

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 1094/16

In the matter of:

MRS. UMAH DAVI SUKHARI

Appellant

v.

DISTRICT COUNCIL OF MOKA

Respondent

DETERMINATION

The appeal is against a decision of the District Council of Moka for having refused to grant an application for a Building and Land Use Permit for the construction of a residential building at ground floor at Peter Both, La Laura, Moka. The sole ground of refusal, as contained therein, is that 'the site is situated outside settlement boundaries as per the Outline Scheme and would not comply with relevant policies of the Outline Scheme'.

The appeal is lodged on the ground that the plot of land of a surface area of 5550 square metres was divided into five portions. The lot bearing reference 'Lot No.2' in the plan annexed to the Notice of appeal, has been granted a BLUP while the Appellant's plot which is adjacent to Lot No.2 is being denied same. The Appellant views this as being unjust and unfair and amounts to an unequal treatment by the District Council of Moka. Reference is also made to three letters emanating for the Respondent, firstly letter dated 28 May 2008 bearing reference PL 7/ 1735/08 addressed to one Mrs. Sunitee Obeegadoo, the owner of the abovementioned Lot No.2 (*where the Council acknowledged that "residential development may be*

favourably considered subject to clearances from CEB and CWA on the subject land". Secondly, a letter dated 21 May 2007 bearing reference PL 7/1281/07 to the same addressee, where the Respondent states that "*Plot No.2 which is of an extent of 1110 square metres situated at La Laura, as per land survey plan duly signed and stamped, is located on the edge of defined settlement boundary as per the Development Management Plan of the Moka Outline Scheme*". A third letter dated 27 August 2012 addressed to one Miss Obeegadoo is an approval of the application for BLUP by the Executive Committee on 24 August 2012, subject to the Applicant submitting an affidavit. It came out from the representative of the Respondent, during the hearing that the affidavit in question is one which was meant to establish that the applicant is applying on hardship grounds. It came out that this document had not been submitted at all by the said Miss Obeegadoo, therefore, the BLUP was not issued.

In the course of the present hearing photographs (Documents F to F13) were produced by the Appellant showing the presence of constructions which appear to be residential constructions within close proximity of the Appellant's land. The representative of the Council explained that some were illegal constructions and some were situated on the edge of settlement boundary.

The Appellant's position as per the statement of case is that the Respondent has failed to act in a consistent and equal manner and its decision is unjust and unfair. The evidence on record shows that indeed, as stressed by the Appellant, the plot for which the application was made is part of a bigger plot of 5550 square metres which was divided into five portions. Plot No.4, as shown on the plan annexed to the statement of case, belongs to one Mrs. Obeegadoo, in respect of which a permit has been delivered and which has been described as being 'on the edge of settlement boundary' (letter dated 21 May 2007 (supra) refers). Plot No.2, Appellant's plot, is almost adjacent to that plot (a 'chemin commun' of 3.50 metres separates them as per the plan annexed to the statement of case shows). The Council adopted a differential qualification of the location (i.e in relation to the settlement boundary). The representative of the Council stated that the Appellant's property is outside settlement boundary by 18 metres and is three metres from the property of Mrs. Obeegadoo who has been granted a permit by the Council. The representative attempted to explain that this decision could have been based on an old development management map which was amended in the year 2011. This is

not an acceptable explanation being given that the letter approving the permit of Mrs. Obeegadoo is dated 27th August 2012, thus sent after the amendment.

Another attempt was made by the Respondent to show that the permit was not issued to Mrs. Obeegadoo as she had failed to provide an affidavit that was required. Yet, the letter dated 27 August 2012 (Annex 5 to the statement of case) speaks for itself: it contains an approval of the application subject to the submission of an affidavit. The failure by the addressee to provide the affidavit does not negate the fact that the Executive Committee had given its approval. The simple equation is that should Miss Obeegadoo have provided the affidavit requested, the Executive Committee would not have assessed the development anew and the BLUP would have purely and simply been granted.

We fail to understand the inconsistency in assessing the location. The application of different planning qualifications to lands which are positioned adjacent to each (one being qualified as 'outside settlement boundary' and the other on as 'on the edge of the said boundary') is hard to justify. The element of hardship as a criterion to grant a BLUP in one case cannot change the planning qualification of a location, it can at most provide a criterion on which an exception can be made in respect of an application (in accordance with the exceptions provided under Policy SD4 of the Outline Planning Scheme). We find that the ground raised by the Appellant that the decision of the Respondent is unjust and unfair and fails to give her an equal treatment is founded. In addition to this, the Appellant has adduced unrebutted evidence to the effect that she has obtained clearance from the CWA and CEB. This satisfies the other exception contained in Policy SD4, namely that "*...proposals for development located outside settlement boundaries may be given consideration in case the proposal is capable of ready connection to existing utility suppliesor can be readily connected without unacceptable public expense*".

In the light of the above, we allow the appeal and remit the application back to the Respondent for appropriate action in the light of the remarks made in this determination.

Delivered by:

Mrs. Vedalini Phoolchund-Bhadain, Chairperson

Mr. M. L. Gerard Lepoigneur, Assessor

Mr. Reshad Monaff, Assessor

Date:

28th May
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