. We note also with concern that the Appellant's evidence that similar activities have been granted permits within the neighbourhood even after the decision to refuse the application presently under appeal. We sound a note of caution on any decision that the Respondent may have taken in its application of the abovementioned policies and, more importantly, any lack of consistency in its decision making. This being said, we are in presence of the refusal met by the Appellants. We can by no means address this appeal on the basis of other permits which may have been granted. In applying the planning instruments as elaborated above, the proposed development is a mislocation. Grounds of appeal 1 and 2 cannot be upheld based on planning grounds. Ground 3 contains elements which propose mitigating potential nuisance. However, in the light of the above, they cannot abate the inherent mislocation of this type of activity in the present premises. Grounds 1, 2 and 3 are accordingly set aside.

14. In view of all the above elements, this appeal cannot succeed. We find no reason to quash the decision of the Respondent. The appeal is set aside.

Determination delivered by:

Mrs. Vedalini Phoolchand-Bhadain, Chairperson

Mr. Marc Reynolds Guiton, Member

Mr. Raouf Soyfoo, Member

Date:

2nd October 2020