

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1181/16

In the matter of :-

Guy Joseph Payen

Appellant

v/s

Municipal Council of Vacoas/Phoenix

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having rejected the Appellant's application for a Building and Land Use Permit for the conversion of the first floor an existing building into a workshop for the manufacture of wooden furniture employing less than 10 persons at 116,AlleeBrillant Road, Castel. The grounds for rejection were communicated to the Appellant in a letter dated 17th May 2016 and are set out below:

"1. Thesite is located amidst residential buildings and the proposed development would constitute an incompatible use.

2. *Strong objections have been received against the proposed development from adjoining neighbours as well the present activities being carried out on the premises which give rise to noise and environmental nuisance.*
3. *The activity had been carried out without having obtained a Building and Land Use Permit and for which the council is contemplating legal action."*

2. Both parties were legally represented. The Appellant was cross-examined by the Respondent's counsel while Mrs. Juwaheer from the Planning and Development department of the Council deponed and was cross-examined by Counsel for the Appellant. The Council also called as their witness a court usher and the two objectors to the development. We have duly considered all evidence placed before us and submissions of both Counsel.

3. It is not disputed that the Appellant has been operating his workshop of cabinet-making for about 30 years on the premises and that he had been operating without the relevant permit. Infact, the Tribunal can appreciate that there is evidence on record to show that the Council had prosecuted the Appellant for not having the required Building and Land Use Permit ['BLUP'] to operate his workshop and had prosecuted him before the District Court of Curepipe. Therefore, we are satisfied as far as ground 3 of the refusal letter is concerned although this reason cannot be taken on its own to reject an application. When taken together with the other grounds it can substantiate the stand adopted by the Council. Whether the case before the District Court was struck out has no bearing on the present appeal since the record of the District Court shows that the case was struck out on the ground that Mr. Payen was not informed of his constitutional rights as an accused party, not on the merits of the case.

4. Under the first ground of refusal, the Appellant's case is that the area is a mixed use one, and not a predominantly residential one. He testified that there were a few commercial and light industrial developments in the vicinity. He however did not produce any map of the locality to give the Tribunal a visual appreciation of how close these non-residential developments were to his premises. While the Tribunal cannot appreciate to what extent, distance wise, the Appellant means by his vicinity, we can appreciate the fact that the area is a residential one with a number of commercial activities especially along Allee Brilliant Road. It is found within settlement boundary where residential development is favoured and in the circumstances we agree with the Council that the development is regulated by **Policy ID2 under the Outline Planning Scheme of Vacoas-Phoenix.**

5. The appellant gave evidence about the property in lite, namely that he lives there and that there are other houses around his house. His workshop is on the first floor of his building. The neighbour who lives at the back hasn't complained about his workshop. Of the two objectors, one lives next door and the other lives across the road. On one side of his house there is a waste land. He stated that one of objectors has a brother who resides behind the objector and also has a cabinet-making business. He stated that his own business of cabinet making had existed since a long time and that the objectors have also been there since their childhood. This is indicative that the site is found in a builtup area where there is development. Infact Mrs. Juwaheer from the Council testified that the residence of the Appellant is found within the settlement boundary but on the boundary line which is Allee Brilliant Road. The Appellant also, in cross-examination, agreed that the area was a residential one.

6. This having been established, the applicable planning policy is Planning Policy Guidance 1 (PPG 1) relating to developments permitted in residential areas. Paragraph 2.13 stipulates that developments permitted in residential areas are small industrial workshops and home working. Paragraph 2.13 of PPG1 is reproduced below:

"2.13 Small Industrial Workshops and Home Working

Small scale enterprises that are carried out in the home with or without modification of the dwelling may in some locations be acceptable if the use is ancillary to the principal use as residential but surrounding residential amenity is not compromised.

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 of sweets and food preparation, sewing and small scale clothing manufacture, repairs to electrical goods, minor car/mechanical and bicycle repairs, artists repairs, artists studios, offices such as book keeping, administration, professional services etc.....

...For both the use of home as office or other small scale enterprise the key consideration is whether the overall character of the dwelling and surrounding amenity will change as a result of the proposed use. If the answer to any of the following questions is 'yes' then the proposed enterprise, by reason of its nature or scale is likely to be unacceptable:

- *Will the home no longer be used mainly as a private residence?*
- *Will the enterprise result in a market rise in traffic or people calling?*
- *Will the enterprise involve any activities unusual in a residential area?*
- *Will the enterprise disturb your neighbours at reasonable hours or create other forms of nuisance such as noise, dust, fumes or smell?"*

7. The appellant has admitted, as per his statement at the Permits and Business Committee, to using on the premises a wood shaving machine, a saw and that the machine does make noise when it rotates. He uses brushes to varnish the furniture. He also agreed that he worked on Sundays and when he had deadlines to meet he would work upto seven o'clock in the evening contrary to what was set out in his application form to the Council. He agreed that the noise may be affecting his neighbours who have objected but maintained that dust does not fly on to their premises. He also stated that he has not been working for the last three years because as soon as he starts operating the Council serves him with a stop order.
8. The main complaint of the objectors is the noise generated due to the electrical wood cutting machine which causes a lot of noise nuisance. Mr. Jugnarain is in his seventies and so is his wife and he has been living there for seventy years without such inconvenience since the Appellant was not using a machine to cut wood but was doing so manually. Mr. Saddul, the other objector, also stated that he had been finding the noise unbearable when the Appellant uses his machine to cut the wood and that the noise can be at anytime during the day and continues sometimes after five o'clock in the evening and at times on Saturdays and Sunday also. He explained that it is a source of nuisance and causing health issues for him and his family.

9. The appellant has been unable to successfully challenge any of the objector's contention. The answer to last question relating to the nuisance such as noise, dust, fumes or smell, as per PPG1 above, which the appellant's enterprise is likely to create thus seems to be in the affirmative. The Appellant himself has stated that the area is a residential one. He agreed that the noise could be causing nuisance or annoyance to the objectors. There is no evidence of bad blood between the Appellant and the objectors, and therefore we find that there can be no bad motive attached to their objection except that they were genuinely disturbed by the noise pollution generated by the business of the Appellant. We can appreciate that after having lived in peaceful enjoyment of their property for over 50 years, the objectors cannot be taxed for wanting to conserve this state of affairs.
10. We are of the view that the rule is that the character and amenity of a residential area should as much as possible not be disrupted and based on the satisfaction of certain criteria exceptionally certain types of non-residential developments may be accepted. On application of the **Policy 2.13** *supra*, the last criterion is not satisfied since there are objections from neighbours. In any event we believe that this type of activity is a bad neighbour development and due to its very nature, through the use of varnish, the use of electric cutting machines and the saw which may be the source of highly volatile dust particles in the surrounding, we believe that the Council was correct to have rejected this application for being incompatible with the residential character of the place. In **Beau Songe Development Limited v/s The United Basalt Products Limited & Anor [2018] UKPC 1**, their Lordships recognized the need not to depart from the provisions of the soft laws where these were available and applicable.
11. For all the reasons set out above, we find that the appeal is devoid of merit. It is accordingly set aside. No order as to costs.

Determination delivered on the 2nd September 2019 by

Mrs. J. RAMFUL
Vice Chairperson

Mr. G. LEPOIGNEUR
Member

Mr. M.R. MONAF
Member