

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1494/17

In the matter of :-

Ranjeetsing Hurlpaul

Appellant

v/s

The District Council of Moka

Respondent

DETERMINATION

1. The present appeal is against a decision of the local authority ["the Council"] for having refused a Building and Land Use Permit ["BLUP"] to the Appellant for the construction of a boundary wall at Petit Verger, St Pierre. The grounds for refusal were communicated to the Appellant in a letter dated 11th September 2017:

"1. The boundary wall has already been put up (at a height of more than 1.80 m) without observing a road reserve of 1.50 metres.

2. Notwithstanding the Report of Land Surveyor, Mr. R. Bhurtun dated 3rd December 2015, the drain- which clearly exists as per description specified in the title deed, Report of land Surveyor Mr. M. Ramlackhan dated 24 January 2012 and averment of the complainant Mr. Alain Paquiom-has been obstructed. As such, it is very likely that there will be an interruption of the free passage of water which can potentially have severe consequences such as flooding in the neighbourhood.

3. Clearances from Water Resources Unit and Forestry Service respectively have not been obtained being given that the drain adjoins the property as clearly specified in Paragraph 2 above."

2. The Appellant, legally unrepresented, deponed was cross-examined by the Counsel for the Respondent. Mrs. Seebaluck, Planning and Development Inspector for the Council was cross examined by the Appellant. We have duly considered all the evidence adduced. It is an admitted fact that it was following a complaint received by one neighbour, to the effect that the Appellant had started a construction of a boundary wall without obtention of a BLUP, that the Council effected a site visit and served the Appellant with a notice to stop construction. The Council observed that the illegal construction of the boundary wall was done without observing the distance required by law from a drain. The Appellant thereafter submitted an application for BLUP in respect of the boundary wall, although according to the Council, the wall was already put up at a height of more than 1.80 metres in some places as the topography of the land varies.

3. According to the testimony of the Appellant, there exists no drain which is bordered by his land, although it is mentioned in his title deed which is on record, there is no physical drain as such present there. The Council's representative, on the other hand testified that a wall and a drain have been constructed by the Appellant which she noted in the course of a site visit. As regards the "natural drain" the witness stated "Infact, when we went there, the drain is like this, but we don't know it passes through the site, it borders the site, we don't know actually..." To a question put by the bench, regarding whether she was making reference to the natural drain, she replied, "Yes, the natural drain because we can't see the natural drain, the path of the passage, but it is like this on the site."

4. From the survey report of Mr. Bhurtun that was submitted, there appeared to be no drain mentioned on the locus although the title deed of the Appellant mentions it and the survey report of Mr. M. Ramlackhan dated 24th January 2012 also does so. We are faced with a situation where there is conflicting evidence as regards the survey of the land. We believe that it is important to establish if physically there exists a drain bordering the Appellant's property. It is only with the presence of a drain that it can be established whether the required setback was left.

5. After having considered all the evidence, we believe it would be more cautious to go by the evidence which has been ushered in before us and tested. The Tribunal is not mandated to elect which surveyor's report it would rather go by. Both the Appellant and the Respondent's representative stated that they have not noted the presence of any drain being physically present on the locus. Mrs Seebaluck clearly stated that she could not see the natural drain. She also stated that the boundary wall put up was more than 1.80 metres in parts depending of the topography of the land.
6. As per **section 4 of the Building Control Act 2012**, there is an exemption from the requirement for permit in the following cases
- "(1) No permit shall be required for building works relating to –*
- (a) a gate, hoarding or boundary wall not higher than 1.8 metres of, a watercourse;*
- (i) one which borders a road; or*
- (ii) an enclosure crossing, or standing within 2 metres of, a watercourse;"*
7. The construction of a boundary wall does not require a BLUP except if it has a height of more than 1.80 metres or it borders a road. We have it in evidence that the road near the Appellant's property has been proclaimed a public road. The Appellant surely needed to apply for a BLUP for his wall. Although it was put to the witness that in erecting the wall, he has not respected the reserve of 1.50 metres set back, he stated that in the locality no one has observed this set back and that the setback is about half a metre. The Council did not adduce any evidence to disprove this, either by way of real evidence or testimonial evidence. After all, in the PPG allowance is where the required setback is not observed as per the norm provided the boundary is in line with the established construction line of the neighbours' boundaries. The wall alignment is normally taken from existing alignment along the road. The evidence of the Council was also flimsy as regards to whether the drain, which was meant to be present near the Appellant's land, fell within the purview of the Rivers and Canals Act and the Forest and Reserves Act for which clearances had to be sought from the Water Resources Unit and the Forestry Services.

8. The Council also failed to adduce any evidence in support of their second ground for refusal as regards it being *“very likely that there will be an interruption of the free passage of water which can potentially have severe consequences such as flooding in the neighbourhood.”* In view of the evidence as presented by the Council, we are unable to accept that there physically exists a drain there but since it has been established that there is now a public road running close to the property of the Appellant, we find no impediment in him being granted the relevant BLUP provided all clearances have been obtained. It is to be noted that the Appellant had forwarded to the Tribunal certain documents on the 18th November 2019 but these have been disregarded on account of the fact that the case is now closed and evidence cannot be adduced behind the back of the Respondent.
9. For all the reasons set out above, the appeal is allowed. The BLUP is to be granted after all relevant clearances have been submitted and any drains he may have constructed be kept clear so that there is always a good evacuation of excess water. No order as to costs.

Determination delivered on ^{29th} ~~21st~~ November 2019 by

Mrs. J. RAMFUL-JHOWRY

Vice Chairperson

Mr. AUBEELUCK

Member

Mr. MONAFF

Member