BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1207/16 & ELAT 1213/16

In the matter of :-

Hilfoul Fouzoul Society

Appellant

v/s

City Council of Port Louis

Respondent

IPO:

Central Electricity Board

Co-respondent

AND **In the matter of :-**

Abdool Farad Nunnoo

Appellant

v/s

City Council of Port Louis

Respondent

IPO:

Central Electricity Board

Co-respondent

DETERMINATION

1. This is an appeal against the decision of the City Council of Port Louis ("the Council") for having granted a Building and Land Use Permit ("BLUP") to the Co-respondent ("CEB") on the 30th June 2016 for a development in the Industrial Area, Plaine Lauzun, that has been described, as per the BLUP (Doc A), as the *"Construction of the St. Louis Power Station with installation of Powerhouse, GIS Sub Station, Tank Perm and Fuel Oil Treatment Building (redevelopment)"*. It is to be noted here that although the Council has issued letters to the Appellants referring to "Tank Perm", according to us it should read as "Tank Farm."It is common ground that the issue at hand is not the structural part of the building as such, but the operational aspect of the project of the CEB which has come about with the installation of new machinery and their operation, and possible associated emissions which is, according to the Appellants, causing them prejudice and inconvenience in their daily lives due to the pollution involved. Following a ruling given by this Tribunal on 6th April 2018, the matter was subsequently heard on its merits and the Tribunal now has to determine this case on the planning merits of the development based on its operational aspects.

2. The two appeals having been consolidated, Counsel appearing for the Appellants, Me. Arvin Ramsohok, decided to drop Grounds 6 and 7 and club the remaining grounds of appeal under four broad headings for clarity and ease of reference. We shall deal with the grounds in the same order. Mr. Nunnoo, and Mr. Sahebjan who represented Hilfoul Fouzoul society, deponed for the Appellants. Mr. Santokee, Head of Planning Department deponed for the Respondent and Mr. Maran, engineer, deponed for the Co-respondent. We have duly considered all evidence placed before us as well as submissions of all Counsel. We shall not be making reference to the submissions of Counsel except where we deem it fit to do so. In view of the technical nature of this case, we shall address ourselves to all live issues pertaining to the subject matter of this appeal and any evidence adduced beyond the scope of this appeal will be disregarded.

I. NOTIFICATION OF PROPOSED DEVELOPMENT [Grounds 1 &2]

GROUND 1

The notice for Permission for Land Use published on 17 May 2016 by the CEB inviting objections from any person "aggrieved by the proposal" for Power Station Buildings at St Louis Power Station related ***specifically*** *to Power Station Buildings and not to the installation of* ***Heavy Fuel Engines re SG MOTOR/0004/2016 contrary to the Local Government Act for use electric motors in Watt as per Part B of the 12th Schedule to the Local Government Act*** *which was the* ***actual*** *subject matter of the Permits and Business Monitoring Committee held on 23rd June at the offices of the Respondent,* ***thereby hiding the true nature of the development and departing from the requirements of the Building and Land Use Permit Guide establishing the procedures.***

GROUND 2

The further publication in L'Express and Le Mauricien attached by the CEB (Co-respondent) to an application for injunctive relief (See Attached ***Annex 3****) duly initialed by its General Manager on 23/6/2106 [we believe possibly meaning the year2016] clearly shows publication for a Building and land Use Permit* ***whilst the verso relates to an application for a Building and Land Use Permit for the installation for Heavy FUEL OIL TANK at Bains des Dames, Les Grandes Salines respectively*** *which clearly shows that Respondent surreptitiously made an abuse of the process.*

3. It is the contention of the Appellants that they were not properly notified of the project in that the proposed development as per the notice in the newspapers did not reflect the actual development proposal. Mr.Nunnoo testified that it was by way of a press notice that he learnt in the newspapers of the 17th May 2016 that the CEB intended to carry out a new development to change its engines and that 4 new engines would be installed and that there would also be a power house. Following the notification, Mr.

Nunnoo, informed the inhabitants in his locality, and many including him, lodged their objections at the City Council of Port Louis. His objection was mainly against the Power House. They learnt from the radio that there would be a hearing at the City Council of Port Louis on 20th June 2016. They went to the Council for the hearing. Mr. Nunnoo had received the convocation on the same day although it was dated 16th June 2016. Due to some apparent issue with the convocation letter, according to the testimony of Mr. Nunnoo, the hearing did not take place and the objectors were convened anew vide letter dated 21st June 2016 for a Hearing before the Permits and Business Monitoring Committee two days later, that is, on 23rd June 2016 at 10 am.

4. In his testimony, at page 13 of sitting of 4th May 2018, Mr. Nunnoo states that he had taken objection to the setting up of a Power House but that it was when he received the second convocation letter that he noticed there were new additional aspects of the development which were not contained in the press notice of the project. We take note that when Doc D and Doc E, which are annexures to the statement of case of Mr. Nunnoo, are compared there appears to be no discrepancy in the styling of the development in the reference heading of the two letters. Doc D is the first convocation letter sent to the Appellant, Mr. Nunnoo, dated 16th June 2016 convening him to appear before the PBMC on Monday 20th June 2016 at 1000hrs at City Hall for a Hearing. The reference of the letter is *"Objection to Planning Application (Ref. SG MOTOR/004/2016) for the redevelopment of St. Louis Power Station with installation of Powerhouse, Gis Sub Station, Tank Perm and Fuel Oil Treatment Building at Industrial Area, Plaine Lauzun."* The styling of the reference and the content of the convocation letter dated 21st June 2016 to the Appellant is exactly the same save for the date of the new hearing which had changed to the 23rd June 2016. Therefore, as far as the Respondent is concerned, we are satisfied that as at 16th June when the convocation letters went out to the objectors, it did not conceal any material information from the objectors out of bad faith or otherwise.

5. As far as the press notification is concerned, it would appear that it was the CEB that issued the press notice. Infact under the law, the obligation falls squarely on the applicant of the BLUP for the development proposal to publish notices in the newspapers. This is what the CEB did. Whether the notice did not adequately set out the nature of the development proposal is an issue that falls on the shoulders of the promoter firstly. This issue is addressed under both grounds 1 and 2.

6. The question is whether the Council had a duty to check the notice and get the CEB to re-notify with the proper notice? The answer is -it depends. It is within the Council's discretion, but a discretion that should be based on reason. In this case, the CEB made press notifications for the purpose of bringing to the attention of the public the proposed development and their right to challenge the development proposal to the Council. The Appellants objected. We believe that the purpose of the notice was thus served. There is no requirement imposed by law as to how a press notice should be published in terms of its content. We cannot read more into the law than what has been prescribed. We can accept that as a matter of common sense, the purpose of a notice is predominantly to bring to the attention of the readers the nature of a development proposal and its location so that if they seek to challenge it they would know where to do so. The Council subsequently set up a hearing to hear the objections, the first and second letters of convocation emanating this time from the Respondent adequately set out the development proposal in its totality. The Appellant had the opportunity to be legally represented. Mr. Nunnoo testified to the effect that he was aware of the development but that the Council should not have granted the BLUP as it would be detrimental to the health of the local inhabitants.

7. The Appellants are raising this as a ground of appeal to challenge the decision of the Council. We believe that even if there was such a discrepancy, the Council cannot be taxed for any lack of information in the notice of the CEB. At best, it could have asked the CEB to issue a fresh notification if, after having taken note of the contents of the

notice, it was of the view that the nature of the development was not adequately reflected therein for the purposes of inviting objections. The notice, annex B to the statement of case of the appellant, shows that the notice is issued by the General Manager on 17th May 2016, bearing the heading of Central Electricity Board (CEB) and is a "NOTICE FOR PERMISSION FOR LAND USE" and the body of the notice is *"Take notice that the Central Electricity Board (CEB) will apply to the Municipal Council of Port Louis for a Building and land Use Permit for proposed Power Station Buildings at Saint Louis Power Station. Any person aggrieved by the proposal may lodge an objection in writing to the above-named Council within 15 days as from the date of this publication."* Being given that on the back of the notice published by the CEB, the Appellant had already objected anyway and he was convened for a hearing twice and the first time round, which was on the 20th June until he was finally heard on the 23rd June, he had already had the opportunity of taking cognizance of the convocation letter in which the Respondent set out clearly the nature of the development and the Appellant had the opportunity to be subsequently heard and legally represented 3 days later at the hearing of the PBMC before the Council, we believe that no prejudice was caused. Infact we believe that Ground 1 cannot in law amount to a ground of appeal to challenge the decision of a local authority because even if the notice was not, according to them adequately particularized, this in itself cannot be taken to be a reason for which the Appellants are aggrieved by the decision of the Council. They ultimately were not deprived of their right to object at the Council, to make representations and be legally represented before the Council, nor lodge their appeal before this Tribunal.

8. As far as ground 2 is concerned we fail to see in what way the Council has not complied with any provisions of the law if the Co-respondent has chosen to publish 2 different notices. Infact we believe that Ground 2 lacks precision, conciseness, clarity, has not been adequately pleaded nor submitted upon and is therefore set aside. In any event, Mr. Nunnoo and the other objectors had been convened by the Council and heard, he was allowed legal representation.

II.HEARING AT THE COUNCIL [Grounds 3,4,5]

GROUND 3

CEB and the City Council of Port Louis have seemingly colluded when the hearing convening the Appellant and other objectors to the ***Permits and Business Monitoring Committee for hearing their objections on 20 & 23 June 2016 by letters dated 16June 2016 and 21 June 2016 respectively, as these relate to "Planning Application Ref SG MOTOR/0004/2016"*** *in breach of the relevant legislations.*

GROUND 4

Appellant's motion at the hearing of the objections scheduled to ***20June 2016 be postponed was not entertained despite the fact that they were not touched with the convening letters until 1100hrs on that same day, whereas the radio aired in the morning of 20 June 2016 that the said Committee would hear objections @ 1000hrs.***

GROUND 5

Appellant's motion that the hearing of ***23 June 2016*** *was against the purport of the publication dated 17th May 2016 was not taken into consideration; additionally, the Appellant's objections in terms of two petitions were not accepted, although previously sent to the City Council on or about 30 May 2016.*

9. Our starting point is to look at the law. Under **s.15 Building Control Act 2012** provides

"(1) No permit shall be issued by a local authority unless —
(a) the requirements specified in section 3 and the minimum building standards are complied with;
(b) the prescribed minimum energy efficiency requirements, if any, are complied with; and
(c) plans and drawings for the proposed building works are drawn up and signed in accordance with subsection (2) and such guidelines as may be issued by a local authority."[stress is ours].

The BLUP guide issued by local authorities sets out the format and specifications of notification plates.

10. The purpose for which a notice is made is to bring to the attention of people who are likely to be affected by the proposed development. The nature of the development is thus brought to the attention of those who could be impacted by it. We wish to point out that from our reading of the law, no such legal requirement has been imposed upon any applicant to give all the details. As a matter of common sense, if this was the case, the problem that authorities would then face would be where to draw the line. This being said, where those who are impacted by the development object to it, the Council has a discretion whether or not to hold a hearing where the aggrieved parties and the promoter express their views and make representations. The law is silent on this issue and it is only in the Building and Land Use Permit Guidance that it has been stated that the Local Authority may offer a hearing to the parties. There is no duty imposed upon it but of course it stands to reason that this discretion is to be exercised reasonably.

11. In the present case a hearing was held. We have it in evidence in the course of the hearing that the Appellants took cognizance of the proposed development in its totality and they had time to make representations as well as being legally represented. We believe that the law imposes no such requirement on the Local Authority to provide to objectors a hearing at their convenience so that, as submitted by the Appellants, their "right to have sufficient time to prepare in order to be able to make proper representations" is safeguarded. Where an institution is vested with a certain degree of discretion, this cannot be fettered. This amounts to reviewing the whole decision-making process, which this Tribunal has no jurisdiction to do. The matter is currently being heard before this Tribunal, which is a Tribunal of fact. This Tribunal is empowered to hear the appeal and assess the planning merits of this application. The appellants are not prejudiced in any way in their case since their objection is against the nature of the development itself. All three grounds of appeal therefore fail.

III. BREACH OF PLANNING INSTRUMENTS [Ground 9]

GROUND 9

Respondent has failed to direct its mind to the Planning Policy Guidance in terms of the Planning and Development Act 2004 which clearly stipulates that the acceptable ***buffer zone of a power plant from sensitive land uses comprising residential dwelling and education facilities is more than 1km and same has been amply set out in the Report dated 2 May 2016 of SLS Mulkraie Nuckchadee (ANNEX 5).***

12. **Policy E1 Sites for New Power Stations** of the **National Development Strategy [NDS]:** *Sites for new power stations need to be identified in revised Local Plans and protected from development. In respect of buffer zones for such bad neighbour developments, reference should be made to Policy ST3.*

13. It is the contention of the Appellants that the Respondent has paid no heed to the planning instruments especially the buffer of 1km from the power plant to sensitive land uses. The Appellant's witness, Mr. Nuckchadee, sworn land surveyor, testified as regards the distance from the subject site to several sensitive land uses such as residential properties and schools. From our reading of the policy, we believe that the **Policy E1** applies to sites for **new** power stations. Infact even as far as the justification of the policy is also concerned it talks of the land development space-wise and it talks of identification of land for potential sites for CEB's power stations. Interestingly, the Policy mentions "*CEB anticipates that additional generating capacity will be required in the near future to meet peak demand, and at some time between 2006 and 2008 to meet energy demand growth.*" Mr. Santokee, representative of the Council in cross-examination by Appellant's Counsel also explained at length, the aim of the policy being for new sites and how there was a projection made for a higher demand of energy in future.

14. From our reading of this policy, we believe that firstly it is applicable for sites which are to be identified for **new** power plants, not where a power plant is existing and been operating for many decades and that too in an industrial zone. Secondly, the aim of this policy for identification of new sites for power plants is for the reason that land-wise there is no space left for a physical lateral expansion of the power plant, not for an intensification of activity on the existing area of the site. Thirdly, we do not believe that the Appellants have brought in any evidence to show that there has been any form of intensification of polluting activity on site. The re-development of the site does not necessarily mean an intensification of polluting activity. Infact from the EIA report and the testimony of witness Maran we have it that these Peilstick engines used to be polluting and they have been replaced by less polluting Wartsila engines.

15. Even as far as **Policy I7** regarding **Bad Neighbour Industries** of the **NDS** is concerned, it essentially sets out some of the factors to be considered when identifying new sites for bad neighbour industrial developments and it also acknowledges the fact that bad neighbour industries exist adjacent to residential or commercial areas but that priority should be given to the cleaning up or re-location of such industries if there are opportunities for redevelopment. This policy also lays emphasis in the reduction of pollution rather than re-location by providing *"Attention to the reduction of pollution as provided for in Policy I.5, rather than simple re-location is encouraged."*

16. In our ruling dated 6th April 2018, we had addressed the issue of the location and had given clear directions that we will not be looking into the locational aspect of the development. It was submitted by Me. Ramsohok, and accepted by this Tribunal, that the case for the Appellants would rather be on the operational aspect of the development. Therefore, all evidence that was sought to be adduced regarding location or re-location for that matter, since the witness for the Co-respondent was cross-examined on the issue of CEB getting an alternative location, will not be considered as being outside the ambit of this Determination.

17. As regards the application of the various policies referred to us under the NDS, we believe that they must all be read in conjunction and not in isolation so that there is a harmonious interpretation and application of same. **Policy I7** on **Bad Neighbour Industries** *supra* whilst acknowledging that there already exists bad neighbour developments near residential and commercial areas, the attention must be focused on the reduction of pollution as compared to re-location of the "bad neighbour development". Under this policy reference was made to **Policy I5** which deals with the processing of industrial waste and it is stated therein *"It is desirable to concentrate or cluster polluting industries, on the basis that pollution can be managed more readily if emanating from a single source."* We are here dealing with a situation whereby in the area there was a pre-existing cluster of industrial activities with a power plant which has been in existence and operating since 1955 in an industrial zone, as set out in the address of the subject site. In the vicinity, there are numerous commercial and industrial (including light industrial) developments in that area of Pailles, which could be observed in the course of the site visit. The factory of the Soap and Allied Industries is also in the vicinity as well as the premises of PKL. It is not denied that most, if not all, of these developments have been in existence since before the granting of the BLUP to the Co-respondent in 2016.

18. **Policies E1, I5** and **I7** make reference to **Policy ST3** on **Sites for Buffer Zones around Bad Neighbour Developments,** principles also entrenched in the Planning Policy Guidance, but again this policy is applicable when considering location of new bad neighbour developments. It talks of the buffer of 1km to be identified by the Ministry of Environment on Local Plans so that in considering the location for new bad neighbour developments buffer zones of up to 1 km from sensitive land uses can be observed. The suggestion by the Appellants that the area has to be looked at as it now stands, that is with the current accommodation of residential developments, is not acceptable in our view. These policies would be applicable to applications for BLUP when considering the location of new bad neighbour developments.

19. It is the contention of the Appellants that the Council failed to consider the 1 km buffer when granting the BLUP to the CEB for the development. From our reading, this 1 km buffer applies to applications for new sites that will be considered for power plants. It cannot apply retrospectively to sites which have long been established to contain industrial activities (which in any event in this case has always been an industrial zone) adjacent to residential and commercial areas. These policies are not applicable to a site found in an area with an existing planning history of being an industrial zone where the Appellants subsequently came to settle there.

20. Mr. Nunnoo came to live there after having obtained a BLUP for his residential building in 2007 whilst the Hilfoul Fouzoul society was not even in existence until its creation in 1986, as per Doc F. CEB has been operating there since 1955. If the Council has considered granting a BLUP for residential buildings in an industrial zone, this cannot be the subject matter of the present appeal since it cannot now become the subject matter of a challenge for an industrial activity which has long been established in its proper zone, well before the Appellants' properties mushroomed in the area. Infact, from the site visit it could be noted that Mr. Nunnoo himself has a business of workshop involving heavy duty vehicles and there are several commercial properties around. If the appellants came to settle in the area being fully aware and alive to the fact that there were industrial activities ongoing since as far back as 1955, can they now complain? We do not believe so.

21. Even if we are to consider the point which the Appellants seek to drive home namely the fact that since it was a "re-development", the Council should not have allowed it on the basis that there are now sensitive land uses around the site, we believe that as stated above, the application of the policies are for new sites. The project is implemented within land already occupied by the CEB since 1955 and there was no need for additional land.

22. Counsel for the Appellants did argue that it was the operation side of the project that would cause nuisance to the Appellants and for which they were aggrieved and he also submitted that planning instruments such as the **National Development Strategy** were not applied. The point that we have understood them to be making is the project of the CEB is a source of pollution and that this is as a result of non-observance of policies under the NDS as regards bad neighbour developments and buffer zones. We do not agree. We have not been enlightened by the Appellants as regards any intensification of polluting activity on site. Infact from the EIA report prepared by Mott Mac Donald (Doc B), it should be noted that changes that were being made to existing structures were so that they could be replaced by more efficient ones.

23. The new power house which now accommodates two new 15MW engines (G10 and G11) which would be less polluting whilst the removal of the existing Pielstick engine and its associated towers would decrease the level of pollution as well as create an even wider buffer zone between the power station and the Appellants' properties. Infact while the EIA report provided that this project is being set up to meet the increasing demands of the population, the report also provided that the CEB has a power generating capacity of 130MW but will only purport, with the implementation of both phases of development, to provide 100MW. This ground therefore fails.

24. We also pause here to make an observation. The EIA report makes mention of the growing need for electricity generation to meet the demands of the nation. It would appear that this has been a live issue for a number of years since it was also mentioned in the Policy *supra*. We are all aware that for the progress of the country basic utilities such as water and electricity is a must. The ultimate purpose of the development is not for the benefit of CEB but for consumption of the inhabitants island wide.

IV. PREJUDICE CAUSED IN TERMS OF NOISE AND AIR POLLUTION [Ground 8]

GROUND 8

The objections of the Appellant in terms of noise and toxic air pollution having negative impacts on the health of the students, inhabitants and other occupiers of properties who have been deprived of their legal right to the enjoyment of their properties, have been ignored by the Respondent City Council, which has also failed to take into account the health hazards as set out in their survey supported by Dr. V. Veeraragoo.

25. It is the contention of the Appellants that the development has been affecting them in terms of noise and air pollution. The complaint of Mr. Nunnoo is that he can feel his house vibrating especially at night and he gets the smell of diesel. The representative of Hilfoul Fouzoul society also complained of air pollution which is leading to health problems. It was submitted by the Appellants that the development has deprived them of a peaceful enjoyment of their property. The appellants have in essence expressed concerns, as people living in the vicinity to the development site, regarding issues of noise pollution, health and qualitative degradation in terms of air, of the location. In submission, counsel for the appellants extensively addressed the issue and also referred to the planning guidelines under Ground 9 to substantiate their case. In short, their case rested mainly on the prejudice that would be caused to them and they would be denied the right to peaceful enjoyment of their property.

26. This Tribunal is being asked to appreciate that the type of industrial development that has taken place with the implementation of the BLUP has had a disruptive effect on the amenity of that part of the locality which has a residential character. We have to address our minds as to whether the Appellants are suffering any real prejudice and substantial disadvantage. We believe that one's right to a peaceful enjoyment of one's property should not be understated or trivialised in anyway. 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**. Besides it is a right enshrined under ***section 4 of our constitution*** under the right to life, which also means quality of life. We are totally alive to the fact that the air quality is bound to be affected by emissions of industries and power generation plants and the like.

27. The witness for the co-respondent was thoroughly cross-examined on the issue of emissions by the Appellants' counsel. The Appellants very clearly have had access to a lot of information regarding the project of the co-respondent on the development, a lot of it having been available in the public domain. The Appellants have not adduced independent evidence and this Tribunal is weary of relying solely on the EIA report regarding the emissions to come to the conclusion that the Appellants must be suffering from noise and air pollution for several reasons. There has been no expert called on behalf of the Appellants to testify as to what pollutants were being generated from the new development of CEB, as opposed to pollutants generated by other industries in the vicinity of the appellants' properties and in what way it was affecting the health and well-being of the appellants.

28. Establishing that the pollution, which could potentially be affecting the Appellants, originates from that particular source or that the actual harm, if any, is caused by the alleged polluting source is a heavy burden to discharge in the present circumstances. For a determination of air and noise pollution a lot of reliance is placed on scientific data collection and analysis and monitoring techniques. In the present case, the Appellants have not produced any such evidence apart from placing heavy reliance on the EIA report, which in itself does not establish the causal link between the source of pollution and the prejudice being suffered by the Appellants. This, in our view, was a very important aspect of the case and yet a difficult hurdle to be overcome by the Appellants, in view of the location of the Appellants' properties.

29. Mr. Nunnoo lives at 76, Trunk Road, Belle Village opposite CEB St Louis since 2007, at approximately 131m, which makes him the appellant living closest to the development site. The report of the Sworn Land Surveyor for the Appellants confirms that between Mr. Nunnoo's house and the Central CEB there is a garden, and the motor way separating them. The Tribunal, in the course of the site visit also took note of the fact that the properties of the Appellants are separated from that premises of the CEB by M1 motorway. The Tribunal takes judicial notice of the fact that the M1 motorway is the main artery into Port Louis with a very high traffic density and is a 5-lane highway at that point, since one lane branches off into Pailles on the way to Port Louis. There is also at that point a double lane Old Moka road coming from Signal Mountain Port Louis which joins the highway out of Port Louis. The sulphur content of fuel oils and diesel used for road vehicles is a known fact. Mr. Nunnoo claimed to be getting the smell of diesel in the air that he inhales. The possibility that this nuisance could be emanating from the diesel run vehicles has not been negated by the Appellants.

30. Following from the above observations, we also agree with the submissions of Counsel for the co-respondent that any noise that could possibly be emanating from the premises of the CEB was masked by the natural ambient noise due to the presence of the motorway. The site visit also confirmed the sound masking by the natural ambient environment which eliminated any pre-existing sounds that could have emanated from the CEB. The Appellant Mr. Nunnoo also complained of his house vibrating. The Tribunal can also now take judicial notice of the fact that the Light Rail Transit, that is the "Metro Express", will soon also run on pillars within metres from the subject site and it will be passing even closer to Mr. Nunnoo's house. We therefore believe that, as matter of common sense, these will inevitably cause vibrations. In the course of the site visit, we have also taken note of the presence of other industrial activities being carried out in the vicinity of Mr. Nunnoo's house such as the Soap and Allied Industries Ltd, which has big exhaust chimneys where fumes can be seen coming out during its hours of operation.

31. In the international case of **USA v/s Canada [1941] 3 RIAA 1907 *(the Trail Smelter case)***, a Canadian mining company operated a large zinc and lead smelter along the Columbia River at Trail, British Columbia. Sulphur dioxide emissions from two large 400-foot chimneys at the smelter had damaged crops, trees used for logging, and pastures in the US state of Washington about ten miles south of the smelter. The US Government brought an action against the Canadian Government seeking compensation for damage caused to forests and pastures. The dispute went to arbitration where the US Government was awarded compensation on the basis that "the case is of serious consequence and the injury is established by *clear and convincing evidence*." [the stress is ours] In the Trail Smelter case, the fact that proximity and the lack of alternative polluting source eased the evidential burden on the Appellant. In the case before us, there is a lack of "clear and convincing evidence" to show the causal link between the source and the alleged prejudice or harm being suffered by the Appellants.

32. We have assessed the version of the Appellants. It is the case for the Appellants that the Tribunal should not consider the area simply by the fact that it was a designated industrial zone but that it is a mixed use area since the Council has also issued BLUP for residential developments. We agree with the position of the Appellants on the issue that the area of Pailles is now a mixed use zone which contains industrial as well as residential and commercial developments. As per the **Outline Planning Scheme of Port Louis ['OPS']**, as approved in May 2015, the description given to Pailles is "*...It is accessed off the M1 motorway and in future the Inner Ring Road and is a mixed use industrial and dormitory settlement serving the capital city.*" This possibly at best can explain why the Council has granted BLUP for residential development in the region of Pailles. The village of Pailles used to fall under the OPS of Black River until the new OPS of Port Louis came out in 2015 wherein it was shifted. Under the OPS of Black River, it is provided "*Pailles is made up of essentially two communities: the older more established community accommodated in modest housing within the motorway corridor and the newer community in more substantial housing on the valley floor.*"

33. The residence of Mr. Nunnoo and the premises where the Hilfoul Fouzoul Society conducts its activities are located within the motorway corridor. There exist numerous houses built compactly next to one another as well as commercial outlets in that community with substandard inner access roads. The premises of the Appellants are within a few hundred metres from operational factories such as Soap and Allied Industries Ltd, and is also found on Trunk Road, Belle Village. Along this road there are other factories such as the Plastic Pipes and Products Ltd for the manufacture of plastic products, Aluminium Glass Industries, Ex-Desbro is an industry for wire products whichin the course of the site visit the Tribunal also noted, and of which judicial notice can also be taken. Infact, it was also noted that within that area of Plaine Lauzun where the premises of CEB are found there are several industrial developments which exist and are operating such as Hemisphere Sud which manufactures leather products, Roger Fayd'herbe which deals with the import and distribution of agricultural fertilizers and chemicals, Amro Chemicals which deals with industrial chemicals, PKL Autoparts which has its store and sales department for sale of spare parts of vehicles, Food Canners Ltd which processes canned food and drinks, B.N.Aukin which is a factory for the manufacture of plastic bags and bottles, amongst others.

34. The area context being as set out above, we have taken on board the fact that the Appellants have acquired their BLUP and established themselves in the area many decades after CEB started operating there in 1955. This issue was addressed in our ruling 6th April 2018. The point we seek to bring out is that the Appellants settled in the area with full knowledge of the bad neighbour development that exist near their settlement. Furthermore, the witness from the Council testified that the new set up will cause less emissions and the air quality of the emissions will improve due to the changes being brought about. The EIA report addresses the issue. The testimony of the witness for the Co-respondent, Mr. Maran, an engineer from the CEB also supports the evidence regarding the general improvement of the power generating system in terms of generating comparatively less pollution with the implementation of the development.

35. From the evidence on record it would appear that the Appellants, through the testimony of Mr. Nunnoo, are only contesting the construction of the new Powerhouse. It is to be noted that with no technical expert on these issues having been called by the Appellants, the Tribunal had to accept the unrebutted evidence of the Respondent and the Co-respondent. From pages 12 and 50 of the EIA report, it can be gathered that the new Powerhouse has been built to house two new engines (G10 and G11) similar to the existing Wartsila engines to replace two old Pielstick engines which are decommissioned together with their cooling towers since they were "nearing the end of their useful life". In terms of discharge of effluents, it can be gathered from pages 13, 39 and 122 of the EIA report, the old Pielstick engines which have now been decommissioned, were using water from St. Louis River for cooling the engines, in contrast the two units are designed to use raw feed water from the public mains water supply and employ radiator cooling thus reducing discharges into the St Louis River. The replacement for the Pielstick engines is the new engines which use the radiator cooling system.

36. As per the evidence of Mr. Maran, the switching of engines from Pielstick to Wartsila will also in future favour the use of Liquefied Natural Gas (LNG) which is much less polluting, thereby also taking on board the representations of the Appellants. On an assessment of the evidence of the Appellants against that of the Co-respondent, it would appear that all in all having a Powerhouse in itself can be no source of pollution. The Powerhouse bearing the two new engines which will have a power generating capacity of 15MW each will be less polluting as compared to the old Pielstick engines which have been decommissioned. However, irrespective of whether the emissions comply with the norms set by regulations, we have not been favoured with any clear evidence of damage to property or health of the Appellants as a result of the implementation of the project undertaken by the CEB for which the BLUP was granted. It would be unwise for the Tribunal to solely rely on the mere *ipse dixit* of the Appellants in this case to come to the conclusion that they are being prejudiced in their everyday life due to the implementation of a new powerhouse, in the absence of clear evidence.

37. The CEB has produced the Environmental Monitoring Reports marked as Docs D, M, M1 and M2 which have submitted to environmental regulators which show that efforts are being made for reporting and compliance. The Tribunal can appreciate the integrated system of control over the environmental impacts which has been adopted by the CEB. Air quality dispersion modelling shows an overall improvement of air quality by reduction of the annual mean pollutant concentration as per the EIA report. Mr. Maran for the CEB also gave evidence that the old short stack chimney has been replaced by a much taller stack of 45 metres high. We understand that the basis of this change is so that the emissions are dispersed at a much higher level in the atmosphere so as to reduce the concentration of air pollutants in the nearby locality.

38. There are also steps which have been taken by the CEB to minimize any impact of noise pollution, which in our view deserves mentioning. Evidence was adduced regarding a wall that has been erected, which was also noted in the course of the site visit, to limit the noise emanating from the premises of the CEB to outside. The buffer zone between the residential area found on the other side of the M1 motorway, which is also where the premises of the Appellants' are located, has been enlarged as the power generating engines have been shifted to the farthest end from those houses.

39. We stated earlier that while we are aware that power plants by their very nature generate some level of pollution, in the absence of clear evidence in the present case we cannot attribute any noise or air pollution to the development undertaken by the CEB as per the BLUP issued on 30th June 2016. Even if the arguments of the Appellants were accepted, the presence of the five-lane M1 motorway which is the main carrier of traffic in and out of the capital and the two-lane Old Trunk Road just in front of the Appellants' properties, it is doubtful whether with the amount of pollution generated by the exhaust fumes of vehicles the air quality or the ambient noise level will improve. The ambient noise level was so high that it is sound-masking. This was also observed during the site visit. As far as vibrations in the locality, we are yet to see how things will pan out with the introduction of the metro express which will come by September 2019.

40. In the case of **Ramgutty and Co. Ltd v Hanumanthadu [1981] SCJ 32,** a case based on nuisance under the Civil Code, the Court recognized that there exist certain "types of nuisances" which become the normal inconveniences of the daily lives of the local inhabitants which they have got accustomed to. In the present case, the Appellants chose to come and live within the buffer of these bad neighbour developments which come with their own baggage of associated pollution. The fact of the matter is the clock cannot be turned back and this situation cannot now be undone. This ground also fails.

41. We have been given to understand from the written submissions of Me. Nikhil Thacoor, Counsel appearing for the Appellants at this stage, at paragraphs 11, 18, 26 and 33, that the Appellants are contesting the decision-making process. If this is so, it would be beyond the jurisdiction of this Tribunal. The decision-making process of a statutory body taking an administrative decision, such as the local authority, can only be done by way of judicial review before the Supreme Court. As a final point addressed by the Appellants, although the **Vienna Convention** has been signed and ratified by the Republic of Mauritius, it has not been incorporated into our law through an Act of Parliament. We hasten to add that this Tribunal being an Environment Tribunal has a duty to safeguard the Environmental Rule of Law, which is *"understood as a legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically sustainable development in the rule of law.":* **IUCN World Declaration on the Environmental Rule of Law 2016**. However, the Tribunal should also adjudicate with fairness and justice on the basis of the strength of the evidence before it. In our view, the evidence presented by the Appellants was rather weak.

42. For all the reasons set out above and more especially the lack of evidence establishing a causal link between the development and any prejudice being caused to the Appellants, both appeals are set aside. No order as to costs.

Determination delivered on the 10th July 2019 by

Mrs. J. RAMFUL	**Dr. Y. MIHILALL**	**Mr. P. MANNA**
Vice Chairperson	**Member**	**Member**

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