

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 991/15

In the matter of :-

Youvraj Chutturdharry

Appellant

v/s

District Council of Moka

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having rejected the application of the Appellant for a Building and Land Use Permit for the construction of a one storeyed residential building at Roselyn Cottage, St Pierre. The ground for rejection communicated to the Appellant in a letter 4th September 2015 is that

"1. Site is situated outside settlement boundary by approximately 268 metres.

2. Site is situated within a buffer zone of a poultry pen."

2. The Appellant, who was legally represented, deponed under solemn affirmation and *was cross-examined by the Respondent's Counsel and the representative of the Council, Mrs Seebaluck, planning and development inspector, also deponed and was cross examined by the Appellant's Counsel.* We have duly considered the evidence placed before us as well as submissions of both Counsel.

I. CONTEXT ANALYSIS

3. From evidence adduced, the development site is of an extent of 5698.17 sq.m situated at Roselyn Cottage, Le Pouce Branch Road, St. Pierre. It is situated at approximately 425-440m metres, as per Doc D, off Bois Cherie Road (although DOC F produced by the Appellant seems to suggest it is 4250m, we believe it was a mistake) and it is undisputed that the site is located outside settlement boundary by 268 metres and is approximately 100 metres from the existing Poultry Pen. No evidence has been produced as to whether the Appellant has obtained clearance from the Ministry of Agro-Industry for the site to be used for residential development.

II. THE EVIDENCE

4. The case of the Appellant in essence is that he does not dispute that his property is outside the settlement boundary. He also does not dispute that his property is partly within the buffer zone of 200m from the Poultry Pen which is operational and which is infact being extended. He has suggested that he may move his house on that part of the plot which falls beyond the buffer of 200m from the Poultry Pen. He stated that he needed a BLUP so that he could build a house for his family as he, being a Police Officer, has lived in the Police Quarters for most of his life and that his children who are now of age need more space. He has however produced before the Tribunal photographs showing a few scattered concrete buildings within a 200 m radius of his property, one of which is in very close proximity. No evidence has been adduced by him to show whether these buildings have a valid BLUP for residential development nor the nature of development, whether residential, commercial or industrial. We will therefore not surmise. His case essentially is that there are other houses in the vicinity where people are currently residing or will be residing and that he can build his house outside the 200m buffer from the poultry pen to be in compliance with the planning guidelines and law. Amenities such as electricity and water are connected to the site.

5. The Council's case is that the site falls well outside the settlement boundary which is not favourable to residential development and that the subject site lies within the buffer zone, around 100 metres, from the Poultry Pen which is fully operational. The testimony of this witness was not impressive, to say the least. She was not well equipped as far as having information at hand, she has done a site visit but could not answer as to certain facts on the locus as she had not done a proper "constat" of the buildings around and she was confused regarding some buildings found in the area which was not expected as she had been on the site on the eve of her deposition before the Tribunal. Local authorities are reminded that planning is always for the future and hence due diligence should be exercised when assessing the planning merits of applications as these will heavily impact the determinations of the Tribunal. According to her, the buildings which have been pointed out by the Appellant are neither in close proximity of his property nor have they been granted BLUPs. She stated that as far as the photographs of buildings produced by the Appellant is concerned, one was a green house, the other seemed like a store but not a house and was closed at the time of inspection. According to her, there are in essence developments without permits except for the Poultry Pen and a house that is found on the edge of settlement boundary. She testified and gave evidence that the site lies some 268m outside the settlement boundary.

III. THE LAWS AND PLANNING INSTRUMENTS

6. Section 117 (3) **Local Government Act 2011** emphasizes the fact that an application for a BLUP should be considered by taking into account the guidelines issued under the law. This section also makes reference to the **Environment Protection Act 2002**. Under **Section 7 of the Environment Protection Act**, the Minister has wide powers, to propose and develop policies on all aspects of environment, to establish such standards as may be necessary to safeguard human health and the environment, amongst others.

7. Some Environmental Guidelines have been issued by the Ministry of Environment for the rearing of poultry and as per these guidelines, the buffers are provided in view of the biosecurity risks. This also implies that the Council should normally take on board the risks associated with the contamination of broilers and spreading of aviary diseases and the likely effect it may have on inhabitants within the vicinity in the eventuality of an outbreak. This, we believe, is the underlying logic for having buffer distances, hence the *raison d'être* of these guidelines.

8. The Planning Policy Guidelines on **Bad Neighbour Buffer for Industry Adjacent to Sensitive Uses** provides guidelines on buffer distances "*to mitigate any negative effects of industrial operations*". Sensitive land uses include housing, education and health facilities. According to these guidelines the buffer distance to be kept between a bad neighbour development such as Poultry/Livestock Farm and a sensitive land use such as housing, is 200 metres. The undisputed evidence shows that the distance between the poultry pen and the appellant's property is much less than 200 metres.

9. The subject site being located approximately 268 m outside the settlement boundary qualifies the development to be considered under **Policy SD4 (Development of Land Outside Settlement Boundary)** of the **Outline Planning Scheme** for the District of Moka where there is a general presumption against development with the exception of certain specific circumstances when development can be considered favourably and the land may be released for development. The first criterion, amongst others, being that it follows the sequential approach and under this policy application under the ground of hardship may be considered.

IV. CONCLUSION

10. The Poultry Pen is approximately 100 metres from the subject site. The 200 m buffer zone is normally measured from the site boundary and it is not disputed that part of the Appellant's land falls within the 200m buffer zone and part falls out of it. While we do appreciate that this is the state of affairs, what cannot be ignored is that this is not the only hurdle in the application of the Appellant. There is also the fact that his property falls well outside the defined settlement boundary. These issues are not disputed by the Appellant and evidence has been adduced establishing these. This implies that by law land which falls outside settlement boundary would normally be favourable to applications which are known as "bad neighbour developments". In other words, bad neighbour developments would be well within their rights to find their existence in such zones, unless of course the tendency of development followed the sequential approach towards a residential development. This will not be addressed at length here as it will go beyond the scope of this determination.

11. The subject site being located approximately 268 m outside the settlement boundary qualifies for the development to be considered under **Policy SD4 (Development of Land Outside Settlement Boundary)**. As can be noted from the photographs produced, there are a handful of scattered concrete buildings over a vast area of undulated land for which the Council has not issued any BLUP for residential development. These cannot be taken to mean either that the character of the area has turned from agricultural to residential, or can be inferred to be going by the sequential approach. In fact it does not and no evidence to that effect was adduced. We will therefore not surmise. The subject site can only be accessed by an untarred track which is 440m from Bois Cherie Road. Despite the fact that evidence was adduced by the Appellant that a big house was under construction close to his property for the last 2 years, there was no evidence adduced as to whether a BLUP for residential development was granted and in any event the Tribunal is duty bound to consider the law and the planning instruments.

12. Under **Policy SD4**, the approach of not releasing land for residential development is so as *“to conserve remaining land in the District, where it is believed that sufficient land is still available, especially land required for long term agriculture, or land that has an ecological or landscape significance, a sequential approach to new development should be followed which first considers sites within or on the edge of built-up areas in existing settlements before greenfield sites outside settlement boundaries are selected”*. From our earlier observation, there is no evidence on record to suggest that the proposed development is following the sequential approach. The land *in lite*, of an extent of 5698.17 sq.m, was acquired in August 2010 for the price of Rs 5,500,000. With this extent of property the applicant does not qualify for any exemption under the ground of Hardship.

13. We have taken on board the version of the Appellant as regards the fact that there may be some houses, with or without BLUP, within the buffer zone of the Poultry farm. These are in direct conflict with the bad neighbour development principles set out in the PPG and the Environmental Guidelines , the very essence of which are to seek to protect the health and wellbeing of humans. However, two wrongs do not make one right. By reason of the fact that some people may choose to go live within the Buffer zone of the Poultry Pen, it does not negate the associated risks to their health and sanitation. The Council’s representative testified that the Council has not issued BLUPs for residential development which is mainly due to the existence of the Poultry Pen. On the basis of the application of the Planning Policy Guidelines, which we believe should be adhered to in the circumstances due to the biosecurity risks involved, we of the view that this appeal should not be allowed.

14. For all the reasons set out above, the appeal is set aside. The Tribunal is duty bound to apply the law and the planning instruments in order to determine the planning merits of each application: **Beau Songes Development Ltd v UBP [2018] UKPC 1.**

Determination delivered on 19th February 2019 by

Mrs. J. RAMFUL-JHOWRY

Vice Chairperson

Dr. V. MIHILALL

Member

Mr. G. LEPOIGNEUR

Member