

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No.: ELAT 1406/17

In the matter of:

MR. BHIMAJEE GOVINDA

Appellant

v.

DISTRICT COUNCIL OF MOKA

Respondent

DETERMINATION

The Appellant has lodged a notice of appeal on the 17th May 2017 against a decision of the Respondent for having refused to grant an Outline Planning Permission (OPP). The refusal of the Respondent has been communicated to the Appellant in a letter dated 28 April 2017, which he avers was received by him on the 3rd May 2017. Eleven reasons have been communicated by the Council to justify its decision. These are, in a gist, the following:

- There is an ongoing case at the level of the Supreme Court in relation to the subject site
- Land cleaning and development is an undertaking under the fifth schedule of the Environment Protection Act requiring an EIA/PER approval. Taking into consideration that the proposed development involves environmental risks to motorway M1, it is preferable to apply for an EIA/PER at the first instance.
- The steep mountain slope behind the subject site poses risks of steep slope failure and/or of rock fall disaster. The Council engineer has recommended that no development of any nature can be authorized on this land.
- The proposed development does not comply with PPG 9 Development on sloping sites, Landslide Hazard Area: The plot coverage of the development exceeds 12% and the development exceeds 150 cu.m and the building height exceeds 7.5 m.

- As per PPG 5 Development along motorway, the road reserves for motorway should be 13 metres which has not been complied with.
- The site is located within an environmentally sensitive zone....According to Policy EC1 of the Outline Scheme, there should be a general presumption against development in such areas due to environmental risk.
- The proposed development does not comply with policy SD3 as it is located within an environmentally sensitive zone (ESAS).
- Direct access to Motorway is not allowed. According to policy TP3 of the Outline Scheme and PPG 5 Development along motorway, no direct access should normally be permitted on M class roads except for acceleration and deceleration lanes.
- The site is crossed by a public road which is not shown on the plan submitted.
- The security post within the road reserve is not acceptable.
- Complaints have been received from road users of the public road passing through the site claiming that same is their sole access which they have been using for many years.

The appeal lodged by the Appellant is on three grounds:

1. The effective date to determine the application was not respected.
2. The Council has not complied with the provisions of the relevant Acts.
3. The Council has acted in bad faith regarding his application.

At the very outset, we note that the second ground of appeal is far from being precise and concise, as required by section 5 sub-section (4)(a) of the Environment and Land Use Appeal Tribunal Act 2012, as amended. This ground is a vague one, leaving the Tribunal to do a guess work as to what Act is relevant and has not been complied with. We set aside the second ground of appeal.

As regards the first ground of appeal, emphasis was laid by the representative of the Appellant on the proceedings before the Judge in Chambers in an application for injunction in relation to the subject site and proposed development. These proceedings have not been brought before the Tribunal, so much so that we are not aware of the contents of same, except for the 'ipse dixit' of the representative of the Appellant. The timing of the decision of the Respondent in relation to the Supreme Court case is questioned by the representative of the Appellant and we take it that this is the basis of his averment that the Respondent acted in bad faith. We however find that this averment has not been substantiated. The Appellant's contention is that the application is one for an OPP and this is a preliminary step to secure an authorization before substantial expenses are made. The Respondent however, has maintained that the procedure for obtaining an OPP is the same as a BLUP. The Respondent has relied on

all expert and technical advice obtained in relation to the proposed development, as shown in the following documents:

- Document K from the civil engineer of the District Council, whereby the civil engineer confirmed that the slope of the site is at an angle of 21.5% and made recommendations on the limitations of the land for the proposed development.
- Document L from the then Ministry of Environment, Sustainable Development and Disaster and Beach Management, which highlighted that as per the relevant PPG, no construction is allowed in the steep slope zone above 20% and that any development listed as undertaking under the Fifth Schedule of the Environment Protection Act (as in the case of the present application) an EIA license or PER approval is required. Furthermore, Document L states that the plot of land belonging to the Appellant is '*partly affected by moderate slopes (10-20%), partly steep slope (above 20%) and prone to high landslide hazard*'. It is to be noted that the report of the land survey produced by the Appellant himself (Document A) shows the average slope of only part of the land as being below 20% slope. The land surveyor has stated in his report that he has been unable to survey the remaining (surplus) land towards the mountain since there was limited access.
- Document M, letter from the Ministry of Public Infrastructure and Land Transport which embodied the recommendations of the Landslide Management Unit to the effect that the development goes against the recommendations of PPG 9, the site represents a direct hazard to the nearby motorway M1 and that the Road Development Authority should be informed accordingly.
- Document N, a report from the Landslide Adviser for Mauritius, highlights the risk that the slope behind the site poses and the risk of slope failure and/or rock fall disaster, and thus recommended adherence to PPG 9.
- Documents P and P1 show the site location and the larger portion of the land is shown to be in the area where the slope is above 20% percent.

The Respondent has shown that it has followed the correct precautionary principle. We find no reason to interfere with this assessment. We find that no element of bad faith has been proven.

As regards the first ground of appeal, we fail to follow the reasoning of the Appellant that the effective date has not been respected because the decision was taken before the 17th May 2017. He attempted to relate this to the proceedings before the Judge in Chambers. As stated above, this Tribunal is not privy to the proceedings conducted at

that level, nor has the Appellant produced the proceedings before the Tribunal. In addition, on the basis of the Appellant's own averment, the OPP application ought to be determined by the 17th May 2017. There is no legal basis for us to take the Respondent to task for having determined the application five days before. We also add that in the face of such overwhelming recommendations against the proposed development, which justify the Respondent's stand, we do not find it reasonable to consider the approval of the application from a restrictive approach of 'effective date'. This would defeat all planning logic.

We accordingly dismiss the appeal.

Delivered by:

Mrs. Vedalini Phoolchund-Bhadain, Chairperson

Dr. Yaswaree Mihilall, Member

Mr. Juswansing Aubeeluck, Member

Date: