

IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1890/19

In the matter of:

Sookumar Bechoo

Appellant

v/s

District Council of Moka

Respondent

DETERMINATION

1. The present appeal is against a decision of the District Council of Moka (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 construction of a residential building (addition of first floor) at Chapel Road, L'Esperance, Quartier Militaire. The grounds of refusal are set out in an e-mail dated 4th October 2019

" 1. As per policy SD4 of the Moka FLacq Outline Scheme since the site lies Outside Settlement Boundary whereby there is a general presumption against development.

2. A licensed poultry farm already exists on the subject site."

2. Both parties were legally represented at the trial. Mr. Mahadowah, the Planning and Development Inspector of the Council ["PDI"] deponed on behalf of the Respondent. A sworn Land Surveyor, Mr. G. Naidoo deponed on behalf of the Appellant. We have duly considered the evidence before us as well as submissions of the Appellant's counsel, the Respondent's counsel having chosen not to submit.

3. The Appellant lodged 3 grounds of appeal which are reproduced below:

“1. Because the Respondent erred in failing to find that the general presumption against development had been rebutted based on the particular circumstances and facts of my application;

2. Because the Respondent failed to find that the present application fell in the exceptions to the general presumption against development, which allow development of land, pursuant to Policy SD4 of the Moka Flacq Outline Scheme.

3. Because the Respondent erred in finding the presence of a licensed farm on the subject site irretrievably prevented the addition of a first floor to an already existing building on the subject site.”

I. THE ISSUES

4. It is not disputed by the Appellant that the subject site lies outside the settlement boundary as defined under the Moka Flacq Outline Planning Scheme. This is also confirmed by the Respondent’s witness. In this respect, we choose to disregard the evidence of the Appellant’s witness, Mr. Naidoo, who seemed to be confused on the issue and relying on his testimony would not be prudent. The Appellant’s case is that he has no qualms about living next to a Poultry Pen, which according to the evidence on record is 3.1 metres away from the proposed construction. In fact the Appellant has also sworn and produced an affidavit to the effect that he is well aware that his property is situated in the buffer zone of a poultry pen and that he waives any right to claim compensation should the Council grant him a BLUP. He stated to the Tribunal that had already started construction which was only halted by a stop notice issued by the Council. As per the Appellant’s testimony his sole purpose for applying for a BLUP is to legalize the construction. The Council’s case is that the site falls outside settlement boundary which is not favourable to residential development and that the subject site lies within the buffer, around 3.1 metres from the poultry pen which is licensed and operational.

UNDER GROUNDS 1 and 2

5. It is the contention of the Appellant that the Respondent could have come to the conclusion in this case that the general presumption against development had been rebutted since the subject site is connected to utilities since the Appellant has been living on the poultry farm with his parents for a number of years. The Appellant's family, who own the property, have no objection to the Appellant constructing an additional floor to the house as per Doc G. The Appellant opines that the proposed development can be done at no unacceptable public expenses.

6. Under **Policy SD4 of the Moka Flacq Outline Scheme ["OPS"]** residential development may be allowed outside the settlement boundary provided it follows the sequential approach and certain criteria are met. Doc C, a site plan was produced by Appellant demonstrating the subject site is surrounded by mostly agricultural or waste land with no built-up area. The development would thus not follow the sequential approach which is the pre-requisite when applying **Policy SD4**. Whether the subject site is connected to the basic utilities or is easily accessed through Chapel Road is a secondary issue to be considered once the development proposal satisfies the sequential approach, which in our view is not the case here. The issue is not one of re-use or refurbishment of an existing house set on its own grounds either. It is a new construction altogether to be used as the matrimonial home for the Appellant and his spouse. Furthermore, there is no evidence on record to suggest that the Appellant is a small owner who is applying under the exception of the "hardship" criterion nor has there been any commitment from any Ministry. So, we fail to see in what respect should this case be treated any differently or as an exception although agreeably it revolves around its own unique facts. It involves the addition of a floor to an existing lived-in house found on a poultry farm, which one would normally not find since a residential development should not normally be found within a bad neighbour development. This goes totally against the basic principles of planning law. These two grounds therefore fail.

UNDER GROUND 3

7. It is the contention of the Appellant that the Respondent was wrong to conclude that the presence of a licensed farm on the subject site irretrievably prevented the addition of a first floor to the existing building. The Design Sheet of the **Planning Policy Guidance 1 [‘PPG’]** makes provisions for “Industry adjacent to sensitive uses” and provides 200m as an acceptable buffer distance of sensitive land uses from the boundary of a “Poultry/livestock Farm”. Sensitive land uses include housing, education and health facilities.

8. 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. 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 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. The undisputed evidence shows that the distance between the poultry pen and the Appellant’s construction is only 3.1 metres.

9. As regards the single-storeyed house that already exists on the subject site, it was made a live issue that the house does not have a BLUP as it was not produced to the Council with the documents that were requested from the Appellant. The issue lacked clarity. The Appellant stated in cross-examination that that house had no BLUP but the PDI stated that he did not check whether there was a Development Permit, as was the practice in 2003 to issue Development Permits by the Ministry of Works as opposed to BLUP granted by local authorities, in the name of Premila Bechoo, the Appellant’s

mother, who owns the existing house. The Tribunal cannot however come to the conclusion that the house was constructed legally in the absence of such evidence on record. However, irrespective of whether the ground floor of the existing building had a development permit, in our view, the proposed construction will not be a sound development that warrants planning acceptance since it will be within the premises of a poultry farm. This will not only raise issues of biosecurity and sanitation, especially if there is an outbreak of swine flu for example, but will also set a bad precedent for future cases as well as in the case of the Appellant and his offspring if they seek to have extensions made to the existing house. Besides there are no compelling reasons to derogate from the strict application of the 200-metre buffer from the poultry pen in this case. Planning guidelines are soft laws which must be applied unless there are very compelling reasons which warrant a derogation. In the case of **Beau Songe Development Limited v The United Basalt Products Limited and another 2018 [UKPC]1**, the Lawlords stated that the Tribunal’s “first task was one of legal interpretation of the planning documents” and with reference “the language used, read as always in its proper context”. We have applied the guidelines and we are not satisfied of a derogation being justified in the present case. This ground therefore fails.

II. CONCLUSION

10. Allowing this development will be 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 well-being of humans. For all the reasons set out above, we find that the appeal is devoid of merit and the decision of the Council was correct. The appeal is set aside. No order as to costs.

Determination delivered on 14th July 2021 by

Mrs. J. RAMFUL-JHOWRY

Vice Chairperson

Mr. P. MANNA

Member

Mr. S. SULTOO

Member