

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1293/16

In the matter of :-

D. Seeven Ltd

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 proposed construction of a boundary wall and the construction of a one storeyed building for office, automotive workshop and a depot of heavy vehicles at Camp Mapou, Henrietta. The grounds for rejection were communicated to the Appellant in a letter dated 11th October 2016 and are set out below:

"1. There is strong objection against the proposed development.

2. The proposed activities are likely to constitute a source of odour and noise nuisances and likely to defile the river."

2. Both parties were legally represented at the hearing of the matter before us. We shall only make reference to submissions of counsel and specific parts of the evidence where we deem it fit to do so otherwise it suffices to say that we have duly considered all evidence placed before us. According to the Planning and Development Inspector of the Council, the subject site for the proposed development is within the defined settlement boundary of the Outline Scheme for Vacoas/Phoenix and is found within a residential zone.

3. This having been established, the applicable policy is **Policy ID2 of the Outline Planning Scheme of Vacoas /Phoenix** relating to developments permitted in residential areas and reproduced below:

"ID 2

Small Scale Enterprises and Home Working

Proposals to operate or 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:

(i) 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 setbacks from neighbouring properties.

(ii) No neighbours' objections within a radius of 50 metres.

(iii) no serious adverse impact on residential occupiers in the area or the character of the neighbourhood particularly in regard to noise, smoke, fumes, smells, dust nor excessive vehicle movements or loading and unloading of goods and products;

(iv) Sufficient parking space within the curtilage of the property available to accommodate any staff or visitors;

(v) Safe access from the roadway.

Storage of materials should be able to be contained within the cartilage of the property. The operator of the office/business use or small scale enterprise should reside at the premises.

Justification: Technological advances and the evolution of the ICT sector in Mauritius are expected to facilitate an increasing proportion of the working population being home-based. Use of a room as office or business typically does not require a building and land use permit as clients associated with the business do not need to frequently visit the property or there are very infrequent deliveries from trade vehicles. The use of part of a dwelling on a small scale for an office can similarly be low key in nature, which does not adversely affect residential amenity, whilst reducing the number of journeys to work and thereby easing traffic congestion. It can also provide local employment opportunities in the service sector.

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?"*
4. According to the evidence of the Council's representative, there were 14 objectors out of whom ten were present at the Hearing before the Council to voice their objections. As per the annexes to the Statement of Defence of the Respondent, the objections were mainly related to the fact that such type of development cannot take place in a residential area because of nuisance due to foul odour and noise as well as proliferation of diseases.
5. At the meeting of the Permits and Business Monitoring Committee that took place on the 7th September 2016, the objectors again raised and elaborated on the nuisances

such as the traffic generation of heavy duty vehicles as well as nuisance, especially due to foul odour emanating from the waste water carriers which makes it difficult for the neighbours to breathe, noise due to lorries and possible spreading of diseases. They stated that there are places of worship in the vicinity as well as a school. The traffic of lorries will raise safety concerns for schoolchildren who are also road users as the school is just down the road from the site *in lite*. The version of the Appellant before the PBMC committee is that he owned 30 to 35 lorries, with trailers of sixty feet long, and that the lorries set off at six o'clock in the morning and they are back by half past five to six o'clock in the evening. He stated that he had products that could be used to disperse any odour.

6. The development is being proposed in a residential area with a school in the vicinity as well as places of worship and this was confirmed by the representative of the Council. While this was not disputed, we fail to see under which policy the Council initially granted the Appellant a conditional BLUP. This type of development cannot gain planning acceptance in a residential locality by its very nature. **Policy ID2 of the OPS** has been fully set out above. According to this policy the only types of development conducive in a residential zone are selective and that too provided that they are ancillary to the principal use which is residential. Having a sizeable garage to store 30-35 lorries, each having trailers of sixty feet long which carry waste water, as per the version of the Appellant at the PBMC meeting, circulating in a residential area is not conducive the character and amenity of a residential area. Maintenance works being carried out on waste water carrier trucks carry an associated risk of leakage of the remnants waste water found in the tankers. One cannot turn a blind eye to the risk of any type of escape especially when it comes to the type of waste leading to the proliferation of bacteria or germs and risks of pollution such as odour. Hence, we believe that the spirit of above-mentioned policy which regulates development within a residential area does not cater for such types of activities. This development proposal does not find its application in a residential area. It cannot be considered even as an ancillary development to the residential development.

7. The first ground of appeal of the appellant is that the Council failed to consider what the development or activity will bring to the nearby community. We do not believe that this type of activity should be accepted in a residential area on the basis of what it can bring to the nearby community. This would be a wrong criterion to assess the planning acceptance of such development within a residential area. The fact of the matter is that by its very nature waste water carriage with heavy duty lorries circulating in an area where people live and there are pedestrians will bring about a situation which will render the roads within the residential area unsafe and disrupt the overall amenity of such a locality. Indeed the objectors did raise the point of the foul odour that is not pleasant or conducive to have within an area where people live, and the Appellant suggested the use of products, that may be used as suppressants in case of odour. We do not believe that having a development, which is a clear misfit in a residential locality, should be allowed simply on the basis that it can bring something to the nearby community. That would be a flawed assessment. Every activity has its place in society. An activity that can seriously disrupt or interfere with the rights of the local inhabitants or their peaceful enjoyment of their residential property with the emanation of foul odour or the safety on the roads of their local community being compromised due to the infiltration of sixty feet long trailer carriers on the roads, is not acceptable within planning norms.

8. The Appellant deponed to the effect that for the purposes of carrying out his activities, the Appellant will have a private road which will not disturb the other road users in the vicinity. According to him, there cannot be much traffic generated by the lorries since they will be leaving in the morning at six o'clock via the new private access road and will return in the afternoon as from half past five. We are of the view that the appellant is using the wrong criterion, here, to make a judgment. From a planning point of view, it is the impact that activities of such nature on the residents of the neighbourhood that should be considered and not the fact that part of the access to his property will be through a private road. In this case the development proposal will, in our view, definitely be incompatible since it will involve the movement of heavy duty vehicles with containers in a residential area thereby creating a negative impact on the traffic conditions as well as the safety of inhabitants within the area.

9. The Appellant's second ground of appeal is that the Council failed to consider that the application was complete and self-explanatory to the effect that it is not a source of odour and noise nuisance. The tankers after disposing of waste water at Mer Rouge would return to the garage with an empty tank and that in any event the tankers are hermetically sealed so that no liquid or odour escapes. We have duly considered the version of the Appellant that the tankers are hermetically sealed nor have we been favoured with any evidence to show that any waste water carried in the tankers will not nor cause a foul smell to spread. Conversely, the letter emanating from the Ministry of Health and Quality of Life dated 20 September 2016, Annex 8 of the Statement of Defence, dated suggests that there have been other cases where complaints have been received that indeed such activities can generate foul smell. It states, "*...you may wish to note that for this particular application the site adjoins River Papayes and a mosque and is close to residential agglomerations. Viewing the close proximity of the site to residential/religious buildings, the proposed activities, namely automotive workshop and wastewater carriers depot are likely to constitute a source of odour and noise nuisances and likely to defile the river. It is to be noted that, in the past, odour and noise complaints have been received for sites carrying out similar activities.*" We believe that this letter should be given due consideration. Objections have been raised on these points at the PBMC and the Council is duty bound to consider the veracity of such objections.
10. In the case of Tempora Pty Ltd v Shire of Kalamunda [1994] 10 SR [WA] 296, it was confirmed that the views of residents can be valuable where they elaborate on other objective evidence, which is not already covered by experts, as is the case here. The views of the objectors, who live in the neighbourhood, confirmed the contents of the letter emanating from the Ministry of Health and Quality of Life. It was stated in the case of *Tempora*, "*The views of the residents that refine and explain the objective analysis of amenity, not canvassed by the experts, must be given great weight.*"
11. We believe that even if the risk of having waste water dripping from the tankers of the trucks, the associated risk of this generating foul smell in the long run is reasonably foreseeable and so is the associated risk of bacterial invasion, in view of the scale of the development proposed, the large extent of the property and the fact that servicing or

maintenance works are being proposed for the waste water carriers on the locus. The investment made by the Appellant in the purchase of the property cannot be planning factor.

12. The third and fourth grounds of appeal of the Appellant taken together, is that the automotive garage will be used for the “anodyne maintenance” of the vehicles of the Appellant and that numerous waste water carriers have been allowed to operate in highly residential areas. We have not been enlightened on the type of “anodyne maintenance” work that the Appellant intends to carry out on the locus. In any event this is a rather confusing term of expression if the Appellant wishes the Tribunal to clearly understand his project. We do not believe that simply on the basis that there are such carriers operating in highly residential areas can be a yardstick to go by. Not only has no solid evidence been brought forward to substantiate this, except that the Appellant stated that his current garage is found in a place where no resident of the locality has ever objected to the activity, but we believe that even if this were to be taken as being true, two wrongs cannot make one right. The Council has made reference to the **Policy ID4** of the **OPS** in their Statement of Defence but we do not believe that this policy finds its application in the present context as it seeks to regulate bad neighbour developments within zones with pre-existing bad neighbour developments.

13. As a final ground of appeal, in reply to one of the grounds of refusal, the Appellant has raised the point that the risk of river being defiled is non-existent. We believe that the Council did not substantiate this ground through solid evidence and that it appeared to be an apprehension albeit mention of same was made in the letter emanating from the Ministry of Health and Quality of Life.

14. For all the reasons set out above, the appeal set aside. No order as to costs.

Determination delivered on the 27th September 2019 by

Mrs. J. RAMFUL
Vice Chairperson

Mr. P. MANNA
Member

Mr. MONAF
Member