

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 625/14

In the matter of :-

Transmotors Ltd

Appellant

v/s

Municipal Council of Curepipe

Respondent

DETERMINATION

The present appeal is against a decision taken by the Council for having granted an application made by the Appellant for a Building and Land Use Permit (BLUP) to convert part of an existing building to be used for the purposes of dealer in bicycles, motorcycles and accessories with the special condition that **no repairs will be allowed on site**, at Dodo Lane, Pope Hennessy Street, Curepipe. The appellant, through its representative, is in essence against a planning condition attached to the permit that has been granted to it.

The BLUP issued to Transmotors LTD represented by Mrs. Sheilla Morel is dated 26th February 2014 and contains as special condition that no repairs will be allowed on site where as it is common ground that the application made by the appellant was in respect of "dealer in bicycles, motorcycles and accessories **having the right to repair same.**"

The following four grounds of appeal were raised by the appellant:

1. Because at no point in time did the Respondent notify the Appellant that it would be contemplating not to grant it the BLP with the right to repair;
2. Because the Respondent unfairly and wrongly granted the Appellant the BLP with special condition of 'no repairs' when the Appellant applied for the BLP under code 52398 which at that time included the right to repair;
3. Because the respondent failed to give reasons as to why the appellant should not have been given the BLP as applied for;
4. Because the respondent unfairly imposed the special condition in the absence of concrete objections or evidence justifying the imposition of such condition.

We have duly considered the evidence placed before us including documents produced and the depositions of all witnesses. The appellant company's representative, Mr. Thierry Morel (husband of Mrs. Sheilla Morel), deponed and was cross-examined by Mr. Chinasamy, the acting planning and development officer of the Council and the latter deponed on behalf of the Council and was cross-examined by Counsel for the appellant. We do not deem it necessary to reproduce each point made by the parties but it suffices to say that we have considered them all.

I. CONTEXT ANALYSIS

It is accepted that the proposed development is meant to take place on the ground floor in an existing residential building located at the junction of Avenue Edgar Hughes and Dodo Lane, Pope Hennessy Street, Curepipe, which is a predominantly residential area with some commercial developments. Within the building there will be a repairs area and a selling area as per DOC B produced. The compound of the property where the proposed development is to take place contains a parking area of approximately 20 metres by 4.50 metres as well as a loading/unloading bay. The property *in lite* is also found opposite a big automotive workshop which has been operating for a number of years.

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II. THE INSTRUMENTS AND THE LAW

The site being in Curepipe, the applicable outline scheme is **Outline Planning Scheme for Curepipe [‘OPS’]** issued under the **Planning and Development Act 2004** and the applicable Planning Policy Guidance is **PPG1**.

The grounds of appeal in essence contest the special condition imposed by the Council. It is important to note that while this Tribunal is mandated to hear and determine appeals, its role in essence is to review and decide afresh the planning decisions of the authority with regard to a development, having regard to the applicable planning framework. Whether the Council is entitled to attach certain specific conditions to a BLUP and whether it was right to have done so in the present context are distinct issues.

Section 117 (10) of the Local Government Act 2011 confers upon the Council the discretion to impose conditions in that it clearly stipulates that *“every Outline Planning Permission or Building and Land Use Permit shall be issued **subject to such conditions** (stress is ours) as the Municipal City Council, Municipal Town Council or District Council may deem appropriate and on payment of such fee as may be prescribed by regulations made by the Council.”*

The reasoning behind the above provision is that when conditions are imposed upon approval of a permit it gives the Local Authority the opportunity to modify the form of the physical development applied for so as to maintain control over the operations of the activity. The first, second and third grounds of appeal are in essence grounded on what appears to be the illegality with which the Council acted in having granted a BLUP with a special condition of ‘no repairs on site’. We believe since the Council is legally empowered to impose conditions it deems fit in the circumstances, these grounds fail.

The fourth ground of appeal relates to the imposition of the special condition in the absence of any concrete objection or evidence justifying same. Mr. Chinasamy explained that there were objectors and that a hearing was convened but that none of

the objectors actually turned up. A letter dated 12th November 2013 has been produced to show that there are objections against the proposed development. We cannot attach any weight to this letter since we do not know who are the signatories, the moreso as no one turned up at the hearing of the Council. The Council's representative gave evidence on the objectors and their potential location but these cannot in anyway be ascertained for the same reason, that is, since they never turned up before the Council. Now, the Council seems to have rightly assessed the planning merits of the application bearing in mind that developments of such nature are normally assessed in terms of their impact on amenity of the locality. The application made by the appellant is for dealer as well as for making repairs on motorcycles and bicycles. Such applications would normally fall within both the commercial and the industrial clusters and would hence normally be regulated by **Policies CR2 and ID2 of the OPS** and under **section 2.13 of PPG 1**, which we find important to reproduce here.

Section 2. 13 states:

'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.

*Examples of potentially acceptable small scale enterprises include cooking sweets and food preparation, sewing and small scale clothing manufacture, repairs to electrical goods, **minor car/mechanical and bicycle repairs**, artist studios, offices such as book keeping, administration etc. '*

We have it in evidence from the respondent's representative that the main reason for the imposition of the special condition is to abate any nuisance associated in terms of noise and fumes that may be generated in case repairs are allowed on the site. As per Mr. Chinasamy's testimony it would appear that the Council took on board that electrical equipment will be used implying that they are likely to generate noise. It is incumbent on the developer to show that the development will not have any negative impact on the amenity in terms of traffic, pollution, noise and fumes. The point we need to address is if repairs are allowed, will the proposed development in fact be detrimental to the

character and amenity of the area. The appellant's representative was cross examined on the issue and he maintained that his business will not generate noise beyond the acceptable level and Doc L produced by the appellant is a letter addressed by Mrs. Sheilla Morel representing Transmotors Ltd to the Council stating "*Please take note that no industrial equipments or noisy tools will be used on site.*"

Now since the Council, after assessing the planning merits of the proposed development and its potential impact had no qualms to grant a BLUP to the appellant for the conversion of an existing building to be used for the purposes of dealer in bicycles, motorcycles and accessories, it must have done so after being satisfied that it will not in affect the character and amenity of the locality. It must have assessed the traffic impact, the noise and fumes likely to be generated by such a development and the products sought to be sold. Of course it stands to reason that while the products are on display, no noise or fumes will be generated but when they are being tested and tried out before purchase, it can be expected that some noise and fumes are likely to escape.

This being said, the plan produced by the appellant shows that the repairs will be carried out inside a room while the display of the cycles will be done in an adjacent room. The compound, as shown in the plan and was not contested, appears to be large enough, as per dimensions provided, for ample parking space on the side of the building and behind the building to serve as loading/unloading bay. There appears to be sufficient set back between the building and the road or the neighbour's property to minimize the risk of noise and fumes escaping thereby causing nuisance.

Furthermore, as stated earlier it is common ground and the representative of the Council also agreed that there exist a sizeable automotive workshop in very close proximity to the proposed development site which repairs vehicles. With all factors assessed holistically, especially bearing in mind that no objectors ever attended the meeting thereby making it difficult to assess the veracity of those objections, we believe that in the present circumstances, the Council need not have inserted the special condition of no repairs being allowed on site. The selling of motorcycles and bicycles is likely to generate some noise albeit not very high level. Since there is an undertaking from the appellant that the development will not be noisy, we believe that the ends of

justice will be met if the appellant is allowed to carry out minor repairs to motorcycles and bicycles within the confinements of the building, as per **section 2. 13 of PPG 1** and without undue noise and fumes escaping in the vicinity.

Allowing a commercial/industrial development in an area which already contains another development of similar category is not likely to change the amenity or character of the locality in anyway. On that score we agree with the stand of the Council for having granted the BLUP to the appellant.

For all the reasons set out above, we believe that the last ground of appeal was well taken. The appeal is therefore allowed. The Council is ordered to grant to the appellant the relevant BLUP of dealer in bicycles, motorcycles and accessories with **repairs allowed on site** with any condition it deems fit especially regarding the revocation of the BLUP should there be any nuisance and adequate disposal of waste products. No order as to costs.

20th June 2016

Determination delivered on ~~17th~~ June 2016 by

Mrs. J. RAMFUL

Vice Chairperson

Mrs. B. KANIAH

Assessor

Mr. BUSAWON

Assessor