IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2086/22

In the matter of:

Harsh Kaullychurn

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 commercial building at ground floor to operate as dealer in ready made goods at Royal Road, St. Julien D'Hotman. The grounds of refusal are set out in a mail received by the Appellant on 3rd February 2022 on the National E-Licensing System:

   "Unfavorable views received from the Ministry of Environment, Solid Waste Management and Climate Change vide letter dated 28 December 2021 reference ENV/CLR/RQS/FLAQ:

   1. Temporary development may be allowed subject to relevant permits and licences being obtained from statutory authorities;

2. All temporary development shall be subject to termination upon issue of prior notice, when the site will be required for quarry operations. Whereas a concrete building of 499.5 square meters is being proposed on site for commercial purposes."

2. The Appellant was legally represented and called as witness, Mr. Chamilall, Divisional Environment Officer, posted at the Ministry of Environment, Solid Waste Management and Climate Change ['the Ministry']. The Respondent was represented by Mr. Hemrage, Planning and Development Inspector. We have duly considered the evidence before us as well as submissions of Respondent's counsel.

3. The Appellant lodged 4 grounds of appeal as per his notice of appeal:

   (i) The grounds of refusal are not actual grounds of refusal at all.

   (ii) No unfavourable view was received from the Ministry of Environment, Solid Waste Management and Climate Change.

   (iii) No definition of "temporary development" has been established.

   (iv) The subject site is fully developed.

I. BACKGROUND

4. The background and undisputed facts of the case are the Appellant wishes to construct a commercial building which falls within the 1 km buffer of a mineral site. His business relates to sale of garments and accessories. It is undisputed that the subject site falls outside settlement boundary and there are other developments, residential and non-residential, within its vicinity. The Appellant filed an affidavit in support of his application for a BLUP whereby he has given an undertaking to put the plot of land *in lite* "at the disposal of the Ministry of Environment, Solid Waste Management and Climate Change and that the development shall be subject to termination upon issue of prior notice" and that the Appellant will allow demolition of the building, when the site will be required for quarry operations.

II. PLANNING INSTRUMENTS

5. The site being outside settlement boundary and situated at St. Julien D'Hotman, the applicable policy is **Policy SD4** of the **Outline Planning Scheme of Moka-Flacq ['OPS'].** We are satisfied that the present development proposal does not offend Policy SD4. The application at hand is for a non-residential development, which may be allowed outside the settlement boundary and as per the google map produced by the Appellant, marked Doc B, it is noted that there are a number of developments in the vicinity of the Appellant's property. This is not contested by the Respondent. As per this policy there is a general presumption against proposals for development unless that proposal has followed the sequential approach to the release of sites identified in SD1, SD2 and SD3 and there are no suitable sites within or on the edge of settlement boundaries. It appears that there has been a release of land in the present context. Furthermore, in view of the surrounding development, the site is capable of ready connection to existing utility supplies and transport networks "without unacceptable public expense."

6. The subject site falls within the buffer zone of a mineral resource site. The applicable planning policy is **Policy MR1 of the OPS**. The policy is reproduced hereunder:

"MR1 -Protection of Mineral Resources

Mineral resource sites as shown on the Development Management Map should be protected from most forms of development. Such sites hold reserves which are important to the national economy and for the building construction sector. Buffer zones of 1km should be established between such sites and sensitive uses including housing, education and health facilities as well as from boundaries of catchment areas of dams and reservoirs.

There should be a general presumption against development likely to undermine the long term quarrying capability, unless and in the national interest or is a Government approved scheme which has already been identified or committed or where suitable alternatives are not available.

Priority quarry areas identified by the Ministry of Environment and Sustainable Development and their buffer zones of 200 metres from the quarry boundaries will be protected from all types of development. Temporary undertakings may be allowed outside the 200 metres buffer zone up to 1 km from the quarry boundaries, subject to relevant permits and licences being obtained from statutory authorities.

Temporary development may be allowed on a potential mineral site and its 1 km buffer subject to relevant permits and licenses being obtained from statutory authorities. Any proposal for permanent development on potential mineral sites and within the 1 km buffer may be considered based on site investigations carried out in line with the methodology developed by the Ministry of Environment and Sustainable Development and demonstration that these sites do not have significant quarry potential in terms of quality and quantity of rocks and their economic exploitability. The site investigation report will be examined by a Technical Committee set up by the Ministry of Environment and Sustainable Development, with a view to recommend to the Ministry whether the site needs to be retained for quarrying or released for other developments.

The final decision of the Ministry of Environment and Sustainable Development shall prevail over the provisions of the Outline Scheme in respect of that potential mineral resource site.

All temporary development shall be subject to termination upon issue of prior notice, when the site will be required for quarry operations. No claim for compensation or liability for damages from the Government of Mauritius would be entertained at closure of operations to allow for quarry activities.

Justification: Since sand extraction from the lagoon was ceased in Mauritius in 2001, terrestrial deposits of sand, building aggregate, crushed rock and other raw construction materials are the only source of supply. To ensure future demand from the construction sector can be met the Ministry responsible for Environment has carried out a detailed study to identify the level of resources available, so as to provide adequate protection for proven sites. The study identified two categories of mineral

resource sites, respectively priority sites and potential sites. For the priority sites the consultants had fully investigated them with respect to quality of rocks and had determined that they were viable for rock quarrying. The priority sites will be highlighted on the Development Management Maps. As for the potential sites, the quality and quantity of rocks were not determined by the consultants.

Given that the resources will need to be extracted or quarried at varying times in the future, buffer zones which separate sensitive uses from the potential bad neighbour aspects of quarrying or extraction are recommended to protect both the resource and residents. Further guidance is provided in policy ID 4 and Industrial Development Design Guidance."

III. GROUNDS OF APPEAL

7. We shall consider all these 4 grounds of appeal together since in our view they are interrelated. It is the contention of the Appellant that the grounds of refusal are not in fact grounds of refusal at all and that no unfavourable view was received from the Ministry of Environment, Solid Waste Management and Climate Change. We turn to the testimony of Mr. Chamilall, officer deputed by the Ministry. We believe that there can be no better evidence as regards the views of the Ministry than that of the officer of the Ministry himself. The provisions of the **policy MR 1 of the OPS** makes it clear that the final decision of the Ministry shall prevail over the provisions of the OPS in respect of the potential mineral resource site. The evidence of Mr. Chamilall therefore weighs heavily on the scale. He explained that the Ministry did not give unfavourable views, it simply stated the provisions of the OPS that if ever there was development within a mineral resource site or within its buffer zone of 1km and Government wished to carry out quarrying activities the developers would have to cease their activities without any claim for compensation. He explained the logic behind the cessation of activities was basically because of the noise and air pollution during the quarrying, which normally goes on for years and would affect people in the vicinity and also any development on the quarry site may delay the quarrying activities.

8. Mr. Chamilall went on to distinguish between a mineral resource site where normally quarrying activities take place such as excavation and the buffer zone around the quarry site. He clarified that a building within a quarry site may need to be demolished if ever quarrying activities start whereas no demolition is required for a building found in the buffer zone of the quarry site since the buffer is there just for a form of protection and quarrying will not take place within the buffer. However, in cases where the developments are within the buffer, the developers will have to cease using their property for the period of the quarrying. In cross-examination, he further clarified the instance when a building is within a quarry site it will need to be demolished prior to quarrying as it will affect the activity. He stated that was the reason why when it comes to within the quarry site, the Ministry grants permission for the construction of buildings which could be demolished easily and that for as far developments within the buffer are concerned the activities need to be terminated but that does not mean that the building will have to be pulled down. But he also clearly distinguished the present case from that scenario by stating that the development proposal was within the inner edge of the buffer zone of the mineral site, not within the mineral resource site itself. As per his testimony the construction of a concrete building within the buffer zone is permissible within the provisions of the OPS.

9. Our reading of the provisions of **MR1** is that developments may clearly be allowed on such sites and the final say vests with the Ministry. From our understanding, the Ministry will consider, as per the provisions of the OPS, whether the mineral site is one which has already been identified as a "priority quarry area" or a "potential mineral site". If it is a "priority quarry area", no development will be allowed within the area and within a 200-metre buffer from the quarry area but temporary undertakings may be allowed beyond the 200 m buffer until the 1km buffer from the quarry boundaries subject to the relevant permits and licenses being obtained. If it is, however, on a potential mineral resource site, then temporary undertakings may be allowed both on the site and on its buffer zone subject to the relevant permits and licenses being obtained. The point being made though is that if the site is needed for quarrying activities and the undertaking has to be ceased or demolished, then there

cannot be any claim for liability or compensation against the Government. In the present case the Appellant has given this type of undertaking clearly by way of an affidavit. We are fortified in our view that developments, including construction of concrete buildings, can be allowed in the buffer area of quarry sites because even permanent developments are allowed in some circumstances on potential mineral resource sites and their buffers. As per the policy **MR 1**, such developments may be considered following onsite investigations which will be assessed and determined ultimately by the Ministry. With the Appellant's site being on the edge but within the buffer zone of a potential mineral site, we fail to see in what way the proposed development offends the provisions of policy MR1.

10. We have considered the content of the letter emanating from the Ministry of Environment, Solid Waste Management and Climate Change dated 24th May 2022, marked Doc A, addressed to the Appellant, stating that the Ministry has no objection to the proposed commercial development but *"no construction should be undertaken in the 30 m, falling within the buffer zone of the mineral resource site"* and that it should be used for parking space and a request is made to the Appellant to strictly abide by this condition. We find this to be going against the provisions of policy MR 1 and the evidence of Mr. Chamilall although the latter explained that the Ministry made a mistake in this case in relying on the plan submitted by the Appellant back then showing part of the land being within the buffer. He stated that they are aware now that the whole site falls within the buffer zone. We would therefore go with the provisions of **Policy MR 1** as applicable in the present context. It is stated in the letter *"However, please note that according to policy MR1 of the Moka-Flacq Outline Scheme, development on a potential mineral site and its 1 km buffer shall be subject to termination upon issue of prior notice, when the site will be required for quarry operations."* [stress is ours] We note that no reference has been made to the site being a "priority quarry area" and in fact reference has been made to a potential mineral site. The site being on the edge of the 1 km buffer zone of a potential mineral site, we find no reason why this development proposal should not gain acceptance under the provisions of the OPS if policy MR1 is applied correctly.

11. In the letter dated 28th December 2021 emanating from the Ministry addressed to the Appellant and copied to the Chief Executive of the Council, and which is the subject matter of the present appeal, we find no "unfavourable views" from the Ministry. In fact, the Ministry's views were simply in line with the provisions of policy MR1 of the OPS that temporary development may be allowed on a potential mineral site and its 1 km buffer subject to the relevant permits and licenses being obtained. We note here also that reference has been made to a "potential mineral site and its 1 km buffer" by the Ministry. Therefore, the Council should not have taken these to be unfavourable views. In case of doubt, it should have sought clarification from the Ministry, whether as regards to the meaning of "temporary development" or application of the Policy. In the case of **Beau Songe Development Limited v The United Basalt Products Limited and another [2018 UKPC 1]** the Lawlords of the Privy Council cited a passage from the case of Hopkin Homes where the court drew an analogy between specialist planning inspectors and expert tribunals to come to the conclusion that the court should *"... respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly."*

12. No definition of "temporary development" has been established as per the contention of the Appellant under his third ground of appeal. While our research has not led us to any clear definition of the term in the OPS, and there may have been some confusion between "temporary development" and "temporary structure". Mr. Chamilall gave the stand of the Ministry as regards what "temporary development" meant. Our understanding of what the witness stated is that according to the Ministry it means a development or undertaking that may be terminated and may not have continuity. It can be either through cessation of activity, most probably if the development is in the buffer zone or through demolition if it is on the actual quarry site, irrespective of whether any construction is made of concrete or materials that can be easily demolished. He explained that when the site will be required for quarrying, the proponent will have to stop his activities and vacate the site for as long as quarrying is ongoing, but that termination of activity when it is within the buffer zone, as opposed to being within the quarry site itself, does not mean that the building will have to be pulled down.

13. The witness was very clear about the fact that construction of a concrete building can be allowed within the buffer zone of a mineral resource site, that as per Doc B there are a number of developments in the vicinity of the subject site, and that the final decision vests with the Ministry. From the testimony of the Respondent's witness and Doc B, we understand that in the vicinity of the subject site and within the buffer zone of the mineral resource site, two residential buildings and a school have been duly granted BLUP in 2014, 2019 and 2013 respectively. These are considered to be developments of "sensitive use".

14. For all the reasons set out above we find that the Council was wrong to have assessed the application as having received "unfavourable views" from the Ministry. The views were in line with policy **MR 1** and so is the application at hand which does not offend the provisions of the policy. We find the appeal to be a meritorious one and is therefore allowed, bearing in mind the provisions of the Business Facilitation Act. No order as to costs.

Determination delivered on 10th January 2023 by

Mrs. J. RAMFUL-JHOWRY	**Mr. S. K. SULTOO**	**Mr. R. ACHEEMOOTOO**
Vice Chairperson	**Member**	**Member**