

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1755/19

In the matter of:

FB Agriland Ltd

Appellant

v.

District Council of Moka

Respondent

Determination

1. The facts:

The present appeal has been lodged by the Appellant against the decision of the District Council of Moka (the Respondent) for having declined to grant a Building and Land Use Permit (BLUP) for the construction of a covered mini synthetic soccer pitch (2 units) including a cloak room and a toilet block. The sole ground of refusal as contained in a letter dated 8th January 2019 is as follows:

1. The site lies in the midst of the Settlement Boundary whereby same is being further consolidated by predominantly residential types of development. As such the proposal is viewed to be incompatible with a peaceful residential neighbourhood on account of the:
 - (a) The noise inherent to the activity being conducted;
 - (b) Hours of operation which can last till night; and
 - (c) Incessant traffic movement likely to be generated over a substandard road network.

2. The Notice and Grounds of Appeal:

In a Notice of Appeal lodged on the 23rd January 2019, seven grounds of appeal were raised as follows:

- (a) The National Development Strategy, Planning Policy Guidance and the Outline Planning Scheme provide that residential settlement shall not be restricted to residential dwellings alone but rather a mixed of retailing activities, services and wellness centres in view of achieving sustainable built development growth thus encouraging a mixed pattern of development at walking distance within residential development reducing vehicular movements.

- (b) The proposed mini soccer centre having its location within settlement boundary is therefore not an issue taking into account the size of the property being 14,436.36 square metres and of a total length of 260.60 metres is sufficiently large enough to allow for its own spatial buffer, therefore the issue of noise emanation and human voice, beyond the property extent does not arise in as much as there is a river bordering the property on the North and East, an agricultural parcelling on its South and the Director's residential on its North West (Annex A).
- (c) The context does not predominantly comprise of residential types of development and the issue of incompatibility with a peaceful neighbourhood does not arise contrary to what has been stated by the Moka District Council. The neighbours raised no objection to the proposed development. The area constitutes of a few industrial buildings, two schools, several commercial buildings, a pump station, dormitories, an agricultural morcellement and an industrial zone managed by ex-BPML whereat heavy machineries are in operation.
- (d) The Appellant has not been given an opportunity to support its application and answer to any queries that the Council considered material such as proposal for road improvement, explanations regarding the hours of operation and noise inherent to the activity. The Ministry of Agriculture, Forestry Department raised no objection to our proposed development. Also, the Ministry of Public Infrastructure and Land Transport raised no objection thereto (Annex B).
- (e) It is therefore perceived that the Council, which is also a provider of wellness/health fitness centres to the community is acting as judge and party, preventing a mini soccer project from a private party to occur.
- (f) The Appellant said projects need to be highly encouraged in order to fight against the scourge of drugs/alcohol/manque de loisir, which will be to the definite advantage of people in the locality.
- (g) It is also important to consider that there is no alternative and more appropriate site from land use point of view for such a project which is a proposed sport centre at a walking distance from the inhabitants' place of residence and rather than leaving it bare land.

3. The Statements filed by the parties:

The Appellant reiterated all the above points in its statement of case.

In its statement of defence, the Respondent stated that the proposed activity falls under the 'Sui Generis' and therefore stands on its own. Having found that the site is in the midst of settlement boundary with predominantly residential premises, the development was found to be incompatible with the existing area in view of the noise inherent to the conduct of such activity, the hours of operation and the traffic that is likely to be generated over a substandard road network. The Respondent placed reliance on the policies set out under Policy CR1 of the Outline Planning Scheme (OPS) and the policy guideline for commercial development issued by the Ministry of Housing and Lands. The Respondent's view is that under Policy CR1, only shops including 'tabagie', small groceries and snack food premises which serve the local neighbourhood needs may be located within settlement boundary and within predominantly residential areas provided the gross floor space does not exceed 60 square metres, which is not the case of the present proposed development. Further it cannot be qualified as one

which falls within the category of services or commercial development allowable in such area and should be located out of centre. Thus, despite the fact that no objection had been received from neighbours, the Respondent stated that it could not disregard the potential nuisance, as listed above, that could occur. Furthermore, such development would change substantially the character of the present surrounding.

4. The Evidence:

The Appellant produced the clearance (Document B) obtained from the Ministry of Agro-Industry and Food Security, Forestry Service, subject to certain conditions, which also highlighted that the proposed development will be located outside the river reserves and any construction will have to observe the river reserve. He produced the notice served by him on the three owners of contiguous properties (Documents C and C1) and the latter had no objection to the proposed development. He produced a letter (Document D) from the Ministry of Public Infrastructure and Land Transport stating that the Urban Transport Programme Secretariat had no objection to the proposed development.

The Appellant explained that there is no residential premises near the site of the proposed development, the nearest residences being at a distance of one to two kilometres away. He added that no hearing had been held at the District Council prior to the decision taken to reject his application. He proposed to operate two pitches, each one being rented for sessions of one hour, and the opening hours would be from 11 a.m. up to 9.00 p.m, at latest. He had made provision for thirty to fifty parking slots. He added that a 'foot salle' is being constructed by the District Council at a distance of hundred metres away from his proposed development and closer to residences and a secondary school. His development will be erected on an area of 726.18 square metres, which is only 5% of the surface area of the land owned by him, which is 14,436.26 square metres. In addition, the road to his property is twelve metres wide (inclusive of the reserve). It came out in his cross examination that the two football pitches will be housed indoors, will be covered and surrounded by walls, as evidenced by Document E produced. The Appellant denied that there were residential premises in the vicinity.

The representative of the District Council, on the other hand, produced a copy of a google map showing the location of the site, and highlighted the presence of residential houses at a distance of three hundred metres to five hundred metres from the site. In cross examination he was unable to give any confirmation on the construction of a mini soccer pitch by the District Council of Moka. When questioned on Policy SC 4 (Approved Version September 2006) of the Outline Planning Scheme, which reads as follows: "Future District and when appropriate regional sports facilities should wherever possible be located close to schools lacking their own facilities and/or within designated growth zones..... Such sites should have a high level of accessibility which provides for a variety of travel modes particularly public transport."), the officer conceded that the proposed development is a sports development. He stated however that other aspects ought to be considered, namely the nuisance factor.

5. Decision:

After considering the evidence adduced by both parties and the planning instruments referred to above, we find that the zoning of the proposed project, namely that it is in the midst of residential Settlement Boundary has not been clearly established. Document F which was relied upon, shows that there are residential premises at a certain distance from the

proposed project. Document F also discloses that the land in question is indeed a much larger portion. Although the proposed pitches are not indicated thereon, the evidence of the Appellant that the pitches will occupy only part of his land has not been rebutted.

It is on record that the project has obtained relevant clearances from the respective authorities concerned and no objection has been raised by inhabitants living near the proposed development. The location of the site, *'per se'*, does not constitute a hindrance to such a development. As regards the nuisance that may arise from such an activity, it is observed that, on one hand, the grounds of objection do not hold or can be curtailed by conditions and, on the other hand, the fact that the pitches will be housed indoors, as explained by the Appellant, this would mitigate the noise that would potentially emanate from the activity. The issue of traffic movement as raised by the Respondent is not justified being given the size of the land, the number of parking spaces available and the number of persons who can attend the pitches (ten at any one time). As regards the hours of operation, it is our view that this is a matter that can be the subject of conditions that the Council can consider imposing.

In view of all the above considerations, we find that the grounds of rejection raised by the Council cannot be supported. The issues raised by the Appellant as grounds of appeal, seem to be justified, especially given the fact that such sports activities can only bring benefits (health and leisure) to the inhabitants of the area and the need for these activities to be within reach of the persons, as rightly described in Policy SC 4 of the Outline Planning Scheme for Moka Flacq District Council.

We highlight the need for a balancing exercise, as propounded in the planning instrument, to be done by authorities in its decision-making.

We allow the appeal and remit back the application to the District Council for it to issue the Building and Land Use Permit and to impose conditions it deems necessary for this activity.

Delivered by:

Mrs. V. Phoolchand-Bhadain, Chairperson

Mr. R. Seeboo, Member

Mr. S Moothoosamy, Member

Date:

3rd August 2022