

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 858/15

In the matter of:

Prithyveeraj Mohabeer

Appellants

v/s

The Municipal Council of Vacoas-Phoenix

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having rejected the application of the Appellant for a Building and Land Use Permit ["BLUP"] for the relocation of an existing Car Body Repair Workshop at Clairfonds No.3, Vacoas. The grounds for rejection communicated to the Appellant in a letter dated 24th February 2015 are set out below:

"1. Site Notification Board was not affixed on site at the time of inspection and same was confirmed by an objector during hearing held.

2. *The access is narrow (deprived from appropriate kerb radius at the junction) and not suitable to serve developments other than residential and may result in hazardous situation between pedestrians and vehicular movement in view of its limited width.*

3. *The area is highly residential and the activity is incompatible with its neighbourhood. (taking into account that there is proposal for the existing homebased workshop to move to a purposebuilt building nearer to the neighbouring houses.)*
 4. *The activity will result in intensification from a home-based "1 slot garage" to a purpose-built "2 slots garage" which will impact negatively on the existing environment in terms of noise pollution, health hazards and loss of privacy."*
2. The 8 grounds of appeal as per the notice of appeal are set out hereunder:

"1. The photos produced to the Council at the Hearing confirms that the Notification Board was duly affixed.

2. The Council failed to take into consideration that:

- (a) The Appellant already holds a Licence to operate a Workshop for repair of motor vehicles' body at the said address and which was issued to him by the Respondent on 26 January 2006 and, as he was working in cramped conditions, he took a loan and purchased the plot of land of an extent of 328.22 sq.mts, which is adjacent to his workshop with a view to shift there.*
- (b) The new building where Appellant intends to shift his activities is more spacious, offers more security and also has a parking space, compared to the existing one which is small, cramped and very difficult to work inside.*
- (c) Access is gained from the main road, which is very close to the site, without any difficulty. As at present, even big lorries have access to the existing Workshop without difficulty,*
- (d) Around 105 sq.mts of the new land is to be used for the Workshop and the rest for parking facilities,*
- (e) The deprivation of the kerb radius at the junction is due to the unlawful act of one of the objectors and, in spite of several complaints made to the Council, latter has not taken any appropriate steps against the offender to order him to observe the kerb,*

- (f) *The Appellant has been operating on the site since a very long time and there has never been any "hazardous situation between pedestrians and vehicular movement".*
- (g) *The objectors are of bad faith as there is bad blood between them,*
- (h) *Following an agreement reached before the President of the Tribunal in a previous appeal relating to the same issue (ELAT 75/12), the Head Planner proposed to reconsider Appellant's BLP and afford him a fresh hearing before the Council on the condition that latter withdraws the said appeal. The Head Planner also undertook responsibility to approve Appellant's BLP for relocating his activities to the new building which is adjacent to the place where he is presently operating a garage under an existing BLP, on the condition that he stops operating in the old garage and shift to the new one. On this undertaking, the said appeal was withdrawn.*
- (i) *The purpose for building a new garage and shift there is also to provide better safety to employees, to the neighbours and to the clients.*
3. *There is no workshop activities being carried out within a radius of more than 500 mts from the proposed site.*
4. *The access road ends at the proposed site.*
5. *The Workshop operates only during normal working hours, i.e between 9 a.m to 5 p.m.*
6. *The new plot of land the Appellant has purchased and on which he intends to make the proposed development, has already been classified as commercial, with effect as from 01.05.09, by the Valuation Office, under the Local Government Act 1989, as subsequently amended, and the Respondent perceives Municipal Tax/General Rates thereon on that basis since then.*
7. *The parking facilities which will be offered on site will solve the problem of obstruction, if any.*
8. *By relocating its activities to the new site, noise pollution, health hazards and loss of privacy, if any, will in fact be minimized.*

3. The matter having started anew before a freshly constituted bench, the Appellant moved to file an amended statement of case outside the prescribed timeframe in view of certain new circumstances. Since the motion was met with no objection, the amended statement of case was filed on record. The Appellant, who was legally represented deponed under solemn affirmation and was cross-examined by the legal representative of the Respondent. Miss Ramroop, Head of Land Use and Planning Department, deponed on behalf of the Council and was cross-examined by the Appellant's counsel. We have duly considered all the evidence placed before us as well as submissions of all counsel.

I. CONTEXT ANALYSIS

4. The undisputed evidence is that the subject site is located along Impasse Savonerie at Clairfonds No.3, Vacoas. The subject site lies within the settlement boundary, and the evidence shows that the area is considered to be a predominantly residential one. The proposed development, as it emerged in evidence, is already being carried out on the subject site illegally, in a garage space on a plot of land next to an existing garage workshop which the Appellant had been operating since 2006. The local authority had at that time granted a clearance to the Appellant to operate a car body repair workshop covering a floor area around 8 ft by 9ft to be used as "1 slot garage" workshop which was attached to the house of the Appellant. Opposite and adjacent to the subject site are found the residential properties of the objectors. Impasse Savonerie is between 2.8 to 3 metres wide. There are only houses situated all along the lane which is a one way, no through public road and around 90 metres long. The topography of the land is such that Impasse Savonerie is prone to flooding.
5. The Appellant's case was essentially based on the fact that this activity was his only source of income, he needs to earn to support his family, he has loans to pay off with regards to the subject property and that this the job he has done all his life. His main contention is that the workshop is too small such that at times part of the body of the vehicle under repair protrudes onto the lane. The workshop is cramped and that when the road floods due to heavy rainfall all the water collects in the existing

workshop thus making it inconvenient and hazardous to work especially with the gas welding machine. He also contends that the subject site, which is situated next to his original garage workshop, was acquired by him in 2009 and that it already contained a “garage” as per the title deed. He claimed to have paid the Council for the commercial use of the building that stands on the subject site. According to him, effecting car body repairs does not generate nuisances and noise pollution as does panel beating due to new methods being used such as hydraulic machines which run with oil. He did not contest the objections raised by his neighbours.

6. The refusal of the Council is grounded essentially on the point that the area being predominantly a residential one and the activity, which we understand the appellant to operating illegally for a number of years, is not compatible with the residential character of the area the moreso as the access road running past the site and the houses is narrow hence leading to hazardous situations. The Council contends that the activity will be intensified in view of the setup of the “new” workshop which provides more space for vehicles and this will further cause nuisance to the residential neighbourhood. This is supported by the number of objections received from neighbours on the ground of nuisance in terms of noise, dust, smell. To substantiate their contention, the Council has referred to the provisions of the Planning Policy Guidance (“PPG 1”) as set out in **section 2.13 of the Planning Policy Guidance on Small Industrial Workshops and Home Working.**

II. PLANNING LAWS AND INSTRUMENTS

7. Having established that the subject site lies within a residential area, the relevant policies to be consulted for such developments in residential areas are **section 2.13 in the Planning Policy Guidance on Small Industrial Workshops and Home Working**, which includes certain types of industrial development which would not normally amount to “bad neighbour” developments as termed in planning jargon, and which stipulates:

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, vibrations and other adverse environmental effects. Examples of potentially acceptable smallscale enterprises include cooking of sweets and food preparation, sewing and small scale clothing manufacture, repairs to electrical goods, minor car/mechanical and bicycle repairs, artists studios, offices such as book keeping, administration etc.

8. The Policy that finds its application here is **Policy ID2 of the Outline Planning Scheme of Vacoas-Phoenix on Small Scale Enterprises and Home working** which provides

Proposals to operate and extend office/business uses or small scale enterprises from residential properties should only be permitted if the use is ancillary to the principal use as residential. Criteria should include:

- 1. 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.*
- 2. No neighbours' objection within a radius of 50 metres.*
- 3. 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;*
- 4. Sufficient parking space within the cartilage of the property available to accommodate any staff or visitors;*
- 5. Safe access from the roadway...*

9. The undisputed evidence is that the subject site lies within the settlement boundary and is therefore a zone which favours residential development. The Tribunal takes on board the fact that the appeal before us is an application for **relocation** of an existing Car Body Repair Workshop but as a matter of fact, the new workshop has a bigger garage which contains one more slot than the previous one and has a much bigger parking space. This is confirmed by the evidence of Miss Ramroop and the photographs filed by her.
10. The Tribunal cannot be oblivious to the fact that there are several objections to this development forthcoming from people who reside in the immediate vicinity of the

appellant's property nor to the provisions of the Outline Planning Scheme of Vacoas-Phoenix which recognizes the area as being within settlement boundary.

III. ISSUES

11. The first ground of refusal, addressed in the first ground of appeal, is that the site notification board was not affixed on site at the time of inspection and same was confirmed by an objector during hearing held. Whilst there is an obligation on the applicant to put up a notification plate, we believe that the purpose was achieved since there were objectors who managed to take note of the application, they did come forward to lodge their complaints with the local authority and they were given a hearing where their objections were heard and taken on board. This ground therefore fails.

12. The second ground of refusal is that since the access is narrow, and hence deprived from appropriate kerb radius at the junction, it is not suitable to serve developments other than residential. This may result in hazardous situation between pedestrians and vehicular movement in view of its limited width. Under grounds 2 (c) and (e), the Appellant stated that the access is very close to the main road and even big lorries drive in without difficulty and that the deprivation of kerb radius at the junction is due to the unlawful act of one of the objectors. Miss Ramroop gave evidence that the width of Savonerie Lane is 2.8 metres, as per Doc H, after having taken measurements as the planner of the Council. According to the Appellant's version, the width is 3 metres. This implies that access to the site is unsuitable being given that it is narrow. The access of lorries was canvassed by the appellant and he testified that lorries do access the lane and he produced photographs, Docs A-A3, presumably to show that the road is wide enough for passage of heavy-duty vehicles also.

13. This in our view does not go in favour of the Appellant because looking at these photographs produced, we believe that it only adds to the nuisances and safety risks

of having vehicles maneuvering into such small lanes in close proximity to people's houses where some of them have their buildings right on boundary of the access road hence having an access from the building directly onto the road while others have main entrances or gates open onto this access road, that is Savonerie Lane. It is only logical that if the width of the road is 2.8 metres, or even 3 metres as per Appellant's version, it does not leave much room for pedestrians, the more so as this road is full of residential buildings. We are alive to the fact that the business of the Appellant existed since a long time but "relocating" to bigger premises implies more traffic along this access road which will increase the risk of accidents and be hazardous for pedestrians.

14. The Appellant stated that there has never been any accident reported involving traffic caused by the activity of his workshop, which was unchallenged, as per submissions of Appellant's counsel. This is also set out at ground 2 (f) of the grounds of appeal. We do not believe that this is evidence of the carrying out of the activity on the locus making the narrow access road hazard-free nor does this reason amount to a planning consideration. Miss Ramroop produced a photograph, Doc H3, showing the appellant's property and the boundary line of the contiguous neighbour who has objected to the development and activities of the appellant, one of the reasons being the risks associated with the increased traffic. Application of **Policy ID2 of the Outline Scheme** provides that the proposed development should not adversely affect the residential amenity and there should not be objections from neighbours within a radius of 50 metres. These have not been satisfied here. The fact that there have not been any complaints recently does not imply that there are no hazards. The new development will result in increased safety risks for the inhabitants of that locality more especially those using the access road.

15. The third and fourth grounds of refusal will be taken together since they are linked. It is the contention of the Council that the area is highly residential and the activity is incompatible with its neighbourhood (taking into account that there is proposal for the existing homebased workshop to move to a purpose-built building nearer to the neighbouring houses). It is also the case of the Council that the activity will result in

intensification from a home-based “1 slot garage” to a purpose-built “2 slots garage” which will impact negatively on the existing environment in terms of noise pollution, health hazards and loss of privacy.

16. The Council’s representative has also produced a series of documents evidencing complaints received from neighbours against the activities of the Appellant since 2009 due to nuisance and disturbance relating to noise, dust, smell and constant traffic along the lane creating risks to their safety and the minutes of proceedings of the hearing before the Council where objectors voiced their complaints against the operation of the Appellant’s activities within their area which is residential and object to the new development proposal for fear of intensification. This evidence directly goes against the provisions of the policy under **paragraph 2.13 of the PPG1** and **Policy ID2** *supra*, there should be “adequate setbacks from neighboring properties” and “no neighbours’ objection within a radius of 50 metres”. Under ground 2 (g) of the grounds of appeal, the Appellant stated that the objectors are of bad faith. We do not believe that is an important consideration in the present case since the application is decided on the basis of its planning merits.

17. We are here looking at the repair of car bodies. This involves the use of several types of equipment for grinding, drilling, welding which are noise generating. The submission made on behalf of the Appellant is that the machines used are small and the noise generated does not constitute “trouble anormal de voisinage”. We do not agree. First of all the type of noise generated by the use of such machines cannot be termed as “normal” in the context of a residential area, after all this type of development is a “bad neighbour development” as termed in the planning rules since it is a source of noise and possibly other types of pollution which constitutes nuisance to the neighbourhood.

18. Under ground 8 of the grounds of appeal, the Appellant has stated that by relocating, noise pollution, health hazards and loss of privacy will be minimized. One

of the objectors lives next door. Some of the objections raised against the activity of the Appellant are that there is a strong smell due to the paint used and the noise generated by not just the activities of repairing the bodies of vehicles but also the traffic that it generates and its associated inconveniences are incompatible with an area where there are inhabitants. It is also not unexpected for the residents living within a 50-metre radius, as per the policy above, to experience on a daily basis some commotion associated with vehicular and human traffic. The noise and dust associated with the cutting, grinding of metal are real issues for residents especially when the noise is an ongoing one which lasts the whole day.

19. The photographs of the Appellant's workshop produced by the respondent shows that the workshop is being operated in an open space under CIS, which allows noise to escape. Miss Ramroop explained that she went on site where stands a garage under CIS which is a 2-slot garage and a compound, where she noticed on the premises of the Appellant about 8 cars at the workshop with 4 having their bonnets opened and raised and works were clearly being done on them and the remaining cars were parked. The house of one of the objectors is adjacent to the subject site. Such activities, in our view, can be detrimental to the amenity of the area.

20. We bear in mind that the local authority had granted a clearance to the Appellant to operate this home-based workshop 22 years ago. At that time, there were no planning policies as such which regulated the siting of various developments within the set clusters. We now have well settled principles and policies to define the parameters within which development is to be done. We have a duty to apply them unless where the situation is such that a derogation is justified. The Tribunal when all evidence is weighed up, is of the view that the subject site being within the settlement boundary and with numerous neighbours who reside in the vicinity (out of whom some have raised objections), that the subject site is predominantly residential. We have not been convinced by any argument put forward by the appellant as to why we should depart from the provision of the Outline Planning Scheme.

21. Not only from a fairness and parity point of view, but also from a planning view point such industrial developments are not conducive to proper and effective planning, due to the lack of safety it creates for other road users along a narrow lane. Under ground 6 of the grounds of appeal, the Appellant stated that the subject site is classified for commercial use. The Appellant's activities are of an industrial nature, not commercial. In any event, all new development proposals have to be assessed on their planning merits by the Council.
22. Under grounds of appeal 2 (a), (b), (d), (i) and 7, the Appellant's case is that because his initial workshop was small and he was working in cramped conditions, he contracted a loan and purchased a bigger plot to have more space to carry out his activities which also offers more safety and security to the employees, clients and neighbours and also more parking space which will solve any problems regarding obstruction of the way. While all these propositions may not be incorrect in themselves, the development must be looked at as a whole in that whether it is conducive to have such types of activities in a residential area. The answer here is in the negative. This is a new development for all intents and purposes which is subject to the provisions of the Outline Planning Scheme. Such types of activities will compromise the peace of the local inhabitants such that they will not be able to have a peaceful enjoyment of their homes.
23. The same reasoning applies in relation to the points raised by Appellant under grounds 3 and 5 of the grounds of appeal. Irrespective of whether there are no workshops within 500 metres from the proposed site and whether the working hours are from 9am to 5 pm, the application of the provisions of the Outline Scheme shows that activities of such nature are incompatible with the character of a residential area and therefore should be discouraged. The activities of the Appellant will not simply be relocated but also intensified with the larger premises.
24. Grounds of appeal 2 (h) and 4 are disregarded as they do not amount to grounds of appeal. Besides as explained above, this matter was being heard by a previously constituted bench and had to start anew before a new bench. As regards ground 4,

evidence was adduced that the access road goes beyond the subject site, it is approximately 90 metres long.

25. For all the reasons set out above, more especially being given that this development will not just constitute a relocation but also an intensification of the activities in a residential area, we uphold the decision of the Council. The appeal is set aside. No costs.

Determination delivered on 2nd June 2020 by

A.

Mrs. J. RAMFUL
Vice Chairperson

Dr. Y. MIHILALL
Member

Mr. H. MEETOO
Member