

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1812/19

In the matter of :-

Pawan Adhish Ramkurrun

Appellant

v/s

District Council of Riviere du Rempart

Respondent

DETERMINATION

1. This is an appeal against the decision of the Respondent [“the Council”] for having rejected the application of the Appellant for the construction of a reinforced concrete building at basement, ground and first floors at Forbach Road, L’Esperance, Trebuchet. The sole ground for refusal communicated to the Appellant vide letter dated 5th April 2019 is:
“SITE LIES WITHIN BUFFER ZONE OF 200M FROM POULTRY PEN AND DOES NOT COMPLY TO THE CRITERIA FOR THE RELEASE OF LAND FOR RESIDENTIAL PURPOSE UNDER POLICY 1D4 OF THE OUTLINE PLANNING SCHEME OF THE RIVIERE DU REMPART DISTRICT AREA.”
2. The grounds of appeal as per the Appellant’s notice of appeal are as follow:
 - (i) *Because the Local Authority failed to give its decision within 14 days of the payment of the application, (in breach of the Local Government Act 2011)*
 - (ii) *Because the Local Authority failed to apply objective, transparent, independent and clear criteria in assessing the application.*
 - (iii) *Because in determining the application of the Local Authority took into consideration erroneous matters.*

3. Both parties were legally represented. Mrs. Padayachi, Planning Inspector, deponed on behalf of the Respondent. We have duly considered the evidence on record as well as submissions.

I. CONTEXT ANALYSIS AND BACKGROUND

4. The subject site is located at Forbach Road, Riviere du Rempart and it is undisputed that the site is found within the 200 metre-buffer zone of an operational poultry pen. From an extract of a google map of the location, Doc D, produced by the Appellant, the presence of a few buildings within the buffer of the poultry pen is noted. There is also a borehole within metres of the poultry pen, which is an admitted fact. The Appellant had made a first application for a BLUP in 2018 which was rejected on the ground that "site lies within 200mts buffer of an existing poultry farm." The present appeal is in respect of the rejection of a second application made by the Appellant. He agrees he has already constructed his house and been living there.

II. UNDER GROUNDS OF APPEAL 2 AND 3

5. The application having been determined by the Council within the statutory time frame, the first ground of appeal was dropped and the appeal proceeded on the remaining 2 grounds which were clubbed together. The case of the Appellant in essence rests on the presence of other residential properties in the vicinity within the 200 metre-buffer of the poultry pen and that he was being prejudiced by not being granted a BLUP for his house. He testified that there were approximately 10 to 12 houses including the houses of one Dr. Luchmun, one Mr. Narainsamy, one Mr. Poonith, one Mr. Nunkoo, 2 eateries and a storeyed building comprising of a restaurant by the name of Vishal Fast Food, of which the first floor is a residential development, and are all found near the subject site and the poultry pen. He also pointed out the distance between the existing borehole and the poultry pen was less than 10 metres. According to the Appellant one of the buildings of Mr. Poonith was being used as a dormitory. He produced photographs, marked Doc F and F1, to show that the buildings to which he made reference looked like residential buildings.

6. As per his statement of case, it is the contention of the Appellant under these 2 grounds that a similar application was refused on the 12th February 2018 on the ground “site lies within 200mts buffer of an existing poultry farm” hence different criteria have been applied for a similar application. It is also contended by him that the Respondent approved BLUPs for other residential premises found less than 200 metres from the poultry pen and that the Respondent is laying emphasis on the presence of the Poultry farm which is infact located less than 10 metres away from a borehole.

7. According to the Design Guidance on Industrial Development adjacent to sensitive uses found in **Planning Policy Guidance [‘PPG 1’]**, the acceptable distance of sensitive land use, such as houses and schools, from the boundary of a bad neighbour industry, such as a Poultry Farm, is 200 metres. It is undenied that the subject site lies within the buffer zone of a licensed poultry pen which is still operational. The Council cannot therefore be said to have erred in applying the correct policy as per the planning instruments. By making a comparative study with other developments in the vicinity, the Appellant’s contention is that his application is being treated unfavorably.

8. The Outline Planning Scheme of Riviere du Rempart [“OPS”] came into force in September 2006. Mrs. Padayachi explained that most of the residential developments found in the area including within the buffer zone of the pen are either old buildings which existed or were granted BLUPs prior to the coming into force of the planning instruments such as the Outline Planning Scheme which regulated development within every district. She also explained that the BLUPs of Mr. Nunkoo and Poonith date prior to 2006 except for another BLUP granted to one Mr. Subodh Nunkoo which dates to 2009. The BLUP granted to Dr. Luchmun and Mr. Narainsamy are dated 2007 and 2014 respectively but that in the case of all these BLUPs granted for residential development there was a disclaimer attached to their BLUPs that they would not have any complaint about nuisance caused through the operation of the poultry farm. She explained however that in 2016 the Council has had to reconsider its position as regards issuing BLUP for residential development within the buffer zone due to the

complaints against the operation of the Poultry pen causing nuisance to the inhabitants and had decided to stop the issuance of residential BLUPs.

9. While we believe that the planning guidelines and policies should be adhered to especially where there are biosecurity risks through infected broilers, hence the provision of buffer zones, the Council could have been taxed for having granted BLUPs in the past. We are however not sitting on appeal of previous decisions of the Council and we should not just for the sake of aligning with previous decisions of the Council do so if we judge them to be wrong. After all two wrongs do not make one right. The risks associated with spread of diseases such as bird flu, can be mitigated in its transmission to humans through distancing, hence the buffer zone. We believe that the Council applied that correct policy as regards the application at hand and came to the right conclusion.

10. The Council's case is also that the site does not comply with the criteria for the release of land for residential purposes under **Policy ID4 of the OPS**. **Policy ID4**, as per our reading, provides for applications for Bad neighbour developments. Therefore, when the application at hand is a bad neighbour development then the criteria to be applied are provided under **Policy ID4**. In the present case the application is rather for a sensitive use one, that is residential. We do not agree that the site or the application has to comply with **Policy ID4**. This, in our view, is a wrong proposition. We do agree however, that an application should not offend the provisions of **Policy ID4** which would be the guiding policy for the establishment and operation of the bad neighbour developments, in this case the Poultry pen. Under the "justification" part of **Policy ID4**, it is provided that Bad neighbour developments are those that cause *"potential nuisance to adjoining residential neighbours by reason of noise, dust, smoke, fumes, smells, abnormal hours of operation or parking or excessive loading problems or through the appearance and scale of the proposal. Bad neighbour developments are required to be distant from residential and other sensitive uses for health and safety reasons and require buffer zones which may preclude certain forms of development within a specified distance."* We agree that once a "bad neighbour development" is established in a designated area then the Council cannot and should not grant

planning acceptance to developments that qualify as sensitive uses within the buffer zone of the bad neighbour development. This being said, we do not believe that it is sound planning to allow restaurants to operate in the buffer zones of poultry farms, where the sanitary elements may be compromised even if restaurants are classified as commercial developments and not of sensitive use. Mrs. Padayachi explained that Vishal Fast Food was granted a BLUP for commercial use according to the Council's record. While we may not agree with the decision of the Council on that score, we are of the view that the Council cannot be taxed for having taken the correct decision in this case despite some its previous decisions being inconsistent with the planning instruments.

11. We also maintain our reasoning as regards to the fact that the Council had rejected a previous application made by this Appellant in 2018 on the ground that the site lies within the 200metre buffer of a poultry pen and that with regard to the application which is the subject matter of the present appeal the Council also added that it does not comply with **Policy ID4**. We are not sitting on appeal of the first application made by the Council therefore we cannot surmise on how the Council assessed the planning merits of the previous application. However, what is noted is that the Council has been consistent in refusing the applications on the ground that the site lies within the buffer zone of the poultry pen. This is not a valid ground in our view to successfully challenge the decision of the Council. It therefore fails.

12. The presence of the Poultry farm being near the borehole is not an issue as regards assessing the planning merits of the application before us. It may well be an undesirable state of affairs which can cause water contamination and which the Council should have been aware of in the interest of health and safety of the inhabitants but it has no bearing for the purposes of the determination of the present appeal. This ground therefore fails.

III. DORMITORY

13. The Appellant testified that Mr. Poonith was operating a Dormitory in the vicinity to which Mrs. Padayachi stated that as per her research following a site visit, the building was being used as store. There is no conclusive evidence on record as regards this issue which in our view is one of minimal relevance for the purposes of assessing the planning merits of the present application and is therefore disregarded. The issue of relevance is the potential health risks that the inhabitants may be exposed to should they be allowed by law to reside within the buffer zone of a poultry farm and this outweighs any other consideration.

14. For all the reasons set out above, we find that the Council was right in its decision. The Appeal is set aside. No order as to cost.

Determination delivered on 26th April 2022 by

Mrs. J. RAMFUL-JHOWRY

Mr. S. MOOTHOSAMY

Mr. P. MANNA

Vice Chairperson

Member

Member