

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

ELAT 1960/20

In the matter of:

Mr. Kovilen Soopramanien

Appellant

v.

District Council of Flacq

Respondent

Determination

The Appellant had applied for a building and land use permit (BLUP) for an extension to an existing reinforced building at ground and first floor levels for residential purpose at Royal Road, St Julien. The Permits and Business Monitoring Committee of the Respondent had on the 30 July 2020 declined the application, decision which had been communicated to the Appellant on the 3rd August 2020. The sole ground on which the application had been rejected is that clearance had not been obtained from the Ministry of Agro-Industry and Food Security-Forestry Service. A letter dated 18 February 2020 contained unfavourable views from the said Ministry stating that there had been encroachment within the rivulet reserves, which is in breach of the Forest and Reserve Act 41 of 1983. The decision also contains a note to the effect that ‘since compliance notice has been served and construction has encroached rivulet reserves pulling down notice to be served’.

The case for the Appellant is that he wished to construct an extension on the first floor on an existing house belonging to his father, for which a development permit had been obtained in 1995. For that purpose, he had erected a concrete column on the ground floor to sustain the construction on the first floor.

The Respondent, having obtained an objection on the said construction, issued a compliance notice (Document L) on the 25.11.2019 wherein the Respondent had requested the Appellant to stop construction and apply for a BLUP. He applied for a BLUP on the 17.12.2019. As per his statement of case, he obtained an acknowledgement letter from the Respondent on the 19.12.2019 where he was informed that the application was waiting for clearances. Since he did not hear from the Respondent until 13.07.2020, he was advised that the application was deemed to be approved by the mere operation of the law and guidelines.

It was on the 03.08.2020 that he was informed through the National Electric Licensing System (NELS) that his application had not been approved based on an unfavourable assessment by the Ministry of Agro Industry on the ground that there is an encroachment on the reserves of the rivulet. The construction had, by then, reached an advanced stage. Document P produced

by the Respondent shows a correspondence from the Forestry Service dated 18 .02.2020 wherein the encroachment of the column by a distance of 5.184 was stated. From the letter, it came out that the clearance sought by the Appellant was for an extension of an existing concrete building at the first floor and columns at the ground floor.

The Appellant submitted that the construction at the ground level was only a concrete reinforcement column, erected to support the construction at the first floor, for which there was no encroachment *per se*, being given the approval of the construction obtained in the year 1995. A pulling down notice had been served on the Appellant on the 28.08.2020. It came out in the course of the hearing that the Appellant had complied with the notice by pulling down a reinforcement column. This was shown in the photographs produced as Documents Q and Q1. The impact of the removal of this column in the steps taken by the Appellant to be in compliance with the law has been the subject of certain contradictions on the part of the Respondent.

As regards the assessment of this construction, Policy EP2 of the Moka Flacq Outline Planning Scheme (as modified in October 2011) refers provides that:

“Policy EP2: Protection of River Valleys and Water Resources:

River reserves as defined by the Forests and Reserves Act means:

- (a) Where there is an escarpment, the land extending from the edge of a watercourse to the top of the escarpment;*
- (b) Where there is no escarpment, the land extending from the edge of a watercourse to the distance measured on the horizontal plane*
 - (i) In the case of a river, of 16 metres;*
 - (ii) In the case of a rivulet, of 8 metres*

Rivers and rivulets the subjects of River Reserves are listed in the Fourth Schedule to the Act.

All River Reserves should normally be protected from development. Exceptions may be made for works deemed to be essential for water abstraction, flow regulation, flood control and for road crossings”.

It came out from the evidence adduced by the representative of the forestry service, Mr. Mootien, who deposed as a witness for the Respondent, that in the course of a site visit conducted by him on 12.09.2024 he found the presence of a concrete column at a distance of 6.2 metres from the water edge (i.e within the statutory water reserves of 8 metres). He added that there had been a concrete column found at a distance of 5.18 metres from the water edge, which had been removed, and now, there is column at 6.2 metres from the water edge. He observed also the presence of a new boundary wall and a metallic staircase, which dated quite long back, which are found within the reserve.

A letter dated 19.11.21 sent by the Forestry services to the Appellant’s attorney was also produced as Document J wherein the Forestry Services stated that the concrete column had been cut and left lying on the reserves. It is also stated that other structures such as boundary wall, a standing concrete column of the building and a metallic staircase were still found within the reserves. The legal adviser was informed that in the light of this, clearance could not be granted to the Appellant.

This witness was lengthily cross-examined on the issue of a new concrete column having been erected after the demolition of the first one situated at a distance of 5.184 metres from the water edge. Despite contradictions in his testimony, he was consistent on the presence of an encroaching concrete wall found within the reserves.

The Government Land Surveyor, Mr. Nundoo was called as a witness for the Respondent. He confirmed the presence of a concrete column and part of a building encroaching on the river reserve of eight metres. He produced a plan drawn by him showing the encroachment as Document K.

The representative of the Respondent, Mr. Bundhoo deposed in respect of a site visit effected by him following a complaint received on the development made by the Appellant without a building and land use permit (BLUP). He produced the compliance notice served on the Appellant ((Document L) and subsequently a pulling down notice (Document M), followed by the rejection decision (Document N). He confirmed that the column that had been the basis of the rejection decision had been pulled down. Another column had been put and produced two photographs (Documents Q and Q1) to show the building as it stood at the time of his site visit, the third one effected by him.

The Appellant had by way of letter (Document R) informed the Respondent that he had pulled down the impugned concrete column to comply with the notice served on him, and that he would submit a fresh application for BLUP. Document S, a letter from the Appellant's attorney, was produced which contained an undertaking to remove the encroachment. Document S1 produced by the Respondent's representative also contains a confirmation as to the removal of the concrete column.

The cross examination of the representative of the Respondent has shown certain contradictions in the assessment done by the latter. Firstly, the evidence tending to establish that although there has been the removal of the concrete column found at a distance of 5.184 metres, a second column has been erected. This is not supported by the photographs produced by Mr. Bundhoo himself. Document Q1 clearly shows that there are two columns separated by a beam and Mr. Bundhoo pointed out, as shown on Document Q1 that the impugned column had indeed been removed.

Through the assessment done by the forestry services, there has been reference to the sole column found at 5.184 metres, which was the reason to withhold the clearance from that authority. This having been removed as per the evidence on record, the Respondent cannot now find that there are other measurements in respect of other columns to rely on to refuse to grant the permit.

We must say that we are not at all convinced by the version of Mr. Bundhoo that '*there was one column, then two, and then one again*'. There seems to have been an a piecemeal assessment of the development, with '*a posteriori*' elements brought in to support the Respondent's decision to reject the application. There had been a compliance notice, to which the Appellant had 'complied' by removing the encroaching column. The discovery of another column in the river reserve reveals that the assessment done by the council has been an approximate one.

There has also been no evidence to rebut the version that the Appellant constructed the first floor on the approved construction made by his father. It is on record that the Appellant agreed to remove the metal staircase and has already removed the encroaching concrete column. Furthermore, the onus is on the authorities to establish the elements of an alleged encroachment, namely of an 'au vent' that covered 10% of the building, which Mr. Nundoo found following a site visit. He did not shed much light, the more so that this alleged encroachment of 10% was not established in the Respondent's case.

We also turn to the submission made on behalf of the Appellant on the issue of the presence of an escarpment at the site. Counsel for the Respondent objected to any reference being made to this on the ground that this aspect has not been part of the case for the Appellant. Yet, questions have been put to the expert witness for the Respondent, Mr. Nundoo, on the matter. Whilst

giving a definition of what an escarpment is, Mr. Nundoo did not define the distance between the river and the development as being an escarpment, for the reason that it was not a natural one (for e.g a falaise). He concluded, without having measured, that there was no slope of not less than 60 degrees at the spot.

Despite the objection raised on behalf of the Respondent, we find that this matter, having now been brought to our attention, should not be overlooked. Even if this has not been pleaded, as raised by counsel, it is a matter of law. **Section 2 of the Forests and Reserves Act 1983** provides that a *river reserve* means, *'where there is an escarpment, the land extending from the edge of a watercourse to the top of the escarpment, and 'escarpment' is defined as the bank of a river, rivulet or feeder, the mean slope of which makes an angle of not less than 60 degrees with the horizontal line'*.

We tend to agree with the submission made on behalf of the Appellant that Document A2 may indicate the need to assess if there is an escarpment in order to determine the river reserve. Had the land been a flat and horizontal one, the matter would have been a clear cut one, which is not the case here. The onus is on the authorities to establish an encroachment and, for this purpose, the measurement needs to be accurate and in accordance with the legal provisions. The expert for the Respondent, Mr. Nundoo stated that there was no natural slope (which is not a criterion laid down in the Act) and there was no evidence to show the actual slope.

We are of the view that the basis for the assessment made by the forestry services has not proven to be accurate and the reliance placed by the respondent authority on this recommendation leaves room for questioning.

All this, coupled with the questionable evidence as to the presence of one or two concrete columns causing the encroachment, and the suggestion that there had been the erecting of a fresh column following the removal of a first one, which was not backed by reliable evidence, leads us to the conclusion that this is an application that has not received a fair and objective assessment.

The appeal is allowed for these reasons and the matter is remitted back to the Respondent for it to issue the BLUP with conditions that are necessary in the light of the above observations.

Delivered by:

Mrs. V. Phoolchund-Bhadain, Chairperson

Mr. Radhakrishna Acheemootoo, Member

Mr. Shanmoogum Moothoosamy, Member

Date: 18 December 2024