

IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

IN THE MATTER OF:

Cause Number: ELAT 744/14

ALTEO LIMITED

Appellant

v.

DISTRICT COUNCIL OF MOKA

Respondent

In the presence of:

FERAS LIMITED

Co-Respondent

DETERMINATION

The Appellant Company has lodged an appeal against the decision of the District Council of Moka (the Respondent) for having on 9 July 2014 approved the application and issued a Building and Land Use Permit (BLUP) to the Feras Limited (Co-Respondent) to convert an existing building to operate a business at Royal road Providence, Quartier Militaire. The nature of the business is as follows: "to conduct mechanical repair of motor vehicles employing less than ten persons, advertising activities, warehouse and storage (less than 50m square) and wholesale of motor vehicles spare parts and accessories".

The Appellant has appealed against this decision of the Respondent on the ground that, **firstly**, the nature of the locality will change with the development by the Appellant of a residential morcellement at Royal Road Providence under the Voluntary Retirement Scheme, and **secondly**, the activity approved by the BLUP will cause considerable noise, trouble and annoyance to the residents of the morcellement, the more so being given the fact that the mechanical workshop is located right next to some plots within

the morcellement. It is the contention of the Appellant that the Respondent has failed to appreciate these two factors in its decision.

The Project Executive of Alteo Limited (the Appellant) has lengthily explained the process whereby approval had been obtained from relevant authorities for the creation of the residential morcellement, namely, the letter of intent issued by the Ministry of Housing and Lands (Document A) with conditions imposed by different authorities. The plans of the morcellement were produced (Documents B, C and D, and the application for morcellement permit submitted by the Appellant to the Ministry of Housing and Lands). It came out that the District Council of Moka is one of the authorities that were consulted at the Morcellement Board and the Council had recommended favourably for the setting up of a residential morcellement but laid conditions to be observed.

The evidence of the representative of the District Council of Moka confirms that a permit has been granted to Feras Limited (the Co-Respondent), however he explained that the permit had been granted 'on a trial basis of one year only' as per condition 8 of the BLUP. His explanation for this course of action is that this is the practice at the level of the Council whenever they have apprehension that any activity would cause noise and nuisance. If such is the case, the Council would then revoke the permit.

At the outset, we observe that such a practice, if it exists, is clearly not in line with the duty of the Council to make a proper assessment of a proposed development in accordance with the existing planning parameters, as laid down in the PPG and other planning instruments (Outline Planning Scheme, the NDS and Regulations). The approach taken by the Council would call for a follow up through inspection of the impact of the activity on the neighbouring environment. Yet, from the evidence of the representative of the Council, it came out that they did not reassess the project after the 'trial period' as they had not registered any complaint against Feras Limited. By so doing the Council placed the onus on third parties to make complaints instead of assessing the planning merits of the development. The lacuna of this approach takes particular significance due to the fact that, as explained by the representative of the Appellant, the residential morcellement promoted by them was for the former employees under the 'Voluntary Retirement Scheme' of the company. The respective plots have not been allocated to individual owners and many of them have not moved in the premises yet. It was pointless therefore for the Council to await complaints from neighbours before reacting. The fact that the morcellement had been approved by the Ministry of Housing and Lands by a letter of intent dated 31 July 2014, changed the nature of the locality into a residential one.

As regards the second ground of appeal, we do not subscribe to the position of the Respondent that the potential noise nuisance is a mere apprehension on the part of the Appellant. We note that along with the BLUP granted with conditions on the 14 July

2014, Feras Ltd. has also been granted the authorization for installation of engines, namely, a polishing machine, an air compressor and tester. The Respondent specifically laid a condition for the 'electric motors to be housed in soundproof enclosures to keep noise within permissible limits as per the Environment Protection (environmental standards for noise) Regulations 1997'. This authorization was granted on the 31 July 2014. The evidence on record shows that it was not disputed at the time of the hearing that the Co-Respondent had been operating since February 2015 (i.e. a year after the granting of the BLUP) that no soundproof structure had been erected by the operator.

The legal position

The Outline Planning Scheme for Moka Flacq District Council Area of 2006 (as modified in November 2011) provides in its policy ID 2 the following:

"Small Scale Enterprises and Home Working

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 suitable size and design to accommodate the additional activity.....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, smell, dust nor excessive vehicular movements or loading and unloading of goods and products;*
- (iv) Sufficient parking space within the cartilage of the property available to accommodate any staff or visitors;*
- (v) Safe access from the roadway."*

The same philosophy governs the Planning Policy Guidance, namely the Design Guidance 2.13 on Industrial Development, where the criteria for the setting up of small industrial workshops and home workings should abide to the prohibition of activities which cause external nuisance such as noise, dust, fumes, vibration among other things.

Although the above provisions deal with instances where the business/industrial use of the premises will be ancillary to the principal use as residence, an analogy can be drawn with instances where a former residential property found next to a residential morcellement is converted into a mechanical workshop. The purpose of policy ID 2 and section 2.13 (supra) is to minimize potential nuisance to adjoining residential neighbours. There is no indication that the Respondent has given any consideration to

the consequences of the activities of Feras Ltd. in an area having residential character, and this, despite the mandatory nature of the PPG as per section 117(3) of the Local Government Act (Act 36 of 2011).

The representative of Feras Ltd. has lengthily explained that the activities that he undertakes in the premises do not cause nuisance in terms of noise or other pollution. Yet, we cannot overlook that the decision under appeal is the BLUP granted with general as well as special conditions, which contain the use of electrical machines. The Respondent felt the need to add special conditions to the authorisation given for the installation of engine. Yet, the very installation of such machines is incompatible with a residential morcellement which had been obtained the favourable views of the Respondent given to the Morcellement Board.

The representative of the District Council, Mr. Mootooveeren ventured to state in the course of the hearing that at the time of the application, the Respondent was of the view that the Co-Respondent's activities were likely to cause nuisance, and this is why the Respondent imposed special conditions. The first special condition is that the BLUP had been granted 'on a trial basis for one year only'. This would, according to Mr. Mootooveeren, lapse automatically after the expiry of one year and a new application would have to be made. Yet it came out from a statement made by counsel for the Respondent that the BLUP would be renewed automatically after one year. Such a position unveils a contradictory approach to policies taken by the Council. What is more serious is that the decision of the Council was meant to be a temporary one, as per the words of its representative, thus creating a less stringent approach to the application. By an automatic renewal, this less stringent approach turned out to be a long term decision which is not in line with the PPG. This we cannot uphold, just like we cannot uphold the decision of granting permits to operate such type of activity in close proximity to an approved morcellement. The Respondent failed to comply with the PPG. In view of the above reasoning, both grounds of appeal succeed.

The appeal is accordingly allowed.

Delivered on.....17th March 2017.....by:

Mrs. Vedalini Bhadain
Chairperson

Mr. Vimalen Reddi
Assessor

Mrs. Brinda Kaniah
Assessor