

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

**ELAT 137/12**

**In the matter of :-**

**Anju Muttur**

**Appellant**

v/s

**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 use of part of an existing commercial building at ground floor to be used for Retail sale of Hardware in stores (having the right to sell cement, iron and steel bars) at 36, Nubee Avenue, Stanley, Rose Hill. The decision of the Council was communicated to the Appellant by a letter dated 6<sup>th</sup> April 2012 which stated that the Council rejected the application on the ground that
  - (i) The proposed development is likely to be detrimental to the amenity of the area with the associated noise, visual and dust inconveniences resulting from such activities usually.
  - (ii) There is no provision for on-site parking and loading/unloading of heavy/delivery lorries.

(iii) Manoeuvring of steel/construction bars (especially of length 9 metres) during loading/unloading may lead to chaotic traffic situation unsafe to pedestrian given the location, context and characteristics of the premises.

2. The appeal was lodged before the Town and Country Planning Board and subsequently transferred to this Tribunal following the enactment of the Environment and Land Use Appeal Tribunal Act 2012. Both parties were legally represented at the hearing. To substantiate the case for the appellant, the latter as well as a planner, Mr. Jalil Foondun and Mr. Aza deponed and were cross-examined by Respondent's Counsel. The Head Planner, Mr. Bungaroo, deponed on behalf of the Council and was also subjected to cross-examination by Appellant's counsel.

3. We pause here to make an observation. It is rather unsatisfactory state of affairs that the officer who has put in the statement of defence on behalf of the Council was not the one who deponed on behalf of the Council. We fail to see how one person can under solemn affirmation confirm the correctness of a document prepared by someone else who is neither his legal advisor nor his technical expert, within the meaning of the **Environment and Land Use Appeal Tribunal Act 2012**.

**Section 5 (5) of the Act stipulates**

*"(5) A party before the Tribunal may be represented by a barrister or an attorney or, with the leave of the Tribunal, be assisted by a person having expertise in the subject matter of the appeal."*

4. It was therefore procedurally incorrect for the Council to have Mr Bungaroo to confirm the correctness of a document prepared by Mr. Cundasamy acting on behalf of the Chief Executive of the Council, the moreso as he stated at the outset of his cross examination that he could not comment on the recommendations of Mr. Cundasamy. This, at the outset, renders the evidence on behalf of the Council rather shaky.

5. The Tribunal also carried out a site visit in this case on the 24<sup>th</sup> April 2015. In the course of the visit, we had the opportunity to see the simulation of a heavy duty lorry carrying 9-metre iron bars and cements packets parking in the parking bay of the building and the items being delivered from it. The Tribunal, thus, had a visual appreciation of facts, which was of great importance in this case since the refusal was based on reasons grounded on an appreciation of facts of the site, locality and circumstances.
6. We have duly considered all the evidence placed before us including submissions of both counsel. We do not intend to overburden this determination with the evidence of each witness or submissions of counsel except where we deem it necessary to do so.

#### **CONTEXT ANALYSIS**

7. The property in lite is a storeyed building found on Nubee Avenue, within a few metres from the junction with Avenue Berthaud. It contains a residential part upstairs and downstairs is commercial with a forecourt used as parking area. Downstairs the property in lite is divided into three units, that is, the main hardware shop, the cement store found right next to the main shop and the store for iron and steel bars found next to the main shop but on the opposite side to the cement store. The stretch of road along Nubee Avenue from the junction of Avenue Berthaud running in front of the appellant's property has been noted to contain some commercial development as well as residential ones.

## THE ISSUES

8. It is the submission of learned counsel appearing for the respondent that the site is located in a mixed use area with predominantly residential settlements and commercial nodes. It is not disputed also that Nubee Avenue is relatively calm compared to the nearby Avenue Berthaud which is very busy and hectic and it is also a mixed use area within the planning jargon, but it remains an area with a suburban feel which cannot be described as 'busy'. Mr. Foondun, planner, who deponed on behalf of the appellant, described the site as being located some 20m from the junction of Avenue Berthaud and Nubee Avenue, which has also been noted in the course of a visit of the site by the Tribunal.

**(i) Detriment to amenity due to associated noise, visual and dust inconveniences.**

9. We are here looking at the delivery of cement and iron bars at the subject site and its associated inconveniences. As far as the amenity of the area is concerned, we have in evidence that the area where the subject site is, is a mixed use area. Therefore, a bit of commotion associated with vehicular and human traffic is not unexpected. Afterall, these are the daily inconveniences of life that one has to put up with when living in an area having some commercial character. Mr. Foondun and the Appellant both deponed on the other commercial activities that exist within the vicinity of the subject site, which also includes a timber yard. Although arguably, the delivery of cement may give rise to some dust and we shall address this further on, we fail to see in what way the intensification of the activities will be detrimental to the amenity of the area especially in terms of 'noise and visual inconveniences' as the Council put it. The fact that the Council has granted a BLUP for a hardware shop to the appellant already means that it

must have taken into account the noise and visual inconveniences, if any. This planning exercise must have been done previously by the Council and yet it decided to give the Appellant the relevant permit. This undermines the Council's own argument on the provisions under policy USD 1 of the old outline scheme, Doc K. The appellant operates a hardware shop which sells iron sheets, sanitary wear, pipes and tiles amongst others. The loading and unloading of such items entails some amount of noise and visual inconvenience and yet the Council deemed it fit to grant the relevant permit at the time. At any rate, following the Tribunal's visit on the locus, we are not convinced that any loading or unloading of such items will be intrusive either visually or with noise. The locality is not one that sees a lot of hustle and bustle but at the same time, one can expect some noise associated with the commercial activities in the vicinity.

10. The position of the Council's representative, Mr. Bungaroo, is that he was not the planner who made the planning report and although in the course of his deposition before the Tribunal he did not have the relevant file before him, he stated that he did take cognizance of the recommendations made and that he could not comment on whether he agreed with them or not. He stated clearly that he did not have any supportive planning evidence as far as noise is concerned. He maintained that to some extent there is a noise problem when there is loading/unloading of iron bars and maneuvering of the heavy delivery lorries. He, however, agreed that the noise level on site was not measured and that the officers of the Ministry of health and quality of life were also not contacted for that purpose. His justification for one Quicallerie Jhugroo found on Avenue Berthaud having obtained a BLUP being at a junction as compared to the Appellants case whose premises is second lot from a junction, simply did not convince us.

11. The Appellant has been operating a hardware shop, with all its associated conveniences and inconveniences, for a number of years in that area now, it is a fact known to those in the neighbourhood. We therefore do not agree that having the right to sell cement and iron bars will now be detrimental to the amenity of the area. In any event, the time

of delivery of these materials can be regulated by the imposition of conditions such that bulk delivery is done at specific times so as not to cause any inconvenience to neighbours and other road users. According to the appellant's testimony if ever any of her clients need a large quantity of iron bars, arrangements will be made for direct delivery from the 'depot' to the construction site.

12. As far as cement is concerned, we believe that the main concern is that it generates dust. However, we can take judicial notice of the fact that cement comes not just in paper packets but also wrapped in plastic packets now. We have it in evidence of Mr. Aza and also it was measured in the course of the site visit, the distance between the lorry duly parked in the loading/unloading bay of the shop's forecourt and the entrance to cement store was 1.3m. That therefore means that during disembarkation the cement bags will be unloaded almost directly into the store since it seemed to be only one hop away from the lorry into the cement store. This therefore does not leave much room for cement particles to disperse into the air.

13. This being said, we believe that in the present context, bearing in mind that we had had the opportunity to have a visual appreciation of the context and how the loading/unloading of materials are done and whether the various units of the building are located, we believe that loading and unloading of cement and iron bars will not necessarily generate pollution in terms of dust since the entrance to the cement store is very close to the bay. When weighed on a balance, we believe that in such cases the imposition of conditions may help abate any potential inconvenience associated with dust. We are therefore not convinced by this ground of refusal. This ground accordingly fails.

**(ii) No provision for on-site parking and loading/unloading of delivery lorries.**

14. From photographs found in the report of M. Foondun, and based on the site visit, we note the existence of onsite parking slots at the forecourt of the Appellant's hardware shop. According to the report of Mr. Foondun, the dimension of the forecourt is 17.37m x 3.6 m. This was not disputed. It is also uncontested that the forecourt of the hardware shop has a dual function in that it is used as parking area for customer vehicles as well as a loading/unloading bay for delivery trucks.
15. According to the PPG, the minimum area for the parking slots is 5 m x 2.5m for cars and 14mx 3.5 m for delivery vehicles. The simulation done by the delivery lorry in the course of the site visit also revealed that the lorry took up almost the whole space allocated for parking. It was submitted by the Counsel appearing for the Respondent that Nubee Avenue being only 5 metres wide and there being no pavement on either side of the road, the space available for vehicles to circulate freely if a big truck is parked in the forecourt of the appellant's hardware shop is only about 1m 30 cm, hence compromising on safety and security. He made reference to Doc E and simulation.
16. True it is that the size of the forecourt is such that it cannot accommodate a long truck of the type that delivers iron bars and other vehicles in its parking area simultaneously. We however believe that this can be arranged by the imposition of conditions to regulate the times of delivery. Otherwise, for smaller trucks and cars the parking space is amply sufficient, if they are to be in the parking area simultaneously, the moreso as the surface area hardware shop is such that its parking requirement is only for the provision of one parking slot.
17. The point put forward by the Council, again, does not appear to be in line with its own previous decision to have granted the Appellant with a BLUP. At that time the Council

must have been aware that the width of Nubee Avenue is 5 metres and of the absence of pavements as well as any restricted space left if ever a lorry is parked in the forecourt. This being said, we do not believe that safety will be any further compromised than it has been since the hardware shop has been operational. We have had the benefit of assessing the feasibility of 9-metre iron bars being delivered without encroaching on the road and have noted that it can be done although due care and diligence must be exercised. Whether a small truck or a long delivery truck or a car is parked in the forecourt, the space left for people to use will not be compromised any more nor any less. We therefore do not find any substance in this ground. It therefore fails.

**(iii) Maneuvering of steel bars may lead to traffic situation unsafe to pedestrian given the location, context and characteristics of the premises.**

18. As stated above, in the course of the visit on the locus the Tribunal has had the opportunity to have a visual appreciation of facts such as the location, context and characteristics of the premises. The simulation showed clearly 9-metre iron bars being delivered without any encroachment on the public road. Therefore the argument that maneuvering steel bars will lead to chaotic traffic situation does not hold. This ground of refusal also fails.

19. For all the reasons set out above, we allow this appeal and order the Council to grant the Appellant the relevant permit with conditions attached regarding specific times for delivery of the iron bars and cement such that it does not create any commotion during peak hours, and that the delivery be done under strict supervision of the appellant or her preposes such that there is no encroachment on the road during unloading/ loading and any other such conditions as the Council deems fit.



Determination delivered on 30<sup>th</sup> June 2016 by

**Mrs. J. RAMFUL**  
Vice Chairperson

**Mr. V. Reddi**  
Assessor

**Mrs. A. Jeewa**  
Assessor