BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 286/12

In the matter of:

BASE ART LTD.

Appellant

v.

GRAND PORT SAVANNE DISTRICT COUNCIL

Respondent

DETERMINATION

The present appeal is against the decision of the District Council of Grand Port Savanne for having refused to grant a Building and Land Use Permit (BLUP) to the company known as Base Art Co. Ltd, represented by Mrs. Marie Papadopoulos.

The grounds of refusal, as contained in a letter from the Respondent dated 11 October 2012 are as follows:

1. The site adjoins a stone crushing plant.
2. Health clearance has not been granted for the proposed activity because of dust, smoke and noise emanating from the stone crushing plant.

The notice of appeal lodged by the appellant company lists the grounds of appeal, as follows:

(a) The first ground of refusal is not a ground in itself as it is a statement of fact relating to the location which is incorrect and erroneous, the reasons being that: (a) the subject site does not adjoin the stone crushing plant but adjoins the offices and parking area located on the stone crusher complex. (b) The limited capacity of the stone crusher. (c) The stone crusher being located within a depression and is at a minimum of 150 metres from the subject site. (d) Mitigating measures having been taken by the stone crushing plant such as tree planting and water sprinkling. (e) The prevailing winds which blow away from the subject site. (f) The stone crusher being within the growth zone

of Beau Vallon as approved in the modified Grand Port Savanne Outline Scheme of 2011. (g) The existence of numerous sensitive uses within the buffer zone of the stone crusher.

(b) The second ground of refusal should be struck down as the Respondent is empowered to exercise its jurisdiction as set out in Section 117(3) of the Local Government Act 2011. Health clearance and enforcement should arise at a later stage, i.e the application for BLUP is considered.

The Appellant listed several measures taken by the stone crusher to state that there is no dust or smoke that emanates from the stone crushing plant. We note here that these are matters which have to be addressed when adducing evidence and do not constitute a ground of appeal as such.

(c) The Local Authority failed to give the Appellant, then Applicant, a proper hearing prior to the determination of the application.

(d) The project of the Appellant falls squarely within the parameters of the National Development Strategy as well as that of the Outline Planning Scheme for the area as approved in November 2011, including Policy SD1 for lands located within Growth Zones.

(e) The local authority failed to carry out a balancing exercise between the application made to it and the relevant Guidelines pertaining to the proposed use.

Grounds (f), (g), (h) repeat, in substance, the concerns expressed above.

(i) This ground, as couched, repeats the objectives that the Appellant wished to attain, and is a matter for consideration rather than a ground of appeal.
(j) This is a repetition of ground (e) coupled with the impact of the decision of the Council, namely the averment of prejudice caused. As such, we do not find that it is a ground of appeal.

The notice of appeal and the grounds listed therein take the form of a submission made by the Appellant more than grounds of appeal in a 'precise and concise' manner as required by the ELUAT Act.

For the purposes of this appeal therefore, we shall address the grounds of refusal as contained in the letter from the Respondent in the light of the points submitted by the Appellant, which are couched as 'Grounds of Appeal'.

As evidence is adduced by both parties on the merits of their respective positions, this Tribunal is in effect assessing the planning merits of the proposed project to see whether the decision reached by the Respondent requires that the Tribunal interferes with it or not.

We have heard the evidence adduce by the witnesses for the Appellant, namely Mr. Foondun, who has lengthily explained the advantages of the site for the proposed development, and Mr. Wong So on his assessment of the absence of dust, fume and noise as well as Miss Futloo on the wind direction blowing all potential dust away from the site. We have considered the evidence adduced by the representative of the District Council in support of the grounds for refusing the application as well as the respective submissions made by counsel for the Appellant and Respondent. We have the following observations to make:

1. **Ground 1: The location of the site**

Two site visits were effected by the Tribunal, one before evidence was adduced by the parties, and the second one after we heard witnesses for the Appellant and Respondent depose. Our first observation is that, despite the successive assurance expressed by witnesses for the Appellant as to the fact that the subject site does not adjoin the stone crushing plant, we must say that we have seen 'de visu' the proximity of the site to the proposed development.

Evidence adduced on behalf of the Appellant laid emphasis on the fact that that the proposed project is adjacent to the administrative block of the stone crusher rather than the crushing plant itself which is at a distance of 150 metres away. Our observation following the site visit effected by the Tribunal is that this did not reduce in any manner the inconvenience of coexisting with a 'bad neighbour'. The subject site is located in an industrial zone as indicated by the presence of the stone crushing plant and the concrete slab manufacturing plant. Those two activities have been operating even before September 2012, when Base Art Ltd. applied for a building and land use permit.

We took into account the mitigating measures taken by the stone crushing plant to reduce pollution. Yet, we could not turn a blind eye on the dust that was caused by the constant movements of vehicles in connection with the operation of the stone crushing plant and precast concrete product plant found adjacent to it. The noise emanating from the lorry engines as well as the beeping alarm sound from the vehicles going to and from the stone crushing plant and sister activity of the precast concrete product was constantly present.

We have taken on board the submission that the stone crushing plant had taken mitigating measures like planting belt of trees, wall...etc. Yet, the reality on the spot

differed substantially: the trees and the wall appeared to be inadequate as screen of protection.

The Respondent referred to the inconvenience caused by smoke as being one of the considerations, as contained in its refusal letter. It has been submitted, and not disputed, that there is no smoke as such emanating from the spot.

We are alive to this, yet the presence of dust and noise in the vicinity of the crushing plant was more than obvious, although the witnesses who deposed on behalf of the Appellant had affirmed the contrary. Mr. Wong So referred to the wind direction that would prevent any dust from travelling towards the subject site. Nonetheless, it is on record that this is not a constant phenomenon, there may be variations, albeit rarely, of the wind direction. There is, as at today, no indication that the industrial activities mentioned above will be relocated elsewhere.

3. Ground 2: Health Clearance

It has been submitted on behalf of the Appellant that this is not a pre-requisite for the consideration of the Respondent but should be a matter to be catered for by conditions imposed and monitoring by the latter.

The Appellant relies on section117(3) of the Local Government Act 2011 to state that the only legislations that the Respondent ought to have regard to are the Building Act, the Town and Country Planning Act, the Planning and Development Act and the Environment Protection Act.

We are of the view that the Respondent cannot be said to have faulted by taking a wide approach in assessing the physical conditions for which its approval is sought. Besides, it would be taking a restrictive view if it overlooked an important element like the health clearance in its assessment.

The approach favoured by the Appellants, namely that only an 'a posteriori' control should be done, amounts to defeating the rationale for the imposition of health standards in the case of an activity that initially included that of a 'victualler'.

We do not agree that the Respondent was wrong to have considered the health parameter, even if this was not listed in section 117(3) (supra). We do not find why the Respondent should refrain from exercising a check at the outset and await for a breach of health standards to act, the more so that such checks would be the responsibility of another agency, i.e. the health authorities.

As regards the issue of fettering its discretion as raised by the Appellant, nothing on record indicates that this was the sole criterion for refusing the application for BLUP. At any rate, this Tribunal is not mandated to assess the process by which the decision is reached. We assess the grounds on which the decision has been reached, and in this process, we have regard to the planning merits of the application. It is in this spirit that we have further observations to make as to the location of the proposed development.

4. The physical conditions of the site:

The site visit effected on the 27th April 2015 has enabled the Tribunal to assess the standard of the building for the type of activity that is proposed. The issue of dust and noise has been addressed above. In addition to this, the Tribunal has observed that the rooms where the arts and craft classes are to be held disclose obvious lacunas, namely, an exiguity of space, a lack of ventilation and natural light due to inadequate openings, absence of security exits that are necessary in cases of large gatherings, given that the building proposes to host concerts.

Furthermore, the access leading to the premises, which is said to be a private road, is a sub-standard one. Access to the site, for which there is no indication that it will be upgraded, may represent a hazard for children who would attend the site.

We have taken note of the point raised on behalf of the Appellant that there has been an absence of consultation between the Respondent and Appellant on the project. This is a matter which is beyond the jurisdiction of this Tribunal to consider. Similarly, the 'major prejudice' that the Appellant avers having felt by the decision of the Respondent is a matter that is to be raised before the appropriate jurisdiction.

5. The legal issues:

It is not disputed by the Appellant that the proposed site is located within the one kilometer buffer zone which surrounds a stone crushing plant. Yet, the Appellant contends that this should not be a bar to the granting of the BLUP for three reasons: (1) the distance separating the stone crusher and the proposed site as well as the numerous mitigating measures taken, (2) there are a number of developments/ sensitive uses within the buffer zone of the same stone crusher, (3) the proposed activity does not fall within the definition of 'sensitive use'.

We have addressed the issue of distance and mitigating measures above, and, as highlighted, our own 'constat' is that the noise and dust pollution is present, be it from the stone crushing plant or the nearby plant manufacturing precast concrete products.

The fact that other sensitive uses have been approved within the same buffer zone is not a matter which we are in a position to assess, as this Tribunal is not in presence of information relating to those other projects. Planning considerations taken in the present case are being assessed by this Tribunal.

Policy ID 4 of the Outline Planning Scheme favours the clustering of 'bad neighbor developments' and the policy lays down buffer zones from sensitive uses. Policy ID 4 provides for certain acceptable uses within buffer zones, namely, agriculture and farming, forestry, large scale leisure and recreation facilities like stadium, vehicle parking areas. Sensitive uses such as schools cannot be, as per policy ID 4, set up in the one kilometer buffer zone.

We hold a different view from the Appellant's submission that an arts and craft centre is not listed in the sensitive uses provided for. We find that any activity as proposed by Base Art Ltd., namely that of an arts and craft centre to include music workshops, painting and craft sessions, theatrical activities mainly for teenagers and children should respond to the same criteria. We cannot, by any stretch of imagination say that hosting such classes for school children should not be assessed by the same yardstick as a 'sensitive use'. The cultural activities proposed by Base Art Ltd. would be in opposition to the industrial activities already in place and the fact that the hours of operation of the stone crushing plant and that of the arts and craft centre differ is not a relevant consideration. The sensitivity of use of such a centre cannot be subjected to the organization of the works of the industrial activities already in place.

We therefore find that the siting of this proposed development cannot be done within the buffer zone, and certainly not 'back to back' to this 'bad neighbor development'.

We concur with the submission made on behalf of the Appellant that the proposed project would indeed be a laudable one, which would be beneficial to the local community. Yet, we are not convinced whether the location chosen for such project is fit for those objectives.

In view of all the above considerations, we find no basis to interfere with the decision of the Respondent to refuse the application for BLUP on the ground of its proximity with a stone crushing plant and the position of the health authorities in the proposed site (bearing in mind that at the time of the decision, the activity of 'victualler' was still being contemplated by the Co-Respondent).

The appeal is accordingly set aside.

Delivered on the 26th February 2016 by:

Mrs. V. Bhadain	**Mr. V. Reddi**	**Mr. M. A. Bussawon**
Chairperson	**Assessor**	**Assessor**