

IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1425/17

In the matter of:

- 1. Mr. Ahmed Ruttun**
- 2. Mr. Maboob Ruttun**
- 3. Mrs. Bibi Asmin Ruttun (born Dowlut)**
- 4. Miss Oummey Wazihah Ruttun**
- 5. Mr. Mohammad Yasheer Ruttun**

Appellants

v/s

The Ministry of Housing and Land Use Planning

Respondent

DETERMINATION

1. The present appeal is against a decision of the Morcellement Board of the Ministry of Housing and Land Use Planning (hereinafter referred to as “the Ministry”), for having rejected an application made by the appellants for the subdivision of a plot of land of the extent of 2094 sq.m into three lots situated at Gros Billot, New Grove for residential purposes. The sole ground of refusal as set out in a letter dated 29th May 2017 is “...the proposed site is less than 200m from the existing poultry farm.”
2. Both parties were legally represented at the trial. Appellant no.4 deponed on behalf of all the appellants and Mrs. Guness, the Planning and Development Inspector of the Council of Grand-Port also deponed on behalf of the appellants. Mrs. Prayag, represented the Ministry while Mr. Lolljee from the Ministry of Health and Mr. Matabadul from the Ministry of Environment testified on behalf of the respondent. We have duly considered all the evidence placed before us as well as submissions of both counsel.

3. The appellants raised 3 grounds of appeal which were elaborated at paragraph 4 in their Statement of Case and are reproduced below:

“4. The Appellants aver that the reason borne out in the aforementioned letter is unwarranted and unjustified in the circumstances of the present case for the following reasons:

a. The Appellants deny that the proposed site is situated less than 200m from the existing poultry farm.

b. The Appellants aver that the location for the proposed subdivision project for residential purposes is in an area which is already being used for this purpose, with the proposed plot of land having no less than ten neighbours who have built residences around the poultry farm. The Appellants further aver that some of those residential premises are barely metres away from the existing poultry farm.

c. The Appellants further aver that there are, within the aforementioned area, Ministry of Housing and Lands residential premises around the poultry farm, as well as one shop which also operates as a liquor store and for which a licence has in effect been granted by the District Council of Grand – Port.”

I. CONTEXT ANALYSIS

4. The subject property, as per the title deed, is agricultural land of extent of 2094 sq.m situated at Gros Billot in New Grove and belonging to all the appellants. The site is serviced by a tarred access road and surrounded by bare land as per Doc B, aerial map produced by the witness from the District Council of Grand Port. The proposed development is to have the land *in lite* subdivided into 3 lots for residential purposes. The case of the appellants in essence is that the area is getting built up and some residential development have come up within very close proximity of the subject site. The Appellant no. 4 testified that there are some ten houses in the vicinity including a shop selling liquor and produced seven photographs, marked Doc A-Doc A6 showing new houses built just metres away from their property.

II. GROUND OF APPEAL

(i) Under Ground (a)

5. It is the contention of the appellants under this ground that the reason for refusal is unwarranted and unjustified since the proposed site is not situated within 200m from the poultry farm. The existence of the poultry farm is not disputed by the appellants but the distance between the poultry farm and their property is contested. It can be gleaned from the real evidence, Doc B, a map emanating from the Ministry, marked Doc B, showing an aerial view of the site and its surrounding, that the poultry pen is 95 metres away from the subject site. Infact it was Mrs. Guiness, witness from the District Council and called on behalf of the appellants who produced the document and according to her the subject site was approximately 45 to 60 metres from the poultry pen. Mr. Matabadul, planner of the Ministry confirmed that the site was 95 metres from the poultry pen, as shown on Doc B. This was not successfully challenged by the appellants. This ground therefore fails.

(ii) Under Grounds (b) and (c)

6. These 2 grounds of appeal will be dealt with together since the issues are related. The contention of the appellants is that the reason for refusal is unwarranted and unjustified because the proposed residential development is in an area which is already being used for residential purposes with no less than ten neighbours who have built their houses around the poultry farm, some barely metres away from the farm. One neighbour operates a liquor store, for which a licence has been granted by the District Council of Grand – Port. The Appellant no. 4 testified that although the land is an agricultural one, the appellants wanted to have a permit to construct their houses there since the area has turned into a residential one with more than ten neighbours having constructed their houses in the vicinity. She produced a set of seven photographs marked Doc A to Doc A6, all purporting to show some new development in the vicinity of the site. It is noted that there are some new houses within just a few metres from the land *in lite* but the number cannot be ascertained.

7. Mrs. Guness, officer of the District Council of Grand-Port, gave evidence that the subject site was on the edge but outside settlement boundary and within the 200m buffer of the poultry pen, as was confirmed by the Development Control Officer of the Ministry, Mr. Matabadul. It can be gleaned from the map, Doc B, which was identified by the latter, as being a map of the Ministry of Housing and Land Use Planning that there is in fact much development within the 200-metre buffer of the poultry pen. These can, however, be demarcated from the proposed development in that they all fall within the settlement boundary where residential development is permitted. No development has been noted outside settlement boundary save for 2 buildings, their existence of which has not been canvassed before us. However, it is noted that they in fact do not fall within the buffer of the poultry pen either. As per the Council's records, the poultry pen is still operational.

8. According to the **Design Sheet of the PPG** the acceptable distance of sensitive land use, which includes housing, from the boundary of a bad neighbour industry such as a poultry farm is 200 metres. Similarly, in the revised **Environmental Guideline on Poultry Rearing** published by the Department of Environment of the Ministry of Environment in September 2021, as regards the siting of a poultry pen, it is provided that *"The site should be at a minimum distance of 200m from the limits of settlement boundary, any nearest residential building outside settlement boundary and other sensitive land uses (including residential, education and health facilities); any domestic borehole and slaughter house. (ii) The site shall be located on agricultural land and outside irrigation zones."* A buffer zone has to be respected because it has its *raison d'être*. The activity of poultry rearing is associated with several environmental impacts, odour and sanitary nuisance such as solid waste and poultry litter, biosecurity risks, wastewater, visual impacts and disposal of dead birds amongst others. Mr. Lolljee, witness from the Ministry of Health explained that a poultry pen is hazardous due to nuisance, odour, biosecurity reasons, flies, rodents, diseases such as Avian Flu that can affect public health. Their objection to having the proposed development within the buffer is therefore based on concern for public health and safety especially if the poultry farm is not managed properly. Mr. Matabadul confirmed that the buffer distance of 200 metres has to be respected.

9. We agree that the planning policies must be respected and that any derogation must be properly justified. The reason invoked by the respondent's witnesses, that is, the biosecurity risk and risks to public health, is an environmental as well as a land use issue. These considerations are inextricably linked in that any development on a property, and thereby its land use, will have an impact on the environment and vice versa that is, be impacted upon by its environment. One therefore needs to look at one's surrounding environment to see whether a particular development is compatible or not with the locality. The appellants' case is that their development proposal is compatible with the land use of the area since several residential developments have come up in the vicinity. The presence of a cluster of some 4 to 5 buildings is noted between the subject site and the poultry pen as per Doc B. Mrs. Guness explained that these form part of a residential morcellement which had been approved by the Ministry of Housing and granted a permit in 2012. This was confirmed by Mr. Matabadul who added that the Ministry only came to know about the presence of the poultry pen in the area in the course of a recent site visit. It also emerged in evidence that the residential morcellement falls within the settlement boundary albeit within the buffer of the poultry pen.
10. While we do appreciate that everyone has the right to a peaceful enjoyment of their property, as do the appellants, the undisputed evidence on record is that the poultry pen is a long standing one of around 32 years. It's existence pre-dates the coming into force of the Outline Planning Scheme, as per Mrs. Guness's testimony, hence at a time when there was no official zoning in the country. It was submitted by Counsel for the appellants that there is no evidence adduced as regards whether the poultry pen has a valid BLUP, since it is located within the settlement boundary, which is in fact a mislocation due to it being a bad neighbour development. The point here being, as we understand it, if the poultry pen is an illegal development, then why should the appellants be penalized. While we agree that the pen should not normally be located within settlement boundary where residential development is favoured, the fact that this poultry pen is a very old one, having been located there and been in operation for over 3 decades, prior to the existence of the Planning Scheme, we have little choice but to accept the state of affairs as they are.

11. The poultry pen is operating with the approval of the Council, that has been accepting its trading fee, as per Doc C1. There is in fact no evidence as regards the BLUP of the poultry pen but it has a trading licence which is still valid, as per Mrs. Guness. The provisions of the **PPG** as regards the buffer distance to be kept from the poultry pen have to be applied. We find no valid justification put forward to derogate from those provisions. As far as the land use is concerned, the appellants' property is an agricultural one surrounded on 3 sides by bare land. Except for a small part, the major part of the land *in lite* falls outside the settlement boundary where no development has taken place, except for 2 random buildings as mentioned earlier. Houses may have mushroomed in the vicinity of the poultry pen but the respondent distinguished them from the present application and justified their presence by stating that they fall within the settlement boundary, which is not denied, where residential development is allowed hence the permit approval. While it seems very contradictory that the Ministry's stand is that there can be no derogation from the application of the **PPG** on observing the buffer of 200 metres and yet it approved a residential morcellement within the same buffer, the witness also agreed that the decision of Ministry in having approved the morcellement was wrong. A previous wrong decision by the Ministry cannot be sufficient justification for the respondent to allow the development in question contrary to the planning policies. As regards the presence of other houses, Mrs. Guness also stated that as per information there are many houses within the buffer of the poultry pen but these have existed for over 30 years prior to the coming into force of the Outline Planning Scheme and have been inherited basically by the current owners from previous generations. We also note from Doc B that these are within settlement boundary.

12. Counsel for the appellants made it a live issue that the respondent was initially ready to approve the current application. Mr. Matabadul however explained that although the Ministry was initially ready to release the site upon application of **Policy SD3 of the Outline Planning Scheme of Grand Port ['OPS']** which favours development on the edge of settlement boundary, albeit on the outer edge in this case, the views of the Ministry of Health were ultimately retained. We believe the respondent was right in so doing and in applying the provisions of the **PPG** due to the presence of the pen.

13. As stated earlier, the rearing of broilers being in such close vicinity to the subject site, its impact upon the inhabitants is a matter of concern in view of potential risks to public health and biosecurity issues. Mr. Lolljee explained the risks associated with having a poultry pen just some 90 metres away and stated that this particular poultry pen had been the subject matter of a complaint in April 2017, as per Doc D, regarding foul smell emanating from it. A site visit has revealed that there has been no proper disposal of broiler droppings which had been stacked in bags onsite. A sanitary notice, Doc D1, was issued which the owner of the farm had to comply with. Although he confirmed in cross-examination that no complaints have been received against the poultry pen since then, it does not negate the fact there are risks of nuisance and biosecurity associated with the close presence of a poultry pen.
14. We are of the view that the stand of the Ministry of Health in not giving the clearance was justified because there was not just a mere apprehension but a real risk of disease proliferation due to poor hygiene standards and maintenance of the farm and mismanagement in housekeeping previously at the farm. Conversely, if the authorities decide to derogate from the policies and laws, and people are legally allowed to reside in close proximity of such bad neighbour industries, this will not only impact health and safety should there be an outbreak of broiler related diseases such as Avian Flu but also leave the authorities in an invidious position of being subjected to future complaints of failing to apply the planning instruments or failing to abate any nuisance or other risks associated with the operation of the pen. This will not set a good precedence. The overriding concerns of health, safety and biosecurity risk are paramount here and are not simply for the benefit of the appellants. The appellants, being owners can still have a peaceful enjoyment of their property as agricultural land as they had been. Appellant no.4 stated that her uncle had been planting vegetables.
15. Mrs. Guness stated in cross-examination that the Council gave adverse views as regards the application at hand because the land *in lite* falls outside settlement boundary. This appears to be in contradiction with the evidence of Mrs. Prayag, representative of the respondent, who stated that the refusal of the Council was based on those of the Ministry of Health. Be it as it may, the appellants' property being

on the outer edge of the settlement boundary, it is thus regulated by **Policy SD3** of the **OPS**, as dealt with previously, but this should be read in conjunction with and without offending the provisions of the **PPG**. The Ministry of Health is a major stakeholder whose views are highly valuable in the present case due to the presence of the poultry pen. Irrespective of the number of authorities that may have given favourable views, we believe, the respondent was entitled and right not to disregard the views of the Ministry of Health. The respondent cannot be taxed for having taken the relevant considerations and applied the correct planning policies and criteria as was required in the present case. Ground (b) therefore fails.

16. To a question put to Mr. Matabadul in cross-examination about the latitude the respondent has in the application of the '*indicative buffer distance*', he initially agreed that the Ministry did have it. When re-examined, however, he qualified his answer by stating that the buffer is taken depending on various factors such as the size of the pen and its location within the site and size of the plot the land. The evidence, Doc B, shows that the whole of the subject site falls within the 200-metre buffer of the poultry pen. We find no reason that would justify the respondent in relaxing its application of the 200-metre buffer distance. Mr. Matabadul also mentioned the application of **Policy ID4 of the OPS** on **Bad Neighbour Development** to the present case. We believe that the application of **Policy ID4** is more in line with new BLUP applications for bad neighbour developments which is not the case here. We are dealing with an application for residential development.

17. The evidence of Mrs. Guness did not enlighten the Tribunal as regards the operation of any liquor store or any licence having been granted to it by the Council. She stated that she had not spotted any liquor store as such but that there were several stores within the buffer of the poultry pen because it is within settlement boundary. In any event a liquor store is a commercial development, not considered as a sensitive use, hence acceptable within the buffer zone of a poultry pen. Ground (c) therefore fails.

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

Determination delivered on 10th February 2023 by

Mrs. J. RAMFUL-JHOWRY
Vice Chairperson

Mr. MOOTHOSAMY
Member

Mr. SEETHUL
Member