

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

**Cause No.: ELAT 1596/18**

**In the matter of:**

**MR. SHEIK RAFFICK MOHAMED HOSSEN**

**C/O MRS. ELFAZ BIBI LOWTUN**

**Appellant**

**v.**

**MINISTRY OF HOUSING AND LANDS**

**Respondent**

The present appeal is against the decision of the Respondent, which is the authority that grants 'morcellement permits', for having refused to grant the application submitted by the Appellant for the subdivision of a plot of land of the extent of 3254 square metres situated at Isidore Rose, Flacq, into six lots for residential purposes. In a letter dated 14 March 2018, the Respondent notified the Appellant that the reasons for declining the application are:

1. The site is located at about 112 metres outside settlement boundary
2. A poultry pen is located at about 112 metres from the site.
3. A cremation ground is located at about 163 metres from the site
4. A cabinet workshop is in close proximity of the site.

In an appeal lodged on the 7<sup>th</sup> April 2018, the Appellant listed thirteen grounds of appeal, out of which four grounds were subsequently dropped (namely grounds (e), (f), (i) and (m)). The first five grounds of appeal as per the remaining grounds, namely grounds (a), (b), (c), (d) as well as ground (g), relate to the location of the site. Evidence was adduced by the Appellant and by his Sworn Land Surveyor, Mr. Nathoo. The Appellant confirmed that he did not own any other land except for the site *in lite* and he had applied for a morcellement permit so that he could share the said lots among his six daughters, as he had already donated an adjoining land (which was initially part of the

same plot) to his son. He did not deny the presence of a cabinet workshop located across the road from his site and also the presence of a cremation ground at a certain distance therefrom. But he denied that the presence of a poultry pen there. His version is that there had been a proposal to set up a poultry pen made by his brother, but the latter is not pursuing this business. He agreed that the site is located in a secluded area.

Mr. Nathoo, Sworn Land Surveyor, produced Documents A and B, being a division in kind before the Master and Registrar and title deed, a proposed sub-division of land into six lots for residential purposes to be donated to children (Document C) and a Google map (Document D). He added that he had been on the site for the purposes of preparing his 'rapport de constat' and that although he had seen the building where the poultry pen was to operate, as per his observations, there had never been any activity actually operating in the premises. He furthermore added that the cremation ground is situated such that the wind blows in a direction that is away from the site. He added that in his opinion the policy SD3 should have applied in this case.

The Respondent's case rested on the evidence of the Town and Country Planning Officer of the Ministry of Housing and Lands, the Planning and Development Officer from the District Council of Flacq and a senior health engineering officer. The evidence of the first two officers is the following: (a) The site is outside settlement boundary by 90 metres (b) The applicable policy of the Outline Planning Scheme or Moka/ Flacq District Council (the prevailing one being the 2006, as modified in November 2011 and March 2016) is Policy SD 4. (c) The access to the site is by a three metres wide untarred road surrounded by thick bushes and the site is segregated from built up areas, thus cannot be included in the sequential approach that could have placed the application within the scope of the exceptions provided in Policy SD 4 (d) The initial sub-division had been done for agricultural purposes. (e) No Building and Land Use Permit had been issued by the District Council for any other residential buildings situated in the vicinity.

The Senior Health Engineering Officer deposed and reported that his site visit had established that there was indeed a poultry farm as indicated on the plan, where there was presence of poultry inside the farm and, as he walked towards the poultry farm, he could smell the odour emanating from the poultry farm. He explained that the presence of settlements near such farms presents bio security concerns and risk hazards to public health.

After considering the evidence adduced, especially by the Health Engineering Officer, we have serious doubts on the version of the Appellant that the farm is not operational. The Respondent, being the sole authority to grant permits or sub-divisions, is duty bound to act in conformity with the provisions of the Morcellement Act, more specifically, sections 5 sub-sections (1) and (2) as well as sub-section 5 (a) of the Act. The policy relied upon by the Respondent namely Policy SD 4 lays down the general presumption

against proposals or development outside settlement boundary unless certain criteria are met, which constitute exceptions to the said presumption. The evidence on record shows that the most indicative element to trigger the exceptions to the presumption is not present, namely that *“the proposal has been shown to have followed the sequential approach to the release of sites identified .....and there are no suitable sites within or on the edge of settlement boundaries”*. It is on record that the site is surrounded by undeveloped land and is bushy. The Appellant himself stated that the land is ‘isolated’ and it came out from the evidence of the witnesses that access is not easy to the site. This finds support in Document G produced by the Respondent.

It has been suggested by the witness for the Appellant, the Sworn Land Surveyor, and in the submission made by counsel for the Appellant that the Respondent should have applied Policy SD 3, which provides that *“There should be a general presumption in favour of development on the edge of but outside settlement boundaries provided such development proposals are aimed at consolidating gaps in an otherwise built up area...”* (among other conditions). Both the documentary evidence (Documents D and F), as well as the testimonies of the witnesses for the Respondent, show a distance 0.90 metre from settlement boundary, which cannot be said to be on the edge of settlement boundary. We note that the Respondent has listed as one of the grounds of refusal that the site is at a distance of 112 metres from settlement boundary, while the document produced by its representative (Document F) shows that the said distance is of 0.90 metres. Whatever be the case, it can be seen from these documents that the land *in lite* is ‘segregated’ from built up areas and there is no indication of *‘gaps to be consolidated with otherwise built up area’*. There is only one residential building found at around 49 metres from the site, for which the evidence from the District Council is that no BLUP had been issued for any development in the area. We find no room for the application of Policy SD 3 to the present proposed development.

It has also been submitted that the Respondent should have given consideration to the exception to be made ‘under hardship criteria’ (Both Policies SD 3 and SD4 create such an exception in the case where *‘the proposal is from a small owner seeking residential property for themselves and their close kin can be considered as a hardship case, provided that in the opinion of the relevant authorities such release would not encourage large scale removal of land from agriculture’*. It is noteworthy that at no point has it been raised that such evidence of hardship had been part of the application. We are not in presence of any affidavit that was filed, nor request made, to that effect. Furthermore, the Appellant has himself stated that his application has been made for the purposes of a ‘partage’ among heirs.

The evidence of the availability of amenities like water and electricity supply are considerations that will apply if the threshold of permissible development is passed. They do not dictate the decision to release the land.

In the light of the above, we set aside grounds of appeal (a), (b), (c), (d) and (g).

As regards ground (h), it has been rightly stated by the Town and Country Planning Officer that the separation of the District Council into that of Moka and the District Council of Flacq has no bearing on the planning instruments that govern them. Both local authorities use the same Outline Planning Scheme. We agree with this position. The administrative decision to segregate the Councils did not repeal the planning instrument that guides their decisions unless specifically provided by the text. We accordingly set aside ground (h).

Ground (j), as drafted, makes an assertion that is not supported by evidence. Despite the belief as expressed by the Appellant, it has come out from the evidence of the Senior Health Engineer that a site visit had not only established the presence of birds in the poultry farm but the nuisance in terms of odour had been felt by the officer. In addition, the Planning Officer has confirmed that the trade fees for this activity had been paid by the permit holder, as evidenced by Document K produced. This evidence clearly disproves the averment of the Appellant that the permit holder no longer intended to operate the poultry farm. We consequently find that ground (j) has no basis and is set aside.

In addition, grounds (j), (k,) and (l) raise that the proposed development is feasible despite the proximity of a poultry farm on one hand and a cremation ground and cabinet making workshop on the other hand. The presence of the latter two activities has not been disputed neither by the Appellant nor his witness. The context plan produced by the Respondent (Document F) as well as the Google map (Document D) show that the land *in lite* is found in a 'bad neighbor' cluster due to the presence of the poultry farm, a cremation ground and a cabinet-making workshop, all three being at a distance of less than the buffer of 200 metres as required by Policy ID 4 of the Outline Planning Scheme. Policy ID4 lays down the following:

*“Bad Neighbour Development:*

*The location of bad neighbor development uses should follow the sequential approach commencing with Policy SD3 and where buffer zones are required or potential nuisance exists, with Policy SD4....Preference should be given to proposals for bad neighbor developments which can be clustered to share a buffer zone....*

*The justification for the clustering of the activities listed as bad neighbor development is set down as : “This policy recognizes that bad neighbor uses are essential for the continued economic growth of the Mauritian economy, but that a precautionary approach to siting new facilities is required to safeguard local environment and amenity.....Bad neighbor developments are required to be distant from residential and*

*other sensitive uses for health and safety reasons and require buffer zones which can preclude certain forms of development within a specified distance...”.*

The stand of the Respondent is in line with Policy ID4 of the Outline Planning Scheme. We find no reason to interfere with this decision, the more so that the rationale or the stand of the Respondent with respect to the buffer zone is dictated by the need for protection against the nuisance emanating from poultry farms for biosecurity reasons as there is the risk of outbreaks of diseases like bird flu which can be risk hazards to public health. Consequently, we do not uphold Grounds (j), (k) and (l).

Based on all the above, we find that this appeal should not succeed and is set aside.

Delivered by:

Mrs. V. Phoolchund-Bhadain, Chairperson

Mr. Gerard M.L. Lepoigneur, Assessor

Mr. Raouf Soyfoo, Assessor

Date

04 June 2020