Before:

THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

In the matter of:

Cause Number: 05/11

UNITED BASALT PRODUCTS LTD.

APPELLANT

V.

THE MINISTER OF ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

RESPONDENT

In the presence of:

BEAU SONGE DEVELOPMENT

CO-RESPONDENT

1. The factual background

1.1 A notice appeal was lodged under section 54(2) of the Environment Protection Act 2002 (hereinafter referred to as EPA) against the decision of the Minister of Environment and Sustainable Development given under Section 23 of the EPA.

1.2 The particulars of the decision appealed against are as follows:

The Minister of Environment and Sustainable Development (now the Respondent) has approved an EIA Licence, subject to conditions to the Co-Respondent (a company known as Beau Songe Development) for an undertaking which consists of a proposed subdivision of a plot of land of 17.938 Ha into 305 lots for residential purposes and 5 lots as green spaces at Beau Songe, Palma, in the District of Black River.

1.3 The plot of land, which is the subject site, belonged to Medine Sugar Estate, which was holder of an EIA licence for a 'morcellement' development.

The Co-Respondent purchased the land and proposed to develop it into a morcellement. A new EIA was required for this purpose and was granted by the Respondent. The Appellant has appealed against the decision of the Respondent to grant this EIA licence.

1.4 The notice of Appeal was lodged before the then Environment Appeal Tribunal on 25/7/11. The matter has been heard before the present jurisdiction, the

Environment and Land Use Appeal Tribunal, which now has jurisdiction to hear and determine the appeal by virtue of Section 9(3) of the Environment and Land Use Appeal Tribunal Act 2012.

1.5 It is on record that all parties concerned by the present appeal have agreed that the delay of ninety days provided by Section 5 (7) of the Environment and Land Use Appeal Tribunal 2012 for making a determination be waived, the hearing itself having lasted for more than a year.

2. <u>The grounds of appeal as listed in the notice of appeal are</u>:

(1) Respondent erred when it issued the EIA licence as the contents of the EIA Report, as inspected when under deposit for public comment, did not comply with the mandatory requirements of the law, *including* sections 18 and section 19 of the Environmental Protection Act (herein after referred to as the EPA).

(2) The EIA report was not prepared in line with the procedural requirements set out in the law, but a marketing exercise where the Proponent's objective was to create a residential real estate development and did not address its mind to any other considerations, *ab initio* – contrary to the legal principles and requirements for an EIA Report. Furthermore, no real consultation of stakeholders has taken place, as required by the law, as per the record.

(3) There are numerous inaccuracies and omissions in the Report, substantial examples are:

(i) Non-conformity of the Survey Plan with the requirements of the Land Surveyors Act

(ii) The report is incorrect when it states that "adjacent centres of activity are mostly residential" whereas the subject site falls within the 1 km Buffer Zone prescribed in the approved Outline Scheme for the area

(iii) Absence of a Traffic Impact Assessment (TIA) Report

(iv) Non Disclosure of the fact that the Subject Site falls squarely within the 1 km Buffer Zone prescribed in the approved Outline Scheme for the area

(v) No information was given as to whether the Subject Site could be provided with water for an additional 305 residential properties, when the Subject Site already falls within an area of water scarcity

(vi) Non Disclosure of the fact that by reason of the location within the one Km Buffer Zone of an Industrial Cluster, the Subject Site was not appropriate for a residential development – all the more because – by reason of the high specifications of the proposed morcellement for example, undergrounding of services, including electricity], the future residents of such morcellement would have legitimate expectations as to the environment.

(4) The EIA Licence, specifying the number of lots, which would obtain access and egress off the busy B2, was granted prior to a TIA [Traffic Impact Assessment] being prepared, submitted as well as approved.

(5) A TIA prepared prior to the event would have indicated that many community facilities should have been provided on site rather than elsewhere, so as to limit the number of trips that require to be made out of the site – specially in the light of the hazardous nature of the location off the busy B2, which is the gateway to the West from Upper Plaine Wilhems.

(6) By granting a Licence, in respect of an EIA, which failed to meet the basic requirements of the law in terms of both substance and procedure – in respect of a major residential morcellement, off the B2 and located within the prescribed 1 km buffer zone of a stone crushing plant – Respondent, who has been entrusted with the duties of decisions upon EIAs, *inter alia*, did not adopt an approach, as was required in the circumstances and failed in terms of environmental stewardship, to which all citizens, including Respondent, are committed though the law.

(7) By his decision under the law in respect of the EIA Licence granted to the Proponent, Respondent failed in his duty *inasmuch* as:

(i) It does not appear to have given due consideration to its pledge of environmental stewardship required of the law and in respect of which it has been entrusted with responsibilities of a very high order, including the authority to decide upon EIAs

(ii) Notwithstanding the numerous inadequacies of the EIA Report, including an inappropriate land use activity as proposed, respondent elected to cause the EIA Licence to be granted, subject

to conditions, which should have been demonstrated in the EIA, conclusively prior to any approval – in spite of the timely public comment made by the Appellant, then Objector.

(8) In granting the EIA Licence in respect for residential morcellement activities within the prescribed 1km buffer zone of the Stone Crusher, regardless of the timely public comment made by the Appellant, Respondent has acted against the rights of the Appellant, with respect to deprivation of property, which is protected under the Constitution.

(9) In failing to observe the 1km buffer zone of the stone crusher, Respondent failed to use his best endeavors to balance conflicting land use activities, including the industrial activities of the Appellant, which are also important within the national economy.

(10) In addition to causing strong prejudice to the property rights of the Appellant Respondent has also failed to adjudicate properly between conflicting land use activities, as well as protect the public interest, including the interests of the future residents, who would be unaware to the fact that they would be buying land located within the buffer zone of a stone crushing plant.

At the close of the case for the Appellant, it was submitted on its behalf that the EIA Licence should not have been granted by the Respondent for three main reasons. These are as follows:

a. The Respondent failed to give consideration to the existence of a one kilometer Buffer Zone.

b. The Respondent failed to give proper consideration to the requirements of the law.

c. The decision flouted the legitimate expectations of the Appellant to be protected in its activities, to carry out and extend industrial activities including suitable development within the one kilometer Buffer Zone.

3. **The position of the Appellant**

It is the contention of the Appellant that the physical presence of a morcellement in close proximity with the UBP plant may, in future, expose the Appellant to complaints and even litigation with the new inhabitants of the morcellement. Mr Giraud, who deposed for the Appellant explained how any litigation, even which he believes that he will eventually win, would cause delay in his production, being given the stop orders that may be issued in the process, thus causing loss to his company. He laid stress on the fact that his company has had to face such stop orders, and thus financial loss, in the past. His position is also that such close proximity may hamper any future expansion of his plant.

He relied on the presence of one kilometer buffer zone around the UBP plant to support his position, even if the Appellant has implemented substantial technological improvements in his production process to mitigate pollution that its activities may cause. An EIA Licence had been granted to the Appellant for this modernization.

3.1 The position of the Respondent

The Respondent's position as contained in the statement of case filed by it and the evidence of its witnesses, in particular that of Mr Heeramun, is that the decision reached by the Minister of Environment in granting the EIA Licence, is correct, both procedurally and in substance. The Minister did not err in reaching its decision to grant the EIA Licence with conditions.

3.2 Co-Respondent's position

The Co-Respondent's position is that the EIA Licence with conditions had been properly granted by the Respondent. The EIA Report submitted by the EIA consultant for the purpose of the application had taken into consideration all the requirements as per the provisions of the EPA 2002. The Co-Respondent relied on the provisions of the Planning Policy Guidelines (PPG) to support its position that the law does not prescribe a minimum of one kilometer for a bad neighbor development from sensitive land use but what is recommended is a Buffer Zone of 'up to one kilometer'. In this respect, flexibility is introduced in the assessment of the type of project and the required distance to be observed. The Co-Respondent also relied on Policy ID4 of the Outline Planning Scheme for the Black River District Council Area and laid emphasis on the factors specific to the site, namely, the topography and wind direction.

4. Methodology

The methodology to address the appeal is important being given the extensive testimonies of the witnesses for the respective parties and the volume of documentary

evidence adduced. Although the Appellant has listed the grounds of appeal in its 'notice and ground of appeal' dated 25/7/11, the approach adopted by the Appellant in submission has been to lump those grounds in three main 'reasons' which the Appellant qualified as being the 'case for the Appellant' and on the basis of which the Respondent should not have granted the licence.

The respondent made submissions per ground of appeal. The Co-Respondent chose a broader approach in its submission, addressing the grounds as well as the three-fold reasoning.

The present determination will be given by considering the grounds of appeal as well as the three-fold classification as submitted.

5. Grounds 1 & 2

5.1 Ground 1: Compliance with the mandatory requirements of the law

Section 18(1) of the Environment Protection Act lists the relevant documents that need to be submitted to the Director of Environment. Section 18(2) lists out the contents of the EIA report that is essential for any application for an EIA licence.

It has come out from the testimony of Mr Heeramun, witness for the Respondent that the whole procedure as laid down by Section 18 of the EPA has been duly complied with, both in the original application, and by way of additional information whenever they were requested by the Ministry of Environment. The compliance of the relevant data that was required to be satisfied was again

confirmed by Miss Koo and Mr. Phul. Mr. Foondun, on the other hand, gave a broad and rather blurred picture of what was lacking in the information provided. The evidence of Miss Brown was unclear as to what was missing from the EIA report that had been submitted. We take on board the statement of Mr. Heeramun that Section 18 of the EPA provides a guideline on the contents of an EIA report, bearing in mind that specificities of each project require technical information on its own nature of activity to be provided. This is where a rigid approach in assessing the contents of the EIA report and the information supplied therein gives way to flexibility. We are of the view that such flexibility is not a departure from the requirements of the law but is rather an assessment based on the specificity of the project (an 'in concreto' approach). In line with this, we do not uphold the first ground of appeal.

5.2 Ground 2: Absence of Consultation with stakeholders

The second ground of appeal relates to lack of real consultation. Mr Heeramun explained that there had been public comments made by Mr. Giraud in a letter dated 22 April 2011. This was acknowledged by the Ministry by way of letter dated 10 May 2011, where Mr. Giraud had been informed that his comments would be taken into consideration at the stage of processing of the EIA application. Mr. Heeramun explained, however, that the EIA Committee does not conduct a hearing with persons who have made public comments. The comments are taken into consideration at the level of the Director's Review. It is

the review that is submitted to the EIA Committee, not the public comments nor is there a hearing conducted with all those who may have made comments.

5.3 As regards the issue of consultation itself, the EIA consultant, Mr Seenyen who deposed on behalf of the Co-Respondent, has conceded that no consultation was held with the Appellant and the justification given was that he did not deem it necessary to contact the Appellant as he had himself acted as their consultant for the modernisation of the stone crushing plant, and as such, he had all the relevant information. He also added that one of the reasons was also that UBP claims to be an 'impactor' rather than the 'receptor' of adverse effects of its activities. Besides, according to him, in so far as the stone crushing plant had been modernized their activities do not constitute nuisance to the neighboring environment. We note that this may be open the door to criticisms on the process of preparing the EIA report. Yet the evidence of Mr Seenyen shows that there has been consultation with other persons living in the vicinity.

Since the issue of lack of 'real consultation' has been put as a ground of appeal, we are called upon to address it strictly within the parameters of the legal provisions, namely Section 18 and 19 of the EPA. It has been rightly submitted by the Co-respondent that Section 18(2) of the EPA makes no specific reference to a mandatory requirement for public consultation to be held by the EIA study consultants **prior** to submitting their reports to the Department of Environment. We cannot, however, obscure that Section 19 (1) (b) of the EPA provides that an EIA shall enclose particulars of any consultation held with the public in the area

where the undertaking is to be located. We note that this provision does not make such consultations mandatory.The representative of the Respondent, Mr Heeramun also stated that there was no strict requirement for consultation. What was mandatory was that the EIA be open for public inspection and notice be given to the public to consult the EIA and make representations.

As regards the procedural requirements of an EIA report as set out in the law, namely section 18(2) of the EPA, we note that there is nothing on record to substantiate that the content of the report is not in accordance with the criteria set therein. Besides, the detailed evidence adduced has shown that whenever there was a need for more particulars to be provided. This was done by requests for additional information from the Respondent, and complied with by the EIA consultant. As such, Mr Heeramun confirmed that the Respondent had found that there had been compliance with Section18 of the above. We have found no basis to support the second ground of appeal, which is also the second limb of the case for Appellant as submitted. The second ground is therefore not upheld.

6. Ground 3: Inaccuracies and Ommissions in the EIA Report

The third ground of appeal lists out a series of what is qualified as 'inaccuracies' and 'omissions', the main thrust being in relation to the 1 km Buffer Zone. Other points under this ground relate to the non-conformity of the survey plan with the requirements

of the Land Surveyors Act, the absence of a Traffic Impact Assessment Report, the scarcity of water, the issue of conflicting land use, and related to it is what the Appellant termed 'the legitimate expectations of future residents'.

Before addressing each of the above issues, we have deemed fit to compare the above with the approach followed by the EIA Consultant for the Co-Respondent, Sceneries, represented by Mr. Seenyen. He deposed to the effect that his view is that the application for EIA licence is a process where the approach is dynamic. It is a normal feature that there are requests for additional information in the course of the assessment of the application. It is also the practice for the applicant to furnish such additional information even after the approval of the EIA licence. His stand is that the conditions attached to the EIA and the monitoring thereof through the Environment Monitoring Plan, is indicative of this dynamics. This stand is shared by Mr Heeramun the representative of the Ministry of Environment. We observe here that there is a difference between this approach, which can be qualified as the 'engineering' approach (where the dynamics is present) as opposed to the 'legalistic' approach (where certainty and rigidity of instruments prevail).

7. Requirements of the Land Surveyors Act.

It is on record that this issue has been dealt with by a request for additional information dated 8 June 2011 whereby the co-respondent provided the relevant plan duly signed by a sworn land surveyor (Doc. AK1). At any rate, the evidence of the Sworn Land Surveyor, Mr. d'Hotman, who deposed on behalf of the Appellant, shows that indeed, a survey plan had been drawn and signed by Mr. James Chung, SLS, for Medine Sugar

Estate, the vendor of the land which is today the subject site. Although there had been no survey plan drawn by SLS Beegun, the original plan drawn by Mr. Chung had been used and the witness stated that a plan can be used for many purposes and the requirements of the Land Surveyors Act had been complied with.

8. The Buffer Zone and Conflicting Land Use

The thrust of the whole debate was essentially around the Buffer Zone. A connected issue was whether the existence of the Buffer Zone blighted any land within this zone even if a settlement boundary fell within this zone (namely, what is the fate land falling within the settlement boundary but which also falls within the buffer zone of a bad neighbor?).

The Appellant holds a position of rigid adherence to the principle of a 1 km Buffer Zone and bases its stand on the provision in the National Development Strategy which states at p. 81:

> *"As a sensitive land use, new housing should not be permitted in close proximity to (i.e. within 1 km of) land neighbour developments such as landfill sites, which would have a negative environmental impact on future residents or on sites which would constrain future expansion of employment or leisure activities".*

The Appellant relied on the fact that the National Development Strategy (NDS) was adopted by GN 1221 of 2005 as per section 2 of the Planning and Development Act, thus giving it legal authority. The Appellant submitted that if the authorities had wished not to comply rigidly with the Buffer Zone provided in the map section of the Black River

Outline Scheme) (BROS), then specific amendments ought to have been made as per the enabling procedures provided for in the Town and Country Planning Act. Reliance has also been placed on the PPG and BROS provisions.

The Respondent takes a different approach by stating that on one hand, there is no such thing as a 1km Buffer Zone that has been prescribed. Instead, a proper reading of the planning instruments shows that the Buffer Zone refers to a distance of 'up to one kilometer', thus creating a maximum of one kilometer. This leaves room for flexibility within the one kilometer. The Co-Respondent, through its witnesses has adduced evidence on the flexibility approach in assessing the Buffer Zone. This is diametrically opposed to the Appellant's perspective. The stand on behalf of the Appellant is a call for strict adherence to the requirements of the law and that no room should be left for inconsistencies, the legal rules being the basis for certainty.

The above two perspectives are based on a difference in approach, one being a legalistic approach and the other being an approach of practitioners of land planning. The latter approach is not necessarily a departure from the existing legal instruments as explained by Miss Koo, who deposed on behalf of the Co-Respondent. Miss Koo, having been the head of the Planning Department of the Ministry of Housing and Lands, explained the change in the philosophy of the NDS. She stated that the new approach, both in the text and the Development Management Map, was to make way for a flexible and an 'in concreto' approach. The proper approach, according to her, was to assess the location of the proposed project, both geographically, and taking into account all the

external factors governing the choice of the locus, namely topography and wind direction.

An analysis of the evidence adduced by all parties in support of their respective positions leads us to the following observations:

It is clear that the proposed Morcellement forms part of the settlement boundary of the village of Beau Songe. Policy SDI contained in the NDS lays a presumption in favour of development in the settlement boundary. It was the Black River Outline Scheme (BROS 2006) that introduced the Buffer Zone. The issue is whether there is conflicting land use by virtue of the introduction of the Buffer Zone there. We are in presence of diametrically diverging views, those of Ms Brown/Foondun, and those of Miss Koo/Mr Seenyen/Mr Heeramun.

We share the view of Ms Koo that the philosophy of the NDS changed in as much as it was no longer a map reading but an "in concreto" context assessment that was required. For this reason, the terms used by the BROS, namely 'up to 1 km Buffer Zone', take all their significance.

The views expressed by the successive witnesses for the Respondent and Co-respondent reflect the correct philosophy of the provisions of the PPG/BROS under NDS, namely that:-

1. Indeed, the NDS (which was adopted in 2004 and which lays down the Development Strategy and Policies of the Government in so far as Planning decision-making is concerned), now lays more emphasis on "a change in direction and focus, such that the new strategy is designed to be more flexible

and dynamic in response to fast-changing requirements". This is the basis for flexibility in approach.

We have taken note of other policies that are contained in the NDS, which are of utmost relevance in relation to Buffer Zones. These are:

(a) Policy I 7 on Bad Neighbour Industries which sets down the requirement of a buffer zone **up to 1 km** distant from sensitive land uses such as residential areas etc.

(b) Policy ST3, setting down the requirement of buffer zones **up to 1 km** from sensitive land uses when considering the location of <u>new bad</u> neighbour developments.

We note that the above-mentioned provisions relate to policy requirements in selecting <u>new sites</u> for bad neighbour developments. The issue is whether the same reasoning should not follow in the case of an existing bad neighbour. The legitimate question is whether the 'up to one kilometre' should not apply in the sense of discouraging the expansion of sensitive land uses within that buffer.

A priori, it may appear that this is the logical inference, namely, to discourage new sensitive land use development in proximity of an existing bad neighbour. However, one cannot obscure other relevant factors, namely the fact that the sensitive land use under consideration is a proposed morcellement, which is to be located within a zone limited by a settlement boundary. This settlement

boundary as it came out from evidence adduced on behalf of co-respondent (evidence of Ms Koo) has existed prior to the putting up of the Buffer Zone. The 'up to 1 km' Buffer Zone has been introduced by BROS 2006 followed by subsequent Outline Planning Schemes drawn up in 2011(BROS 2011). None of them have caused limitations to be put to the settlement boundary, nor has there been objection raised by the Appellant on this intersection. No objection was raised or position expressed by the Appellant on this despite the direct bearing of the buffer zone on its activities, more particularly on what was referred to as potential for future expansion and cluster. Therefore despite BROS 2006, the Settlement Boundary was maintained.

Miss Brown has expressed the view that that the settlement boundary in such circumstances, was meant for other types of development, namely light industries ..... etc, not for residential use. Her view is that the buffer zone acts like a screen between compatible land use and non-compatible land use and there is a presumption that new residential development will not be located within the Buffer Zone. In response to this, the Respondent has submitted that this presumption, as stated by Miss Brown, is not based on any planning law or planning policy guidelines of Mauritius. On this score, we agree with the submission of the Respondent.

The stand of the Appellant that the Respondent failed to give consideration to the existence of a 1 km Buffer Zone finds no support. The mere fact that there has not been adherence to a prescriptive position of 1 km Buffer Zone is not

indicative of such failure. The submission of the Co-respondent, supported by the different policies contained in the NDS (policy NR2, policy ST3) and PPG is that there is consistency between those instruments and those instruments are to the effect that the 'up to 1 km buffer zone' is only an indicative one.

The emphasis on the flexibility approach has been lengthily explained by Miss Koo. As opposed to this approach, the Appellant's view is that there is a need for certainty so that any investor must know where he stands in so far as land use is concerned.

We agree with this position. However even if support for this stand comes from the spirit of the Business Facilitation Act, it is important also to note that the principle of flexibility is embodied in the NDS itself, which is prescribed in GN 122 of 2005. The '*flexibility*' with which the indicative criterion of the '*up to 1 kilometer Buffer Zone*' is to be assessed is explained by Miss Koo in her testimony, the relevant part which enlightens this issue is as follows:

> *"In 2001, the Town and Country Planning Board brought the Morcellement site within settlement boundaries. Then when the Outline Planning Scheme was updated in 2006 and lately in 2011, the morcellement was still kept with settlement boundaries. But what has changed is the element of flexibility and pragmatism introduced in the new version of the Outline Planning Scheme as from 2006..... As from 2006 and 2011, this minimum buffer zone requirement has been replaced by 'up to one kilometer' and*

qualified by other criteria ..... We have introduced since 2006, a map called the Development Management Map. It's a Development Management Map. It's not a prescriptive map".

Basically therefore, what the new planning instruments advocate is an *"in concreto"* assessment of the proposed project, taking into account the nature of the project, the indicative buffer zone (within the maximum of 1 km buffer zone) and the specific criteria of pollution potential.

The intersection between the buffer zoned and the settlement boundary was considered. There is ample evidence on record to show that an *'in concreto'* approach in assessing the proposed project was followed by the Respondent. It cannot be said that consideration was not given to the Buffer Zone.

For all the above reasons, the submission as grounded in the 1st reason of the 'case for the Appellant' and also as contained in grounds 3 (ii), (iv) and (vi) of the grounds of appeal cannot be upheld.

9. Traffic Impact Assessment

Grounds of appeal 3 (iii) and 5 relate to the issue of Traffic Impact Assessment (TIA). The contention of the Appellant is that no TIA has been submitted along with the application for EIA licence. Had this been done, the impact of traffic on the road network would have been viewed differently by the decision makers.

On this score, the evidence on record is to the effect that a TIA has been conducted by the Co-Respondent despite the fact that there had been no request for same. This was submitted to Traffic Management and Road Safety Unit (TMRSU) on 24 May 2011 and copied to Road Development Authority (RDA) subsequently the TRMSU gave its approval on 21st June 2011. The EIA licence was issued on the 30 June 2011.

Assumptions made were such as 25% of 305 plot owners will possess 2 cars and total traffic will be shared in either direction.

The findings of the TIA are as follows:

- A total of 10 stations were monitored on Wednesday 23rd and Thursday 24th March 2011, and repeated on a Sunday (3rd April 2011) on 6 of 10 stations including stations 1 and 2.
- As per common practice, the mixed traffic was converted to a PCU unit.
- The survey showed that only stations 1 and 2 had sufficient traffic volumes.
- The worst case scenario was identified.
- Finally the TRMSU recommended several measures, following which it was concluded that the existing road network would satisfactorily accommodate the load of the Morcellement and the increase in traffic at morning and afternoon peaks will still be within manageable range.

The consultant from Sceneries has explained that no TIA had been requested from the authorities. Yet, this was done, albeit after the application had been submitted. The representative of the RDA did state that there had been no request for a TIA. Whatever be the stand of the Appellant on the timing of the TIA, it is noteworthy that the Appellant

has not conducted any traffic assessment study to verify or counter-verify any of the findings of the TIA.

We are of the view that the evidence of the EIA consultant, both documentary and oral as well as the evidence of the representatives of the TMRSU as well as the RDA have shown that as per the TIA, the existing road network will satisfactorily accommodate the additional load of traffic from the Morcellement. Based on this, the Respondent had no reason not to act on such information and to have any reservation on the traffic management aspect of the project. We therefore find that grounds 3(iii), 4 and 5 are devoid of merit.

10. Provision of water to the Morcellement

Ground 3(v) relates to the absence of information on whether the subject site can be provided with water for 305 residential properties. In evidence, the EIA consultant, Mr. Seenyen explained that subsequent confirmation had been obtained from the CWA subject to conditions. He explained that certain investments were to be made following the condition that the supply of water was to be obtained from Pierrefonds. This had been agreed upon and that water supply to the morcellement would not be provided from the CWA reservoir that fed the village of Beau Songe. This approval, having come at a later stage does not, in our view impact on the rightfulness of the decision of the Respondent for the same reason as explained earlier, namely that EIA approvals are not a tick box exercise but a process which is more dynamic. The very existence of conditions attached to such approvals and the continuous monitoring done 'a posteriori'

is confirmation of such process. We find that there is no basis for the third ground of appeal on this score.

11. Environmental Stewardship

Extensive evidence was adduced on the potential pollution that the proposed morcellement may be subjected to, namely the pollution caused by dust, the issue of wind direction, availability of water, air monitoring for the purpose of assessing the pollution, drainage of water..... etc. It is noted that the issue of 'nuisance' that can be caused by pollution did not form part of the grounds of appeal per se. However, we consider that these fall under what the Appellant qualified as the 'environmental stewardship' to which the Respondent is committed to through the law and is contained in ground 6 and 7. This is why the 'nuisance' issues, as well as the 'inadequacies' considered in the procedures followed by the Co-respondent and the decision of the Respondent will be considered individually.

11.1 Dust

The records from regular monitoring (the Environmental Management Report of UBP) do not show any adverse effect of dust on the surrounding neighborhoods.

An independent dust monitoring test was conducted by the department of Chemical Engineering, Faculty of Engineering, University of Mauritius, during the following periods: 9-15 November 2012, 17-20 October 2012 and 27-29 October 2012. Particulate matter (PM) of less than 10 microns at two different locations at UBP stone

crushing plant were carried out as per testing procedures in the USEPA CFR 40 Part 53.

The conclusion was that the average daily mean concentration of PM 10 at three sites was well within the ambient air quality standard of 100 $\mu g/m^3$ as per 1998 EPA standards. Even the peak PM 10 measured was 40.4 (<100) at the Morcellement (known as Morcellement Tamira). During the period 9-15 November 2012, (a) very high concentration of PM 10 was obtained at location 1 (Morcellement Tamira, Beau Songe) due to the stone crusher plants operation of UBP; (b) at location 3 (East Boundary of Morcellement Tamara), the high concentration of PM 10 measured was due to heavy vehicle movement on the nearby earthen road. At these times, the prevailing wind direction during the study was from south east at an air speed of 4.3m/s and most of the readings (PM10) were well under limit.

It is to be noted that the UBP site (primary crusher) is situated around 200 meters from the nearest point of the Morcellement at a drop of around meters from the proposed Morcellement and that its primary crushers are enclosed. Water jets are used so that there is limited dust moving around, unless there are very high winds. But even then they would be blown away rather than allowed to settle. Moreover, the Appellant's consultant, Mr Wong So could not provide evidence nor any study about the probability/frequency of this happening.

Furthermore, during the site visit conducted by the Tribunal in April 2013, no dust was found on the leaves of trees at the nearest point of the Morcellement from UBP and anywhere else in the Morcellement which could indicate settlement of dust.

11.2 Wind

Since the Beau Songe site lies North West of UBP premises, the parameter that has to be considered is the percentage of wind direction blowing North West.

Data percentage of wind frequencies at Medine 1996-2010 were given (interpretation of wind roses) by Mr Sok Appadu (consultant) and former Director of Meteorological Services, Miss Koo (planner) and also by the University of Mauritius (PM 10 study) using the air monitoring unit.

From the data presented, there was no indication that there would be strong winds in the direction blowing North West during several days of the month. The evidence of Mr. Sok Appadoo attempted unsuccessfully to show that his conclusions from the meteorological data that he gathered point towards wind blowing from the UBP site towards the morcellement over substantial time so as to affect the future inhabitants of the morcellement. The evidence of Mr. Sokappadoo was seriously shaken in cross examination. In fact, the percentage of wind frequency from the North West was 0.6 to 7.1%, and the mean, 3.3% (Document AD).

11.3 Water: On site rainwater disposal

As per the EIA report, the whole Morcellement will be provided with drains running alongside the road and be discharged into the existing natural drains. Miss Brown,

consultant for the Appellant mentioned that, for the smaller plots, of size of 380m^2, when developed, might lead to risk of not having enough land to absorb all the water when it rains. However, no engineering report was given by Miss Brown to support that 'on site rainwater disposal could cause flooding'.

Mr Jankee from the Road Development Authority (RDA), confirmed that RDA had looked at the drainage schemes proposed and that detailed calculations for the drainage network were sought. The RDA approved the calculations and designs (as per Document AK: Additional information submitted by SceneRies) and was satisfied by the roadside drains proposed for surface runoff. Furthermore, the soakaways proposed would have to be designed properly at building stage to ensure that there is no risk of creation of pool of water. Mr Jankee confirmed that drainage would not be an issue in the Beau Songe area for the residential plots.

The suitability of soil types was addressed by Miss Brown and Mr Jankee confirmed that the risk of having water pools depended on many important factors such as topography, soil type, soil permeability and soil percolation rate.

Findings of a report done by Mr Laulloo, a Civil/Sanitary Engineer, in 2003 on soil and subsoil conditions were used by SceneRies (the EIA consultant company) for their detailed calculations and design and the assumptions used were appropriate. There was no reason to think that the soil conditions would have changed that much in 10 years.

An engineering approach with certain assumptions was taken by SceneRies to calculate runoff and computation of flood flow and to design the drain. Sceneries concluded that

the volume that can be absorbed as per the calculations was greater than the volume of runoff generated under the worst scenario. We have found the explanations given on behalf of the Co-Respondent to be satisfactory and found no basis on which the Respondent could have withheld its approval on such a ground.

11.4 Sewerage

We note that as per the EIA Report at page 181, as for any Morcellement, the disposal will be done through onsite sewerage disposal system comprising of septic tanks and absorption pit arrangement. There is no departure here from the current practice which can question the environment stewardship of the Respondent on this issue.

11.5 Noise

During site visit conducted on 8 April 2013, even if noise was being generated by the crushing of rocks and reversing of trucks at UBP site, no noise was heard at all at the Morcellement site during the spent by us there (namely some 30-45 minutes on the spot).

11.6 Concluding note on environment stewardship

As per the environmental parameters considered such as dust, wind, traffic, inflow water, there has not been any evidence that these will not be mitigated properly. Data analysed showed that there will not be any real issues in not allowing the Morcellement to go ahead. Furthermore, as per the EMD of the Morcellement while monitoring the EIA during the construction stage and operation of the activities of the Morcellement, all mitigating measures have to be respected to control any adverse effect of noise, dust,

inflow water and sewerage to the site. Many of these mitigating measures are to be found in the EIA licence granted to the Appellant itself for the modernization of its plant. We are of the view that the Respondent cannot be called upon to withhold an application basing itself on consequences that may spill over from a failure to abide by the conditions contained in the Appellant's own EIA licence in respect of its project. A proper monitoring of these standards will enable the inhabitants to enjoy a sound environment as for any other project. Environment stewardship is not merely a decision taken on paper granting or rejecting a project on the basis of a rigid interpretation of certain rules. It is a more practical exercise which calls for a flexible assessment, as submitted on behalf of the Respondent as well as the Co-Respondent. We find that the submission that an EIA is a process and not an end, is a proper description of the status of the project. This has to be within existing parameters set by the planning instruments. For this reason we find that ground 6 and 7(i) cannot be upheld by this Tribunal.

12. The issue of legitimate Expectation:

We have given due consideration to the issue of 'legitimate expectation' raised by the Appellant. This has been raised at ground 3 (vi) (while referring to the legitimate expectation of future residents as to the environment) and at the third limb of the Appellant's submission, where it was raised that the decision of the Respondent flouted the 'legitimate expectation of the Appellant to be protected in its activities, to carry out and extend industrial activities including suitable development within the 1 kilometer Buffer Zone'.

At the outset we observe that there is nothing on record that suggests that the Appellant holds a mandate to make representations on behalf of any future resident. Nothing prevents the Appellant, being a longstanding industry in the region, to express concern for the inhabitants in its vicinity. Yet, we are surprised that such concern, if any, for the inhabitants' clean environment, emanates from a party who is himself claiming to be a 'polluter' in the circumstances, albeit the fact that there have been very laudable initiatives taken by the Appellant to reduce pollution caused by its activities. However, being part of the grounds of appeal, the locus standi on this score has yet to be shown.

Secondly, the legitimate expectation of the Appellant in respect of its growth within the 1 Kilometer Buffer Zone is not based on any undertaking on the part of the Respondent of any other authority. As rightly submitted on behalf of the Co-Respondent which relied on numerous authorities, one can only talk of legitimate expectation when it had been the result of promises or representations which were clear, unambiguous and devoid of relevant qualification. Basically, what is required to be shown is the legitimacy of the expectation. It is true that the existence of the Buffer Zone is contained in planning instruments. Yet this, *per se*, does not justify the expectation as described by the Appellant. Furthermore, we observe that any such expansion as described in the ground of appeal would amount to the 'bad neighbour' expanding its activities within the settlement boundary, thus carrying similar risks to the environment!

We therefore find that this ground is devoid of merits.

13.Deprivation of property

The issue of 'deprivation of property' is contained in ground 8. It relates to the Respondent having acted against the rights of the Appellant with respect to deprivation of property which is protected under the Constitution. We read from this ground that the fact that the Respondent has granted the EIA licence within the prescribed 1 Km Buffer Zone of the Stone Crusher, this deprives the Appellant of its property rights. We are most surprised by the assertion! We have given consideration to the submission as to whether policies adopted for land use management (albeit prescribed by government notices like the NDS or PPG's) can infringe on the property rights of the developer. We are of the view that although the Respondent has a duty by law to look at environment engineering and stewardship aspects in relation to such projects, yet these instruments cannot take precedence over property rights protected by the civil code. Failure to do that can lead to deprivation of property in breach of Constitutional provisions. As stated above, we do not find any issue of deprivation of the Appellant's property rights that is connected to the Buffer Zone. It has been stressed above that we do not share the view that the existence of a maximum of 1 KM Buffer Zone creates any monopoly whatsoever on that zone in favour of the Appellant. Had it been the case, there would not have been the development of other residential areas in the zone, namely the Bambous VRS area and the NHDC Housing estate, which both came into existence after the Black River Outline Scheme 2006 which created the Buffer Zone. Ground 8 is therefore set aside.

14 .Public Interest

Ground 10 of the notice of appeal has brought in the issue of public interest, namely that the Respondent has failed to adjudicate properly between conflicting land use activities as well as protect the public interest, including the interests of the future residents. We have seen no evidence adduced in support of this assertion. What has been placed on record is firstly, the potential loss that any litigation can eventually bring to the Appellant should any future resident bring an action against it and, secondly, the limitation of expansion possibilities of the Appellant in future. We note that the in latter case, this can be problematic being given that any such expansion would bring the Appellant (the bad neighbor) geographically closer to the settlement boundary! Also we have not been put in presence of any mandate from future residents on whose behalf the Appellant has brought in this ground of appeal. Whatever be the case, we are in presence of case for the safeguard of the private interests of the Appellant only (save for a reference made to the employment of the villagers of the Bambous area which may be at stake). We do not find that the Respondent has failed to protect the public interest in reaching its decision. Ground 10 is therefore not upheld.

15. **Conclusion:**

For all the reasons we have given above, we do not find that the grounds of appeal raised by the Appellant can be upheld. We therefore dismiss the appeal. With costs.

Delivered by:

Mrs. V. Phoolchund- Bhadain	**Professor R. Mohee**	**Mrs. A. Jeewa**
Chairperson	**Member**	**Member**

Date: 13th January 2014.