BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 574/13

In the matter of :-

Shezad Ali MAWOLABACCUS

Appellant

v/s

Municipal Council of Vacoas-Phoenix

Respondent

DETERMINATION

The present appeal is against a decision taken by the Municipal Council of Vacoas Phoenix (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (BLUP) for the construction of a building to be used as a poultry pen with less than 500 birds. The grounds for refusal were set out in a letter dated 28th October 2013 as follows:

"(i) The plot of land where the proposed poultry pen is to be put up is not big enough to cater for the buffer of 200m within the said site itself.

(ii) the proposed development will cause prejudice to adjoining owners for future development considering the fact that their properties will fall within the buffer of 200m."

Both parties were legally represented. The Appellant testified under solemn affirmation and was cross-examined by the Respondent's Counsel. His witness, Mr. Devanand Nathoo, Land Surveyor, also gave evidence but was not cross examined by Counsel. Miss Ramroop, acting head of the planning department of the Council subsequently deponed and was also subjected to cross-examination by Me. Jagoo, Appellant's counsel.

We have duly considered all the evidence placed before us, including the pleadings filed by both parties with the annexures as well as the report of the surveyor.

BACKGROUND

The Appellant explained that he has taken on a 10 year lease from one Manilall Surdha a plot of land of the extent of 2A19p situated at Petit Camp, Phoenix, which is currently agricultural **[DOC A].** The lease was signed in August 2013 for a yearly rent of Rs 40,000 starting in 2014. He intends to use a portion of it for the rearing of poultry after putting up a building on it [**DOC A1-A13**]. In short his case is that he had complied with all the conditions imposed by the Council and obtained a 'no objection' from the Ministry of Agro Industry and Food Security which was given to him subject to all conditions and necessary clearances having been obtained from the relevant authorities including the Council. He gave evidence that the surrounding land was purely agricultural and that there are no residential developments within the 200m buffer. The PER guidelines issued by the Department of Environment of the Ministry of Environment was also produced to show that there are stringent requirements for the rearing of cattle above 5000 in number. His case is also that the Respondent, by invoking the second ground of rejection, violated his constitutional right to pursue a legal economic activity by assessing the potential prejudice likely to be suffered by adjoining owners in the future. The surveyor called by the Appellant produced his report, marked **DOC C,** after solemnly affirming to the correctness of it. He gave evidence that the site was 230m from the settlement boundary and that the development itself could satisfy the buffer of 200m imposed by the Council. He stated that the Outline Scheme of Vacoas Phoenix was on Public Deposit Version which meant that it was yet to be approved after going through the relevant procedure although he later admitted that since the previous outline scheme is revoked, the Council will have no other scheme to follow than the one that is under deposit. He also briefly addressed us on the present state of the site and its surroundings as well as the guidelines on the rearing of poultry referred above. His testimony was found to be of limited assistance.

The Respondent's case rested mainly on the grounds set out in its statement of defence. The representative explained in cross that although the outline scheme was still under public deposit, the time limit for public representations had lapsed since June 2013. She also gave evidence that there were recommendations made by the Council to the Ministry of Lands and Housing when the current Outline Scheme was under preparation that all bad neighbour development should cater for the buffer zone of 200m within their own plots so as not to cause prejudice to adjoining land owners. We pause here to make an observation that having perused the Outline Scheme, we cannot find in any part of the Outline Scheme where this recommendation or any related issue has been addressed. Upon questions put to her, she also

stated if the site for the poultry pen is moved, on the one hand it would satisfy the 200m buffer zone from the defined settlement boundary but it would still not do so *vide* the adjoining properties. She explained to the Tribunal that the Ministry of Housing and Lands will eventually come up with an action plan whereby many plots in the area will be developed for mixed use development (residential and industrial). She however clearly stated that the Council cannot take a decision on this particular area as to what type of development will come in the near future, whether it would be industrial, mixed use or that the boundary of the residential area will be extended or that there would simply be no development at all. She also gave evidence that the Council sought clarification from the Ministry as to the urban expansion zone area which was not well defined in the proposed outline scheme but that the Council is yet to get an answer. She finally admitted that the objection of the Council was more in the nature of a preventive action.

ISSUES

1. **The plot cannot cater for the buffer of 200m within the site.**

We have it in the evidence of Miss Ramroop that the time delay for public representation on the Outline Planning Scheme of Vacoas Phoenix which has been under deposit has expired since June 2013. The evidence of the appellant's surveyor also confirms that the Council has to go by the Outline Scheme which is under deposit, the previous one being revoked upon submission of a new one. This shows that the Council was not wrong in assessing the application on the basis of the proposed Outline Scheme, for want of appropriate guidance. This is infact a matter of *Ordre Public,* which the Council has respected. **DOC A**, produced by the appellant, shows that the lease agreement was signed in August 2013. It is important to note that at paragraph 3, one of the terms of the agreement is that the lease will be for a period of 10 years starting from 2014 until 2024. As per the application form annexed with the pleadings, the application of the appellant was submitted to the Council on 6th August 2013 and the final decision was taken by the Council in October 2013. The appellant entered a contract with the owner of the property at Petit Camp at a time when the previous Outline Scheme was already revoked. Therefore the planning assessment has to be based on the more recent guidelines which were already under deposit at the material time.

The Council's stand is that as per the recommendations made by the Council, the developer, in cases of bad neighbour development, has to ensure that there is a buffer zone of 200m from the development within his property itself so as not to prejudice adjoining land owners. While it is important to note that these recommendations do not figure in the Outline Scheme, we do understand the rationale behind this recommendation in that one should not be deprived from

ones rights to peaceful enjoyment of one's property. This reinforces the argument that if a neighbour decides to embark on a project, it would normally not gain planning acceptance if it causes prejudice to surrounding land owners. The facts of this case are rather peculiar in that there are no objectors in the present instance but the Council has decided to impose the 200m buffer so that the surrounding land owners are not prejudiced. This calls for an analysis of the law and policies regulating the rearing of Poultry.

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"

Section **117 (3) Local Government Act** 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 in September 2009 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."* There is a need for such guidelines in view of biosecurity risks and pollution associated with such types of farming. A revised version of the guidelines is available on the website www.environment.govmu.org. As per these guidelines, in terms of siting of poultry farms, the selected site must satisfy a minimum distance of 200m from the settlement boundaries and sensitive land uses. It also states that it should be limited to agricultural land only.

From the evidence, it is undisputed that the proposed development can be moved within the site so that it respects the 200m buffer from the defined settlement boundary. The rationale behind this being that the defined settlement boundary is the limit of permitted residential development. This is clearly a fact that at this point exists. But what about the surrounding properties? The issue that begs addressing is whether the Council is right to reject an application on the basis that there may be future "sensitive" developments in the adjoining properties. The Guidelines issued by the Department of Environment *supra* states that the selected site must satisfy a minimum distance of 200m from **sensitive land uses**, the stress is ours. It would appear from the evidence of Acting Head Planner of the Respondent that at this

point in time the Council cannot make a pronouncement on what the potential use of these properties may be put to. As stated by her, and we agree, it appears that the decision was more of a preventive action.

There is a balance to be struck between the right of the individual to carry out a trade and the right of the decision- maker to take a decision in the interest of the public. The decision to have the 200m buffer zone unanimously applied to all bad neighbour developments, as seen above, has its own rationale. What is the right of the appellant now? The proposed development is on an agricultural site, surrounded by agricultural land where no one has objected as at the time the case was heard before the Tribunal. It appears that at this moment in time, given the present context, this development seems to satisfy all planning criteria and hence may gain planning acceptance. The problem that might arise is if ever in the future the adjoining land owners decide to put their land to 'sensitive' uses, as per planning jargon which basically means development involving people staying in a place for a long time such as schools, hospitals or houses. One has to bear in mind that once a BLUP is issued, it is attached to the land. **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.** The problem however is that unfortunately our legislation makes no provision for the revocation of such BLUP.

While we do believe, on the facts of the present case, that the Council was not wrong to assess the application under this policy, the use to which the adjoining owners may put their land to is a matter that no one can speculate, possibly not even the land owners themselves. It may well be that a neighbour wishes to carry out an activity compatible with the one the appellant seeks to do. On the other hand, the land use to which the appellant wishes to put the property, in our view, is not incompatible with the current status of the land and hence can gain planning acceptance at present. In order therefore to meet the ends of justice in this case, we believe that the appellant may be granted the relevant BLUP which will be subjected to review by the Council depending on the change in context with future developments and the moreso if there are objections in future. Since the appellant has taken the property on lease, setting up his business enterprise will inevitably be at his own risk and peril.

2. **The proposed development will prejudice adjoining owners for future development within the buffer of 200m.**

Having reached a decision under the first limb, we believe that we need not consider this ground since it is essentially an offshoot of the first ground and therefore these grounds are inevitably intertwined.

For all the reasons set out above, the appeal is allowed. The Council may grant the relevant BLUP to the appellant with any condition attached as it deems fit.

Determination delivered on 22nd April 2016 by

Mrs. J. RAMFUL	**Mrs. A. Jeewa**	**Mr. S.Karrupudayyan**
Vice Chairperson	**Assessor**	**Assessor**