

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 961/15

In the matter of:

MR. & MRS. GANESHAN RATHNASABAPATHY CHETTIAR

Appellants

v.

DISTRICT COUNCIL OF MOKA

Respondent

DETERMINATION

The Appellants are appealing against the decision of the Respondent for having refused to grant a Building and Land Use Permit for the construction of a residential building at l'Agrement St. Pierre. The sole ground of refusal of the Respondent (a second ground not being a live issue) is that the site is situated outside settlement boundaries by approximately 211 metres. It is also not contested that an Outline Planning Permission (OPP) had been issued to the Appellants on 22 July 2014 in respect of the same development.

The Appellant's submission is two-fold, firstly that once the OPP has been issued, the BLUP is only an administrative procedure to be followed and, technically, the BLUP relates to architectural and structural requirements. Secondly, the assessment of the site itself by the Respondent calls for consideration given the lacunas in the evidence adduced by the representative of the Respondent.

1. The issue of the OPP

It is submitted by the Respondent that in accordance with Section 6A of the Town and country Planning Act, an OPP is '*a permission for the development of land sought from a local authority at an early stage and irrespective of whether a Building and Land Use Permit is to be granted or not and before substantial costs are incurred in relation to the development of land*'. Their stand is that the

granting of an OPP does not lead to an automatic grant of a Building and Land Use Permit (BLUP). It is clear, as submitted by the Respondent, that from the wording of sections 6A of the Town and Country Planning Act, the issuing of the OPP does have a bearing on the decision to grant a BLUP. Nonetheless, the Legislator does not legislate in vain. There must be a rationale for the existence of this provision. It is our view that the Legislator, in its wisdom, has deemed necessary that such a two tier process be provided so that promoters are given an indication of the feasibility of the proposed development at an early stage and before substantial costs are incurred. It is clear from section 6A sub section 4 of the Town and Country Planning Act 1954 that an OPP shall be valid for a period of twelve months and an OPP does not authorize the holder to start work on the land to which the application relates. It is in the process of the application for BLUP that a number of procedures, including notification procedures are followed and the project is properly assessed by the relevant committees of the local authority.

We have been left in the dark as to what assessment is done by the local authority before an OPP is issued, although in this particular case it has come out that the OPP was issued by the Minister in accordance with section 117(12)(a) of the Local Government Act 2011.

Now that the OPP has been issued, this creates a legitimate expectation that the BLUP will be granted in pursuance of the initial phase of the process. This is not a blanket position that the local authority is bound to issue a BLUP, because it stands to reason that any application calls for a thorough assessment of the proposal for development, which is done at the BLUP stage.

However, although the scrutiny of the proposal is done at the BLUP stage, we find that such scrutiny should go to the details of the project. A matter relating to the zoning of the project (as expressed in the ground of refusal) would logically call for an assessment as a first step in the proposal. This is why we are of the view that, having obtained an OPP, the Appellants are justified in holding a legitimate expectation that the location of the project (at the very least) was not questionable.

In addition, the Respondent is bound by the decision of the Minister in so far as the OPP is concerned (this being a discretionary power under section 117(12)(a)). The BLUP in respect of the project subject matter of the present appeal is only in 'continuance' of the implementation of the project subject matter of the OPP. The Respondent, in the exercise of its powers, has the power to impose

conditions to the development in accordance with its powers. Going back to address the zoning of the project is tantamount to questioning the decision of the Minister in the exercise of his discretionary powers under section 117(12)(a) of the Local Government Act 2011.

2. The issue of Settlement boundary

The refusal of the Respondent rests on the ground that the site is situated outside the settlement boundary by approximately 211 metres. The Outline Planning Scheme for Moka District Council in its policy SD4 stipulates that there is a general presumption against proposals for development outside its settlement boundary. This calls for the measurement of the proposed location from the declared settlement boundary. In this respect, the representative of the Respondent has been lengthily cross examined on the mechanism for measuring the distance relied upon by the Respondent. It came out that the Respondent relied on a distance generated by a software used by the Respondent, for which no report has been generated, nor produced as documentary evidence. This measurement is strongly disputed by the Appellant, who also averred that the nearest building is within a distance of 100 metres from his plot of land. Furthermore, the starting point of the measurement taken by the Respondent (namely the use of a natural flow of water...) has not been supported by any guideline or documentary evidence in support of this practice, and is unclear. The difference in approach as regards the calculation of the distance from the settlement boundary has remained unexplained.

The Respondent has laid emphasis on the inadequacy of accessibility to the Appellant's site. Evidence that came out, after much difficulty, from the Respondent in providing the required information, has shown that it was the Respondent itself that has declared a road to the Appellant's site a public road.

Document E is evidence of a request from Appellant No.1 to declare the extension of Jafazul Road up to his plot of land as public and this was acceded to by the Respondent.

In the light of the evidence adduced on behalf of the Respondent, the sole reliance on policy SD4 to reject the application is questionable, the more so that, the evidence placed before this Tribunal to support that policy SD 4 is applicable to the present case has been tainted with inconsistencies and uncertainty.

On the basis of the above, we allow the appeal. The matter is referred back to the Respondent for it to issue a BLUP with the conditions that it deems fit for the proposed development.

Delivered by:

Mrs. V. Phoolchund-Bhadain, Chairperson

Mrs. A. Jeewa, Assessor

Mr. S. Karrupudayan, Assessor

Date:

19th October 2018