

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 60/12

In the matter of:-

V.M.C Dhunnoo

Appellant

v/s

District Council of Moka

Respondent

IPO:

- 1. Chaturdharry & Gooray Co. Ltd**
- 2. Subway Fresh Co. Ltd**

Co-Respondents

DETERMINATION

The present appeal is against a decision taken by the Council for having granted a Building and Land Use Permit to Co-respondent no.1 for the conversion of an existing building situated at Valetta, Moka to be used as a poultry farm for the rearing of above 500 chicks.

The appellant, feeling aggrieved by the decision of the Council, lodged an appeal before the Town and Country Planning Board and the appeal was subsequently forwarded to this Tribunal following the enactment of the **Environment and Land Use Tribunal Act 2012**. Pleadings were exchanged and filed before this Tribunal. As per the statement of case of the appellant, the reasons for which he is appealing against the decision of the Council is grounded on 2 points namely that the Co-respondents have been and are illegally operating a poultry pen and a slaughter house and that the Council acted unlawfully and illegally in granting a BLUP to the co-respondents. The respondent and co-respondents contested the appeal and filed pleadings.

UNDISPUTED FACTS

It is uncontested that the property owned by the appellant and that of the co-respondents was initially one plot of land containing a main building. Following a distraction the land was subdivided into two lots and the building into two parts, one part of the building with the associated land was purchased by the appellant and the other was subsequently purchased by co-respondent no.1. The property of co-respondent no.1 was transferred to co-respondent no.2 after the present appeal was lodged.

In the course of the hearing of the present appeal, it was brought to our attention that the appellant had lodged an appeal containing several grounds before the Town and Country Planning Board but since no evidence was adduced before us save on two aforementioned issues, which are the two live issues, we deem it that the appellant was no longer pressing on these.

GROUNDINGS OF APPEAL

The two main issues raised by the appellant in support of his contention that the Council should not have granted the BLUP to co-respondent no.1 are essentially that firstly, for the type of activity that the co-respondent no.1 was carrying out, the latter did not have a preliminary environmental report (PER), and secondly, the minimum buffer distance of 100 metres from the appellant's poultry farm had not been observed.

These points being technical in nature require some insight into the statutory and planning instruments.

(1) Did the application require a PER?

The application being for the issue of a Building and Land Use Permit ("BLUP") is governed by **section 117 of the Local Government Act. Section 117 (3) of the Local Government Act** which provides that *"Every application for a Building and Land Use Permit shall be in accordance with guidelines issued under the*

- (a) The Building Act*
- (b) The Town and Country Planning Act*
- (c) The Planning and Development Act; and*
- (d) The Environment Protection Act"*

The Environment Protection Act deals with PER. **Section 16 of the Environment Protection Act 2002** stipulates that a PER is required in respect of undertakings specified under Part A of the First Schedule to the Act, wherein the undertaking with respect to poultry has been set out at paragraph 22 for the rearing of poultry above 5000 heads. It is therefore a requirement under the law to provide a PER for permit applications when rearing poultry above 5000 heads (the stress is ours).

The respondent adduced evidence by producing the application form submitted to it by co-respondent no.1 wherein it clearly states that the application was for 5000 chicks. This was not disputed by the appellant. Applying the law to the facts, it is therefore clear that there was no requirement for the co-respondent no.1 to submit a PER with its application. This ground therefore fails.

We pause here to make an observation. The operation of a slaughter house is one of the activities listed in **Part A of the First Schedule to the Environment Protection Act** which requires the submission of a PER to the Council for an application for BLUP. True it is that the appellant stated in cross-examination that the co-respondent no.1 was also conducting slaughtering activities on the premises but this was denied by the co-respondents, as represented by Mr. Gooray. The appellant neither called any witnesses before us nor produced any evidence on which we could rely to make a finding on this issue.

We now turn to the next issue, that is, whether the Council should have considered that the distance between the poultry pen of the appellant and the one proposed by the co-respondent no.1 at that time, was not in conformity with the 100 metres buffer distance as prescribed by the guidelines issued by the Ministry of Environment.

For us to make a finding on the issue, we first need to know what is the “status” of the BLUP that was granted to co-respondent no.1- whether it is still in existence or not. If we follow the submissions of learned counsel appearing for the appellant on this issue, it would appear that the BLUP is attached to the person and not the land. If this were the case, should co-respondent no.1 no longer be in existence, the BLUP if it is attached to the person, also lapses. Likewise, once co-respondent no.1 ceases to be the holder of the BLUP (as in this case since it has passed hands), that should have been the end of the matter since the BLUP would no longer be valid. The same reasoning would follow. The submission of counsel appearing for the appellant seems to be in contradiction with his own case. **Section 127 of the Local Government Act** is clear on the matter. This section imposes certain requirements on a holder of a BLUP should he wish to transfer his business. When read in conjunction with **Section 121 of the Local Government Act**, the clear interpretation is that the BLUP attaches to the land. This is precisely why, once a person holds a BLUP which is attached to the economic activity that is being carried out on the land, he can sell his “business” to another person without the need for a fresh BLUP,

save that the law imposes a requirement of notification upon the BLUP holder to inform the appropriate Chief Executive pursuant to **Section 127 of the Local Government Act**. Whether this has been done by Chaturdharry and Gooray Co. Ltd in the present case, is beyond the scope of the present appeal suffice it to say that we have been satisfied that the BLUP is attached to the land and is therefore still "alive" in that it has not been rendered obsolete once co-respondent no.1 ceased to be the holder of it. For the sake of completeness, it is worthy of noting that the new BLUP holder must, on the other hand, apply for a fresh trade license. A trade license is not transferable on the reasoning that the business will have a 'new' trading name or a 'new' owner.

(2) Buffer distance of 100 metres

The above having been established, we now turn to the issue of whether the buffer distance of 100 metres should have been observed. It is the contention of the appellant that the Council should not have granted the BLUP to the co-respondent no.1 on the basis that the guidelines issued by the Ministry of Environment clearly stipulates that the minimum distance to be respected between 2 poultry pens as in the present case is 100 metres. The appellant adduced undisputed evidence to show that the distance between his poultry pen and that of the co-respondent is much less than 100 metres, being given that the 2 poultry farms were initially one and the same property and it was only following the 'distraction' that they were severed into two parts.

Section **117 (3) Local Government Act** *supra* emphasizes the fact that an application for a BLUP should be considered by taking into account the guidelines issues under the law. 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. By virtue of the powers vested upon the Minister, Environmental Guidelines have been issued by the Ministry of Environment for the rearing of poultry up to 5000 poultry heads "*to ensure that all environmental issues have been duly taken into consideration by all stakeholders.*" As per these guidelines, in terms of siting of poultry farms, the distance *allowed* between poultry farms is 100 metres where the scale of activity is the rearing of up to 5000 birds, in view of the biosecurity risks.

The key question that we need to decide on is whether it was justified for the Council to depart from a material consideration in a guideline?

Planning and indeed environmental law is understood to be broader than other areas of law in that they come from different sources, aside from legislation or judicial decisions. There are also guidelines, circulars, policy documents amongst others. In fact, the bulk of technical details

are found in those tertiary sources or rules. These may be binding and mandatory in nature depending on the drafting/wording, area of regulation and industry/ sector.

Typically guidelines or rules provide a minimum standard from which the regulating body or authority can over and above exercise a degree of structured discretion. They are especially important in our jurisdiction that adopts more of a discretion-based decision-making model for planning and the environment. The decision-maker thus has an inherent discretion on the understanding that it is best placed to take such planning or environment decisions.

In the present matter, it is the contention of the appellant that since the distance between the 2 poultry pens is undeniably less 100 metres, the Council should have applied the guidelines of the Ministry and considered that the co-respondent no.1's property was not an adequate site for the rearing of poultry due to bio-security risks involved since the appellant had already started operating his own poultry farm next door. It is an uncontested fact that the property of the appellant and co-respondents was initially one. Mr. Gooray gave evidence to the effect that when co-respondent no.1 purchased the property, the 2 buildings therein were already equipped and had the necessary infrastructure for a poultry farm, save for one store which existed and is still being used as such. To recapitulate, the present appeal is against the development of one of the existent buildings being converted into a poultry pen and the ground raised by appellant is the buffer distance of 100 metres has not been respected. The reason invoked by the appellant, that is, the biosecurity risk, is an environmental as well as a land use issue. These considerations are inextricably linked in that any development on a property, and thereby its land use, will have an impact on the environment and vice versa. One therefore needs to look at one's surrounding environment to see whether a particular development is compatible or not in the locality. While we do appreciate this, it was rather surprising that the appellant did not adduce before us any evidence for our appreciation of the risk of disease proliferation due to poor hygiene standards or maintenance of the property of the co-respondents. He stated that he had witnesses but none were called to testify nor were photographs produced in support of his contention. The settled principle in civil cases is that "He who avers must prove." The onus is therefore on the appellant to prove to the tribunal that there were real risks of biosecurity, since this is the reason he invoked as the very basis of his application. We cannot rely on the letter of complaint allegedly emanating from the appellant which has been annexed to the statement of defence of the respondent as this is self-serving. The letter simply shows at best that the appellant made a complaint. The stand of the Council is that the property being initially one plot which subsequently being divided by a boundary wall, it exercised its discretion to allow a lesser distance between the 2 farms. Reference was made to a PER granted to one Mr. Abdool Taliboodeen Hamed, which is on record. The latter was the previous owner of the property which was subsequently purchased by co-respondent no.1. The existence of this PER demonstrates, in our view, that Mr. Hamed had a project of rearing 9630

broilers on the plot which had gained environmental acceptance. On the basis of this, under the circumstances of the present case can it be said that the Council wrongly exercised its discretion in approving the application for a BLUP? We do not believe so. The Council, being the decision-maker, exercised its discretion to derogate from the guidelines on the basis that the proposal for rearing of a few thousands more broilers on the same property had previously gained acceptance from the Department of Environment of the Ministry of Environment. Given the peculiar circumstances of this case, the Council was justified in granting the BLUP and we do not believe that the Council acted illegally or unreasonably.

This being said, although the appellant failed to adduce such evidence, we are in no way insensitive to the bio-hazard risks that could exist. But we also believe that as a further measure of security and comfort and to ensure biosecurity is not compromised, additional conditions can be imposed on the BLUP of the co-respondent no.2. We therefore order the Council to impose additional conditions to the BLUP of the latter with regard to proper ventilation, proper and adequate disposal of all types of waste including waste water, good husbandry and housekeeping that will mitigate any risk of biosecurity and negative impact on health and that the permit will be cancelled in case of non-compliance with the conditions.

The appeal is otherwise dismissed. No order as to cost.

Determination delivered on 19th March 2015 by

Mrs. J. RAMFUL

Vice Chairperson

Me. V. Reddi

Assessor

Me. Seetohul

Assessor