

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 745/14

In the matter of:-

Kailash Babajee

Appellant

v/s

Municipal Council of Vacoas/Phoenix

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 residential building at Royal Road, La Marie, Vacoas. The ground for rejection communicated to the Appellant in a letter 28th July 2014 is that

“THE PROPOSED DEVELOPMENT IS FOUND WITHIN THE BUFFER OF 200M FROM AN EXISTING 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, Miss Ramroop, also deponed and was cross examined by the Appellant. The Council also called 3 other witnesses namely Mr. Rishi Luchmun, Town and Country Planning Officer from the Ministry of Housing, Mr. N. Seetahul, Ag. Administrative Officer at the Town and Country Planning Board [“TCPB”] and Mr. R. Hemoo, Land Use and Planning Executive at the Ministry of Housing. We have duly considered the evidence placed before us as well as submissions of Counsel.

I. CONTEXT ANALYSIS

3. By way of background to the case, the land was sold by one Mrs. Salick to the Appellant's father as evidenced by the title deed and the latter has granted to the Appellant the permission to construct a residential building thereon. The plot *in lite* is residential land of an extent of 498.12 sq.m. found at Route La Marie, La Marie, Vacoas. The plot is located within the settlement boundary as per undisputed evidence and the plot also has a development permit for residential development attached to it which was issued to the previous owner Mrs. Salick in 1993 as per the evidence of Miss Ramroop, representative of the Council. It is undisputed that the site is approximately 35 metres from the existing poultry pen which belongs to one Mr. Fareed Purahoo, who as it happens also has a residential building on the site of his poultry farm.

II. THE LAWS AND PLANNING INSTRUMENTS

4. 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. This is also provided in the **Environmental Guidelines No.7** issued by the then Ministry of Environment. **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, hence the necessity to have buffer distances. The undisputed evidence is that the distance between the poultry pen and the appellant's property is much less than 200 metres.

III. THE EVIDENCE

5. The evidence as borne out in google aerial maps marked Docs H, H1 and the photographs marked Docs J1 - J7 as well as the BLUPs for residential development granted to other landowners in the vicinity copies of which were produced and marked Doc G, G1 and G2 provide strong supporting evidence to the testimony of the Appellant that there are a number of residential development in the vicinity and in close proximity of the poultry pen. The case of the Appellant in essence is that he does not dispute that his father's property is within the buffer zone of the poultry pen but that has no qualms about living near a poultry pen as he has no other place to build his house and he has also produced an affidavit to that effect regarding the fact that he has no land of his own. His main ground of appeal is that there are several other other houses in the vicinity of the poultry pen where people are currently residing.
6. The Appellant explained that the local authority has approved BLUP of other land owners, such as that of one Mr. Jugessur, whose land is found within the 200 metre-buffer zone of the poultry pen close to the subject site. He added that the BLUP of one Mr. Boyroo was also approved by the Council for residential development on a plot of land situated 150 metres from the poultry pen and a BLUP was also granted to Mr. Khodadhin for development on a plot of land situated 71 metres from the poultry pen. As stated above, he produced photographs to substantiate his contentions and show the residential developments which are within the 200 metre- buffer zone of the poultry pen.
7. Doc G2 is evidence of the fact that a BLUP for residential development has been granted to one Mr. Akbar Wahab Khodadin, in December 2014. Infact, from Doc L which is a locational map of developments around the poultry pen and Doc L1 which is a summary of the decisions of the PBMC, the Executive Committee and the Minister as regards each application for BLUP made in the vicinity of the subject site, it appears that the Minister did approve the application for BLUP in the case of Mr. Khodadin, in December 2014 while having rejected that of the Appellant in July 2014. The contents of these documents have not been disputed by the Respondent.

8. It is the contention of the Respondent that the Council has not granted the BLUP to the Appellant on the basis of the provisions of **s.117(12) of the Local Government Act 2011** where it was the Minister, having a droit de regard on such issues, who had so decided. The present state of affairs as revealed by the evidence is that a poultry pen is found within the settlement boundary within a residential area amidst residential buildings. As per the planning guidelines a buffer of 200 metres should be kept between the sensitive land uses such as houses and the poultry pen. It came out in evidence of the Council that the construction and subsequent operation of the poultry pen took place in that area after a development permit was granted to one Mr. Purahoo in 1989 by the District Council of Moka under whose jurisdiction the area fell at the relevant time. As a matter of fact, there are several houses in the vicinity of the pen, many of which also hold valid BLUPs for residential development, with the exception of one case, which have been granted by the Council and the relevant Minister who had a droit de regard, despite the presence of the poultry pen since 1989.
9. It is to be noted that Mr. Babajee filed a letter from the owner of the poultry pen stating that he had ceased to carry out the poultry pen activities however the evidence from Miss Ramroop, head of the planning department of the Council, who reported to the Tribunal following a site visit is that the activity was still operational with approximately 1000 broilers in the pen although there may have been a pause in the activity of rearing broilers at some point.
10. Although the decision of the Council to reject the present application is understandable on application of the provision of the PPG as regards keeping a buffer of 200m between a poultry pen and sensitive land uses, the inconsistency in the decisions of granting a majority of BLUPs for residential development in the years 2013 and 2014, with the exception of the present case, as shown in Doc L1, cannot be explained. It does not suffice, in our view, for the Council absolving itself of all responsibility to simply lay it on the Minister as regards the inconsistencies in their decisions. At the end of the day, it is a case against the Council and it is for the Respondent to defend its position.

IV. CONCLUSION

11. It would appear that there has been a series of wrong decisions that have been taken. Initially a BLUP was granted for the building and operation of a poultry pen within the settlement boundary then BLUPs were granted for residential development in the vicinity and within the buffer of the poultry pen, and furthermore there were inconsistent decisions taken in 2014 whereby the present application was refused a BLUP for residential development but another one falling within the buffer of the same poultry pen was granted in December 2014. If a poultry pen is operating legally, BLUP applications for residential development within its buffer zone should not have been entertained. 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. In the Privy Council case of **Beau Songe Development Limited v The United Basalt Products Limited and anor [2018] UKPC 1**, the Lawlords observed that the Tribunal's primary task is "one of legal interpretation of the planning documents to be decided by reference to "the language used, read as always in its proper context"". By reason of the fact that the Council has granted BLUP for residential development with conditions to some people within the buffer zone of the poultry pen, does not negate the associated risks to their health and sanitation. On the basis of the application of the Planning Policy Guidelines, which I believe should be adhered to in the circumstances due to the biosecurity risks involved, I am of the view that this appeal should not be allowed.

Mr. Rajee and Mr. Manna dissenting:

12. We believe that since several BLUPs for residential development were granted to landowners in the vicinity of the poultry pen in the year 2013 as well as in December 2014, after the present application was rejected, it will not meet the ends of justice if the case of the Appellant were to be treated with disparity.

13. It is on record that Mr. Khodadin has been granted a BLUP on the 2nd December 2014 by the Council with special conditions attached. It is unclear to us the reasons which could have justified the granting of a BLUP in December 2014 within 71 metres of the poultry pen after the present application was rejected earlier in the same year. We are also alive to the fact that the area is a residential area and is found within settlement boundary therefore, if at all, it is the poultry pen that is wrongly located in the residential area as this would affect the land use and value of several plots in the vicinity. Infact we also bear in mind that there had been a development permit for residential development that had been granted to the previous land owner Mrs. Salick with regards to the property *in lite* before it passed hands and became the property of Mr. Babajee's father. This is indicative of the fact that the Council had previously assessed the merits of a residential development thereon and had approved it.
14. We believe for the sake of parity, consistency and fairness, the Council should grant a BLUP for residential development to the Appellant with special conditions if need be. Since the Appellant has stated that he has no issues having a poultry pen in the vicinity and he has no other property except for his father's land on which to build his house, we believe this may be treated as a hardship case and the appeal should be allowed.
15. For all the reasons set out above, since the majority decision lies in favour of the appeal, the appeal is allowed. This case is to be confined to its own set of facts and circumstances and is not to be taken in anyway as a general rule that the residential developments within the buffer of bad neighbour development is to be allowed. No costs.

Determination delivered on 30th September 2020 by

Mrs. J. RAMFUL

Vice Chairperson

Mr. B. RAJEE

Member

Mr. P. MANNA

Member