IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1938/20

In the matter of:

Ashok Samrat Nowbuth

Appellant

v/s

District Council of Flacq

Respondent

DETERMINATION

1. The present appeal is against a decision of the District Council of Riviere du Flacq (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (hereinafter referred to as "BLUP") for the extension of an existing reinforced concrete building at first floor for residential purposes at Pont Bon Dieu Road, Salazie, Brisee Verdiere. The grounds of refusal are set out in a mail received by the Appellant on 6th March 2020:

"1. Subject site lies within the 200 m buffer of an existing Poultry Pen.
2. All existing features on site have not been shown on site plan as per site conditions (swimming pool etc.)
3. Site lies outside settlement boundary by approximately 1 km and does not comply with Policy SD3 and SD4.
4. Land Conversion Permit has not been submitted (site extent is 12843 sq.m)
5. No permit for existing building has been submitted. As per records, there is no permit for the said existing development."

2. The Appellant and the Respondent were legally represented. The Appellant and two other witnesses, Mr. Hemraz, Planning and Development Inspector at the District Council of Moka and Mrs. Ooriah, Office Management Executive at the Ministry of Agro-Industry and Food Security, were called by the Appellant's counsel. They deponed and were cross-examined. The Planning and Development Inspector of the Council, Mr. Bundhoo, deponed on behalf of the Respondent and was cross-examined. We have duly considered the evidence before us as well as submissions.

3. The Appellant lodged 3 grounds of appeal in his notice of appeal, which were in fact not addressed in his statement of case and are reproduced below:

"(a) Existing poultry is one of a small scale and the council failed to take into account appellant is residing on site since 2011.

(b) The Council failed to require appellant to submit amended plan should some features be missing.

(c)Council erred to conclude that site is outside settlement boundary by 1 km when there are other residential developments including commercial."

I. BACKGROUND

4. By way of background to the case, the uncontested evidence is that the property in *lite* is situated outside the settlement boundary and was acquired by the Appellant in 1995. The case for the Appellant in essence was that he has been living on the subject site since 2012 and that he was granted a development permit in 1998 for excision for residential purposes. This is evidenced from the annexure to the statement of case of the Appellant which is on record and shows that the Appellant is the holder of a Development Permit Ref: T/17/bis/98 Nov Div/4892 dated 10.07.98 for excision of 845 sq.m of land from a portion of 11439 sq.m for residential purposes. In a letter emanating from the then Ministry of Agriculture, Food Technology and Natural Resources dated 24th September 1999, the Appellant was informed that this plot of land is not agricultural land. This implies that a Land Conversion Permit is not required.

5. The Appellant had on a couple of occasions prior to 2012 applied for a permit to build his house on the subject site but that each time it was rejected by the Council and finally because the Council was outside the prescribed time frame to communicate its refusal to the Appellant, the Council did not object to the construction of the house by the Appellant. The subject site is serviced with all the utilities such as water, electricity, phone line and there are commercial properties in the vicinity. The Respondent took the contrary view namely the fact that the Appellant could not prove that he holds a valid BLUP for residential development and having infact admitted in cross-examination that he was not granted a BLUP for his residential property on the subject site, no permit can be granted for an extension.

II. GROUNDS OF APPEAL

6. The first ground of appeal seeks to address the first ground of refusal which is that the subject site lies within the buffer zone of a poultry pen. It is the contention of the Appellant that the pen operates on a small scale and that the Respondent failed to take into account that the Appellant has been residing there since 2011. He has adapted to the environment and because of the wind direction he is not affected. We understand the point that the Appellant seeks to be making, which is in essence that whether he has a building on ground floor or ground and first floor, it will not change anything for him since he has been living on the property for many years. The issue however is that the guidelines which the Council is required to apply still have to be observed by any developer seeking to bring in any development, whether it is something built from scratch or adding on to an existing structure.

7. The Planning Policy Guidance 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 neighbor development such as Poultry/Livestock Farm and a sensitive land use such as housing, is 200 metres, as provided in the Design Sheet. There are risks associated with the contamination of broilers and spreading of aviary diseases and the

likelihood of it affecting inhabitants within the vicinity in the eventuality of an outbreak. This is the reason for respecting a buffer distance from a poultry pen. The **Environmental Guidelines** on Poultry Rearing published on the website of the Ministry of Environment Climate change and Waste Management also provides an insight as regards the zoning of poultry farms and the risks associated with pens.

8. The undisputed evidence is that the distance between the poultry pen and the appellant's property is much less than 200 metres. The Respondent was right to have applied the guidelines of the Ministry to refuse the application because approving the extension would contradictorily imply that the Council is condoning the building being put to residential use when in fact application of the guidelines are clear in that residential development ought not to be found within the 200-metre buffer from pen, the more so as the poultry pen, irrespective of its scale, has been operating since long in the vicinity. There should be no derogation from the application of soft laws unless there is a clear justification for such derogation, which we do not find in this case. This ground therefore fails.

9. Under the second ground of appeal, it is the contention of the Appellant that the Council failed to request him to submit an amended plan should some features be missing. We agree with the Appellant's contention on this score. If there was insufficient information provided to the Council, the latter could have requested this information from the Appellant. Whilst this ground of appeal has merit it has no bearing on this appeal since it addresses a ground of refusal which is not based on planning considerations and would have had no material bearing on the outcome of the Council's decision.

10. The third ground of appeal seeks to address the third ground of refusal which essentially provides that as per Policies SD3 and SD4 the application cannot succeed since the property lies outside settlement boundary by around 1 km. It is the contention of the Appellant that the Council erred in coming to this conclusion since there are other residential developments including commercial property in proximity to his house. The Council has adduced evidence that the subject site is outside the

settlement boundary by some 990metres, almost 1 km, as per Doc B. The applicable Planning Policies which regulate development of land located outside the settlement boundary as per the Development Management Map are indeed **Policy SD3 of the Outline Planning Scheme ['OPS'] of Moka-Flacq** which regulates development on the edge of settlement boundary and **policy SD4**, which in essence provides that there should be a general presumption against proposals for development outside settlement boundaries unless it *" Has been shown to have followed the **sequential approach** to the release of sites identified in SD 1, SD 2 and SD 3 and there are no suitable sites within or on the edge of settlement boundaries;"* and, amongst other reasons, in the opinion of all the relevant authorities release of such land will not encourage large scale removal of land from agricultural use. The proposed residential development does not fall under **Policy SD3** since the Appellant's house is well away from the edge of settlement boundary by several hundred metres and to the Appellant's contention that there are residential developments nearby, Mr. Bundhoo gave evidence that there is a small settlement near the crematorium closer to the settlement boundary but the property of the Appellant is very far from that settlement and there is no in-filling of the gap, it is not consolidated. This evidence was not challenged. This reasoning also applies in support of the fact that the proposed development for residential use cannot be regulated by **Policy SD4** since there is no sequential approach to the development.

11. The Appellant has not been able to prove to the Tribunal that he holds a valid BLUP for the construction of his house which was erected in 2011-2012, as addressed in the last ground of refusal. The Council has no record of any application nor does the Appellant have any proof. Infact, if from what we gather to be the contention of the Appellant, he proceeded with the construction of his house after making an application for BLUP for which no refusal was received from the Council hence it was "deemed to have been approved" as per **section 117(11) of the Local Government Act 2011**, then the latter should have produced a copy of the acknowledgement receipt together with the receipt acknowledging payment of the fee which is deemed to be the BLUP for the ground floor of his building. However, the Appellant failed to produce this evidence before the Tribunal.

12. Even if the version of the Appellant is to be taken as true in that the Council did not object to the construction of his house on the basis that it failed to inform the Appellant of its decision to reject the application within the required time frame, it still goes to show that the development did not gain planning acceptance by the Council. The Council is maintaining the same stand even now. We agree with the stand of the Council on this issue under grounds 3 and 5 of the grounds of refusal. This ground of appeal therefore fails.

13. As far as the Land Conversion Permit is concerned, addressed under the fourth ground of refusal, the witness from the Ministry testified that the land is not an agricultural land and therefore in such cases a Land Conversion Permit is not given. The Council's argument is that the Land Conversion Permit lapsed. We do not agree with the Council's submissions on this. The Land Conversion Permit can only lapse if there is such a permit which has been granted. In the present case, the application for this permit was made but the reply from the Ministry of Agro-Industry was clear that the land is not agricultural. This implies that no such permit is required. A land conversion permit is only required when land having the status of agricultural land is to be converted to some other use. It stands to reason that if the land is not agricultural, then there is no need for such a conversion. There was however no ground of appeal raised on this ground of refusal although in the statement of case it is mentioned that such a permit was granted along with the Development Permit granted in 1998.

14. For all the reasons set out above, the appeal is set aside. No order as to costs.

Determination delivered on 13th December 2021 by

Mrs. J. RAMFUL	**Mr. P. MANNA**	**Mr. S. BUSGEETH**
Vice Chairperson	**Member**	**Member**