

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

ELAT 1751/19

**In the matter of:**

**Mr. Fayuz Goolvaden**

**Appellant**

**v.**

**District Council of Flacq**

**Respondent**

**Determination**

The present appeal is against the decision of the District Council of Flacq (the Respondent) for having refused to grant an application for Building and Land Use Permit to the Appellant for the 'Manufacture of furniture and cabinet (employing less than 10 persons) at Petit Bois road, Caroline, Bel Air Riviere Sèche. The reasons put forward by the Respondent to refuse the application are, as per the letter dated 26 December 2018, as follows:

1. The proposed development lies within the settlement boundary, as such it is likely to create nuisances to residential and other sensitive uses such as noise, dust and air pollution not acceptable within a residential area.
2. The proposed development does not comply with Policy ID 1 of the Moka Flacq Outline Planning Scheme as the proposed development is not located in any industrial zone.
3. The proposed development does not comply with Policy ID 2 of the Moka Flacq Outline Planning Scheme.
4. As per circular letter dated 8 August 2018 from the Ministry of Local Government and Outer Islands, workshops, industries, panel beating, painting, hardware shops and warehouses among others, likely to create noise and odour within residential zones, further, Industrial developments within residential areas should be discouraged.
5. Complaint has been received against the proposed development.

In a notice of appeal lodged on the 15<sup>th</sup> January 2019, the Appellant has raised the following grounds of appeal:

- (a) At the material time the plot of land was an agricultural one and thus same was purchased for the sum of Rs.475,000 which is cheap.
- (b) There exists only one residential premises which is 200 metres from the business operation.
- (c) The plot of land is surrounded by sugarcane.

- (d) The owner of the properties which are contiguous to the plot have no objection whatsoever for the operation of such business.
- (e) In the premises, no prejudice whatsoever will be caused to anybody.

A statement of case was initially filed on the 25<sup>th</sup> January 2019 by the Appellant and a statement of defence filed on the 15<sup>th</sup> February 2019. Subsequently, an amended statement of case was filed on 26 November 2019, to which no amended statement of defence was filed. In his statement of case as well as in his testimony in the course of the hearing, the Appellant placed emphasis on the reasons for applying for a BLUP for operating his workshop in new premises. He explained the difficulties that he faced in his existing workshop, the health issues faced by his father, who now required the premises to live in, and the access road to his workshop which would not be available for use for his activities in future (Documents A and B have been produced to show the difficulty of access to his place). This is why he purchased the property (as evidenced by Document C) to operate his workshop and applied for a BLUP for the new premises. He maintained that the plot of land is surrounded by bare land, as shown in Documents D and E produced. He added that other activities that operated in the neighbourhood were those of panel beating, upholstery workshop and marriage hall, photographs of which were annexed in the statement of case. He averred that the area is far from being a purely residential area. The Appellant proposed to put up soundproof installations and dust extractors to mitigate any potential environmental hazards that his activity may cause. He also proposed to operate within specific working hours and with a staff of less than ten employees. In his cross examination he stated that he had purchased the land 'in lite' as agricultural land.

A statement of defence was filed by the Respondent on the 15<sup>th</sup> February 2019 (which was maintained after the filing of the amended Statement of case) wherein the Respondent maintained that the application had been assessed by the Planning department and the latter had 'not recommended based on planning requirements', hence the Planning and Business Monitoring Committee of the Council did not approve the application. The Respondent referred to the Planning Policies ID2 and ID4 and the objections received from adjoining neighbours who have not yet erected their house but intend to do so. The Respondent did not deem it necessary to convene a hearing being given that the development itself does not comply with planning requirements in that area.

The planning instruments relied upon by the Council as per the statement of defence filed on behalf of the Respondent are Planning Policies ID 1 and ID 2. In the statement of defence, however, reference is made to Policy ID 4, the justification put forward being the potential risk of nuisance.

The relevant extracts of the Outline Planning Scheme for Moka- Flacq District Council, produced as Document F, are reproduced hereunder:

**Policy ID 1: *Development in Existing Industrial Estates and Zones within Settlement Boundaries:***

*"Within existing industrial estates and zones within settlement boundaries and identified on the Development Management Map there should be a presumption in favour of light industry, small factories and workshops (including Small and Medium*

*Enterprises-SMEs) and those industries not causing nuisance to nearby residential and other sensitive uses by reason of smoke, fumes, dust, noise, excessive vehicular movements and loading issues”,*

**Policy ID 2: Small Scale Enterprises and Home Working within Settlement Boundaries:**

“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.

**Policy ID 4: Bad Neighbour Development**

“The location of bad neighbour uses should follow the sequential approach commencing with Policy SD 3 and where buffer zones are required or potential nuisance exits with Policy SD 4.

Bad neighbour developments are defined to include quarries, stone crushing plants, concrete batching plants, asphalt mixing plants, power stations and tank farms, animal-rearing uses including piggeries and poultry farms sewage treatment works, sites for landfill....”

We have considered the evidence adduced by the parties and the justifications put forward by the Appellant for the need for him to move his workshop from his actual place of operation to the new premises. The decision of the Respondent rests however on planning considerations and planning instruments.

At the very outset, we observe that reference made to the proposed activity being a bad neighbour development is irrelevant because, firstly this is not a ground of refusal in the decision of the Respondent, secondly, the proposed activity does not form part of the definition given in Policy ID 4 on Bad Neighbour Development, namely in the indicative list of activities that are defined as bad neighbour development, and finally, it was conceded by the representative of the Respondent that this was not one of the criteria for the declining the application. Besides, counsel for the Respondent reiterated in his submissions that this was not relied upon.

We note also that the reliance placed by the Respondent on Policy ID 2 is neither here nor there being given that this policy applies to ‘Proposals to operate or extend office/business uses or small-scale enterprises from residential properties...’. The policy would apply to the premises where the Appellant is presently operating and not to the proposed one, subject matter of the present appeal.

As regards Policy ID 1, the Appellant did not dispute the fact that the land '*in lite*' is within settlement boundary. The Google Map filed as Annex C to the report of site visit effected by the representative of the Respondent (which is part of the record) shows that the proposed site is at a distance from residential development and is in the middle of vegetations, as explained by the Appellant in his testimony and shown on the location plan produced (Document C) and photographs (Documents D and E). Furthermore, Annex D to the said report shows the presence of four other concerns, namely, a panel beating workshop, a motorcycle workshop, an upholstery workshop and a multipurpose hall within the settlement boundary and closer to the residential areas. The representative of the Respondent had no information on when the permits for those concerns had been delivered, which as per his evidence would presumably be prior to the splitting of the Moka-Flacq District Council. The permits had been renewed since then. Their presence within the settlement boundary has not been questioned. In fact, Policy ID, 1 relied upon in the grounds of refusal, lays down a presumption in favour of light industry, small factories and workshops (including SMEs) and those industries not causing nuisance to nearby residential and other sensitive uses by reason of smoke, fumes, dust, noise, excessive vehicular movements and loading issues.

The Respondent relied upon the objections made by three neighbours (Document G) and a letter from the parent Ministry (Document H) which calls for an exercise of 'due diligence' when granting BLUP for 'nuisance causing activities such as workshops, industries, panel beating, painting, hardware shops and warehouses amongst others, likely to create noise and odour within residential zones'.

A perusal of the terms of Policy ID 1 shows that it does not lay a prohibition on industrial activities within settlement boundary. This policy creates a presumption in favour of light industry but limits it to those types of industry that do not create smoke, dust, noise...etc. The assessment of the proposed development, as contained in the first ground of refusal is questionable as it states that the proposed activity is likely to create nuisance by the mere fact that it lies within settlement boundary. This is based on apprehension.

The second ground of refusal is in contradiction with Policy ID 1, which at no point requires that such proposed development should be located within an industrial zone. This has in fact been confirmed by the representative of the Respondent in cross examination, who confirmed that Policy ID 1 makes reference to two types of locations where there is a presumption in favour of light industries, firstly industrial estates and secondly settlement boundaries. This ground of refusal can therefore not stand.

As stated above, Policy ID 2 refers to small scale enterprises operating from residential properties. The application made by the Appellant is for the manufacture of furniture and cabinet. At no point has reference been made to the premises to be used as residence. As such, compliance with Policy ID 2 or not, as contained in the third ground of refusal is not relevant. This ground of refusal cannot stand.

Grounds 4 and 5 of the refusal letter relate to the need to discourage such activities within residential zones and the fact that complaints have been received. In this respect, the evidence of the Council’s representative unfolded that there were three objectors (as per Document G). It came out that the objectors do not reside in the vicinity of the proposed development but are land owners. There was also no evidence of the position of their land with respect to the proposed development. The presumption created by Policy ID 1 in favour of light industry and the qualification set by it that it should not cause nuisance targets nuisance to ‘residential and other sensitive use’. It is a moot point whether being land owners without being residents amounts to ‘residential and sensitive land use’. Had the Council conducted a hearing, the potential nuisance to future occupiers as well as any mitigation thereof could have been addressed before a decision is taken.

The Appellant has proposed mitigating measures like soundproofing and collection of dust and other measures. The representative of the Respondent rightly pointed out that none of these measures had been placed before the Council for it to assess. Yet, it is our view that such issues could have been addressed had a hearing been held.

In the light of all the above considerations, it is our view that the decision to reject the application on the grounds as mentioned in the refusal letter cannot be supported. We find that although the grounds of appeal, as drafted, do not address the points observed by us, this is a fit case for us to allow the appeal and remit the matter back to the Respondent for it to consider the imposition of conditions that it deems fit.

Delivered on 23<sup>rd</sup> June 2022 by:

Mrs. V. Phoolchund-Bhadain, Chairperson .....

Mr. Sujoy Busgeeth, Member .....

Mr. Shanmoogum Moothoosamy , Member .....