

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 575/14

In the matter of :-

Keeren Suraj Kumar Boyjonauth

Appellant

v/s

Municipal Council of Vacoas /Phoenix

Respondent

IPO:

Younous Banharally and 14 others

Co-respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for rejecting the application of the Appellant for a Building and Land Use Permit for the conversion of a building at ground floor to operate a metal welding aluminium, panel beating and/or paint workshop at Parisot Road, Mesnil. The grounds for rejection communicated to the Appellant in a letter dated 12th December 2013 are set out below:

“(i) The site is located amidst residential building and the proposed development would constitute incompatible use.

(ii) Objection has been received against the proposed development.

(iii) the proposed aluminium workshop is likely to affect the neighbours adversely in terms of noise, dust and smell.”

2. The Appellant, who was legally represented deponed under solemn affirmation and was cross-examined by legal representatives of the Respondent and Co-respondents. 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

3. The undisputed evidence is that the subject site is located along Parisot Lane a few hundred metres off the M1 Motorway, Phoenix-La Vigie Road, and some 800m from the Phoenix- Mahebourg A10 Road. Since the subject site lies within the settlement boundary, and it is considered to be a predominantly residential area since this type of zoning as per the Outline Planning Scheme is conducive to residential development. The proposed development is to be carried out in a space covering a floor area of 50sq.m to be used as workshop but the house of the appellant is also to be found in the same compound. Opposite the subject site and next to the subject site are found the residential properties of the objectors. Parisot Lane is between 3.6 to 4 metres wide. There are only houses situated all along at the lane but there are also some buildings carrying out industrial activities similar to that of the appellant, some operating illegally as well as commercial buildings.
4. 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 and that's the job he has done all his life. His main contention was that there are other such workshops along Parisot Lane which are in operation and so the area was not predominantly residential but a mixed use one containing some industrial and commercial activities. He did not contest the objections raised by his neighbours.

5. 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. 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.**

6. The undisputed evidence is that the subject site lies within the settlement boundary and is therefore a zone which favours residential development. The Tribunal cannot be oblivious to the fact that there are over a dozen objectors to this development 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. After all the application of soft laws in the planning system has been recognized and reinforced by the lawlords in the Privy Council case of **Beau Songe Development Limited v/s UBP Ltd [2018] UKPC 1** where their Lordships stressed on the careful analysis and reconciliation of the planning policies by the Tribunal and that *"their first task was one of legal interpretation of planning documents to be decided by reference to "the language used, read as always in its proper context."*

7. Having non-residential activities within a zone designated for residential use should be an exception to the rule, not the rule itself. The appellant's contention was that the area is now a mixed use one. A Sworn land Surveyor to produce a plan, Doc A, to show developments of non-residential nature from his visual appreciation following a site visit. The appellant's case as per his statement of case is that he was residing there before those who are now objecting to his development.

8. The context of this development is very important, and whether the character of the area is residential or has become one of mixed use is the focal point of this case. We

believe that by providing the relevant “chaining” distances to the Tribunal, the Sworn Land Surveyor called by the Appellant, has been of assistance in giving us an idea of the length of Parisot Lane, which is roughly around 1 km.

9. Bearing in mind this evidence as a backdrop, we have assessed the evidence of Miss Ramroop for the Council regarding the operation or non-operation of similar workshops. She stated that there were three similar workshops but not operating, three others having BLUPs and are operating and four workshops (including that of the appellant) operating illegally out of which three have been issued with stop notices. This means that infact there are only three legally operating workshops along the stretch of Parisot Lane.
10. 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 (who have raised objections), the vicinity of the subject site is predominantly residential. We therefore have not been convinced of any argument put forward by the appellant as to why we should depart from the provision of the Outline Planning Scheme. The presence of industrial workshops are not conducive to residential amenity are they are bad neighbour developments and should not normally be located within a residential area, irrespective of whether they are operating legally or illegally.

II. PLANNING LAWS AND INSTRUMENTS

11. This being established, 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, which stipulates:

Industrial Uses such as panel beating and pray 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 small scale 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.

12. The Council also referred to **Policy ID4 on Bad Neighbour Development** which essentially stipulates that there is a general presumption for bad neighbour developments which can be clustered on an existing bad neighbour site. Since this is not a bad neighbour site due to the presence of residential properties in the vicinity, we believe that this policy is not applicable here.

13. The Policy that does however find 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;*
- 6. Storage of materials should be able to be contained within the cartilage*

7. *The operator of the office/business or small scale enterprise should remain at the premises.*

III. ISSUES

14. The three grounds of refusal raised by the respondent in its letter are interrelated and we will therefore deal with them together. Miss Ramroop gave evidence that the width of Parisot lane is between 3.4 m to 4 m. This implies that access to the site is unsuitable being given that it is narrow. The access of lorries for the unloading of aluminium bars was canvassed in cross-examination of the appellant and he agreed that lorries do access the lane. This, in our view, adds to the nuisance and safety risks of having big lorries driving into small lanes where metal workshops are in close vicinity to people's houses. Miss Ramroop produced a photograph showing metallic and aluminium structures from the appellant's property resting on the boundary line of the contiguous neighbor, Mrs. Nazeerally, who has objected to the development and activities of the appellant. The Council's representative has also produced Doc B where several of the objectors' houses have been plotted and they are all in the vicinity of the subject site. This evidence directly conflicts the provisions of **Policy ID2** *supra*, there should be *"adequate set backs from neighboring properties"* and *"no neighbours' objection within a radius of 50 metres"*.
15. We are here looking at the delivery of raw material such as aluminium bars, the cutting and grinding and welding of metals and aluminium at the subject site and its associated inconveniences. 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 and aluminium are real issues for residents. The evidence as borne out is that machinery of some 3000 watts is being used by the Appellant. These are indicative of the noise generating capacity of some of the tools that the appellant

has to use for his job. The photograph 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, to say the least. Such activities, in our view, can be detrimental to the amenity of the area.

16. We bear in mind the fact the Appellant's position that there are currently others doing similar businesses along Parisot Lane (whether rightly operating or wrongly). When this is placed on a balance where the subject site is in an area having so many residents in the vicinity who have raised objections, we believe the balance tips in favour of the co-respondents. At the trial, we have noted that a relatively large number of residents are objecting forcefully to the development, with a view to defend their right to peaceful enjoyment of their property. We believe it is important to consider how residents in the neighbourhood are impacted by the development. The Appellant also did not deny that noise would be generated from his activities. We could not agree more with Justice Domah when he said "*One cannot put a price to the peace and quiet enjoyment of citizens in their homes.*": **Suhootoorah & Ors v/s Al Rahman Co. Ltd & Anor (2013) SCJ 273**. After all, the peace and tranquility that one seeks in the solace of one's house, should not have to come with a price. The personal circumstances and constraints of the Appellant cannot unfortunately be taken on board when considering the planning merits of such application.

17. We are therefore of the view that when all considered such "bad neighbour" development should not be allowed in residential areas to the detriment of other residents, the more so as the immediate neighbours have objected and the reasons advanced is that it will have an adverse impact on the character with regard to noise, fumes, smells and dust which the objectors are not willing to put up with. Due diligence must be exercised when carrying out development which is likely to have an impact on the neighbourhood.

18. We pause here to make a point. While we are alive to the fact that a handful of aluminium workshops and the like have been granted BLUPs in the past, since the present application cannot gain planning merits on the ground that it is a predominantly a residential area, the Council has a duty to maintain close scrutiny on all the illegal industrial developments along Parisot Lane and ensure uniform and fair application of the laws and planning policies on all those residents in the vicinity who are operating workshops either illegally or have workshops but no activity has been noted. Not only from a fairness and parity point of view, but also from a planning view point as 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.

19. For all the reasons set out above, we uphold the decision of the Council. The Council is however urged to take note of the penultimate paragraph of this determination and ensure that there is uniformity in its application of planning norms and enforcement in the locality. The appeal is set aside. No costs.

Determination delivered on 14th November 2018 by

Mrs. J. RAMFUL
Vice Chairperson

Me. A. Jeewa
Member

Mr. S. Karupudayyan
Member