THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

In the consolidated matter of:

ELAT 651/14

MRS OSAKA MANEL AUBEELUCK

APPELLANT

v.

DISTRICT COUNCIL OF PAMPLEMOUSSES

RESPONDENT

In the presence of:

EASTERN STONE CRUSHER LTD

CO-RESPONDENT

AND

In the matter of:

ELAT 659/14

MRS INDIRA JOOTUN

APPELLANT

v.

DISTRICT COUNCIL OF PAMPLEMOUSSES

RESPONDENT

In the presence of:

EASTERN STONE CRUSHER LTD

CO-RESPONDENT

Determination

The Appellants in the two consolidated cases had lodged an objection to the District Council of Pamplemousses against the application made by the Co-Respondent for a Building and Land Use Permit for the setting up of a stone crushing and block making plant and the construction of a ground and first floor building to be used as office at Morcellement St. Andre, off the Fond du Sac Road. The Council, now the Respondent, informed the Appellants by way of letter dated 7 March 2014 that the application had been approved by the Executive Committee, with a specific condition which is as follows: All conditions as mentioned in the EIA Licence shall be complied with.

In a letter dated 7th April 2014, received at the Tribunal on the 8th April 2014, the Appellant, Mrs. Aubeelack, wrote a letter notifying the Tribunal that she is appealing against the said decision, stating out the reasons for her appeal. The notice of appeal was received at the Tribunal on the 8th May 2014 laying down the grounds of appeal as follows:

1. The immediate neighbors to the proposed site were not all notified as required by law.
2. The permit was issued by the District Council despite the absence of water, electricity provision granted by the relevant authorities as required by law.
3. The proposed site is within the Northern Irrigation Plain and falls under the purview of the Irrigation Authority. The Ministry of Environment was ill advised for the Environment Impact Assessment.

At the very outset we note that the present appeal is not against the EIA Licence that was granted by the Ministry of Environment but is, as per the notice of appeal, against the decision of the District Council to grant a BLUP. As such,

the third ground of appeal, as drafted, is in respect of the Ministry's decision. It falls outside the ambit of the present appeal as the notice of appeal clearly spells out that the appeal is against the decision of the Pamplemousses District Council. We therefore find no reason to assess and cannot go into the merits of the EIA process here. The third ground of appeal is set aside.

After an initial plea in limine litis raised by the Respondent on the ground of that the appeal was lodged outside delay, the point was dropped on the 20 May 2015. Counsel for the Co-Respondent also did not press on taking the issue of delay as a preliminary point. The matter proceeded to be heard on the merits. An amended statement of case was put in by the Appellants, who were now legally represented, which raised several issues which had not been contemplated in the notice and grounds of appeal. In addition to the failure to notify all the neighbors and the issue of the site being in the Northern Irrigation Plain and that of water and electricity provision not having been granted by relevant authorities, the statement of case brought in other issues. These relate to the inadequacy of the road infrastructure for such a project and the increase in pollution level in the area, thus affecting the quality of their crop and the health consequences to all those working in the cane fields in the area. The detriment of the project to the other land owners in terms of the market value of their land was also pressed upon.

The Respondent did not file an amended statement of defence (SOD) and relied on the initial SOD, which in essence relied on the fact that the developer had obtained an EIA licence to operate and that the Planning Department made recommendations to the Council. These were to the effect that the EIA had been satisfactorily carried out and that the Council is only concerned with whether the procedures with the setting up of the plant are respected. The Respondent also averred that at the hearing held at the level of the Council, the Appellants did not challenge any planning regulations or/and statement from the EIA.

To this averment, we take into account that the Appellants were not legally represented at the hearing and may have been unable to raise legal points by way of challenging planning regulations among others. This could explain why their complaints consisted only of an exposure of their concerns as owners of contiguous sugar cane fields. The interface between their complaints on one

hand, and the decision to grant a permit on the other, in particular, whether it would be compliant with the planning instruments, is a matter for the Respondent to look into. The Respondent also wrongly construed that the Appellants had to raise issues in relation to the EIA in the course of the hearing, whilst the Council is not the body that granted the EIA licence.

The Co-Respondent, just like the Respondent, implicitly accepted the 'new' grounds as contained in the amended statement of case, as they raised no objection to them and traversed the averments. The Co-Respondent listed out and annexed in its SOD the authorizations obtained from the different authorities, namely, the EIA licence, the Land Conversion Permit, the Road Development Authority, the traffic adjustments made to the satisfaction of the Traffic Management and Road Safety Unit and the Monitoring plans submitted to the Ministry of Environment.

The Appellants and their representative Mr. Jootun, have adduced evidence on the consequences of the proposed development on their sugar cane plantations and were lengthily cross examined on these.

We have given careful consideration to the points and complaints raised by them as well as the submissions made by counsel for the respective parties.

At the outset, we note that much of the potential sources of nuisance as described by the Appellants are related to the environmental concerns, which fall under the purview of the EIA licence and within the ambit of the Environmental Monitoring Plan (EMP). This plan is an ongoing assessment of the project and its impacts at different phases of its implementation. In addition, the Council embodied the conditions of the EIA licence as part of the 'specific condition' to be observed by the proponent (Document R produced).

Much emphasis was put by the Appellants on the fact that the land is in the Irrigation Zone and that this zone is considered to be as "High Agricultural Suitability". The Co-Respondent on the other hand, has placed on record the approval obtained from the Ministry of Agro-Industry for a land conversion permit under the Sugar Industry Efficiency Act for converting an extent of 30,324 square metres for the setting up of the stone crusher and stone making plant (Document Q). He also produced a licence for installation of engines

issued by the Respondent on the 2nd April 2014 (Document S) to which was annexed the notice served to the Appellants as well as other neighbors. Notice for the public inspection of the EIA report in respect of the said proposed development have been produced as Documents U, U1, U2, U3 and U4. A further notice was placed in two newspapers in respect of the application for Building and Land Use Permit, inviting persons who may feel aggrieved to lodge their objection (Documents V and V1). These formalities that the Co-Respondent complied with, rightly rebut the ground of appeal raised that there had been no notification made to the neighbors, the more so that the return of the usher's service of the notice of the application of the Co-Respondent to install electric motors to operate the stone crushing and block making plant on the owners of the contiguous properties, including the Appellant, have been produced (Document T).

As regards the issue of inadequacy of the road and access to the site, we take into account the complaint of the Appellants that the road that the Co-Respondent proposes to use as access, is a common and party road, access to which had only been given to the Irrigation Authority for irrigation purposes. Nevertheless, the Respondent has placed before the Tribunal documentary evidence showing that all the required clearances had been obtained, namely: Document W, a letter addressed to the TMRSU with a drawing showing access and exit to the site and Document X, the clearance from the Road Development Authority to the implementation of the proposed project. It also came out from the examination in chief of the representative of the Co-Respondent that there have been developments as regards the ownership of the land adjacent to where the proposed development is being done (namely the proposed purchase of the land owned by one Mr. Saddul). This would have a bearing on the layout of the access and exit and any potential interference with the irrigation of the surrounding lands. Document Y was produced to illustrate the impact of this proposed purchase of the land. In the same manner, an agreement between the Co-Respondent and the Irrigation Authority (Document Z) sets down an elaborate plan whereby the activities of the stone crushing plant will not interfere with the irrigation activities of the Irrigation Authority at the site. The Co-Respondent also produced a series of photographs showing the measures taken by it to mitigate the potential pollution that may be caused (Documents

AA1 to AA15) and monthly reports on compliance to EIA conditions and environment Monitoring Plans (Documents AB1 to AB6), in compliance with the conditions of the EIA licence. The EIA licence was produced as Document AC.

Some of these matters arose after the decision to grant the BLUP was taken and after the appeal was lodged. Strictly speaking, they fall outside the purview of the present appeal. Yet, given the evolving context, they would have a significant impact on the layout at the spot and reality on the ground which, in our view call for consideration.

The submission of the Appellants on the other hand, is that the activity of the Co-Respondent constitutes a 'bad neighbor development', which is governed by Policy ID 4 of the Outline Planning Scheme for Pamplemousses Riviere du Rempart District Council Area (Approved version of September 2006, modified in August 2011), which provides that:

- *"The location of bad neighbor uses should follow the sequential approach... Bad neighbor developments are defined to include quarries stone crushing plants.....Preference should be given to proposals for bad neighbor developments which can be clustered to share a buffer zone....*
- *Such proposals should also ensure that: adequate road access and utility provision are available or can be provided as part of development costs....*
- *The development would not adversely affect areas suitable for agriculture or of environmental sensitivity or landscape significance.*
- *Mitigation measures including buffer zones, landscaping and an after care plan required as a condition of an EIA licence approved by the Ministry responsible for Environment are being capable of being provided within and around the site as part of the development costs.*
- *Acceptable uses within buffer zones may include agriculture, forestry...."*

It is noteworthy that the issue of the '*bad neighbor development*' was not raised as a ground of appeal. Nonetheless, being given that this is a planning

consideration, and being given the issue of potential nuisance raised by the Appellant, we shall give due consideration to this aspect.

The conditions of Policy ID 4 are, to a large extent, met by the list of measures taken and clearances obtained by the Co-Respondent, namely road accessibility and implementation of mitigating measures in compliance with the EIA conditions, among others. As regards the issue of the buffer zone, it is on record that a land conversion permit has been granted for the development of this land that was initially designated as agricultural land, Furthermore, it has come out in the evidence of the representative of the Co-Respondent that it was a government decision for the designation of the land in question to be declared within boundary and that all clearances from the Ministry of Housing and Lands and the Ministry of Agro-Industry have been submitted to the District Council. This evidence has not been rebutted.

It has been submitted that the Respondent has failed to act within its statutory obligation of having regards to the planning instruments. The response from the Council is that the Council was part of the EIA Committee that granted the EIA licence. The Council has imposed the condition of strict compliance with the EIA licence as part of the BLUP. The concerns expressed by the Appellant as regards the potential impact on the environment have been taken care of by the Environmental Monitoring Plan, and this is a continuous process. The Council was in presence of clearances obtained from the RDA and TMRSU when assessing the issue of accessibility to the site. The second ground of appeal as contained in the notice of appeal is thus not sustained. The issue of failure to notify the neighbours of the proposed development, as per the first ground of appeal has been negated by ample evidence showing the contrary.

The Appellant has also raised the issue of economic loss to her by the negative impact of the plant on her crop. This is not a matter that has been canvassed in the grounds of appeal. In addition, it is an economic issue which is not within the planning matters that require the Council's consideration.

Finally, now that we have taken cognizance of the numerous developments that postdate the lodging of the appeal, namely the negotiations between the Co-Respondent and another land owner which would resolve the road accessibility

to the site, the proposed works on the land so as not to affect the irrigation pipes (which were not matters placed before the Council as they occurred after the decision to grant the BLUP), we find that it is appropriate for us to have regard to these developments that address the very complaints of the Appellants. Failure on our part to do so will amount to this Tribunal engaging in an academic exercise.

We also highlight that a two tier assessment, through the EIA process on one hand, and the application for BLUP on the other hand, can, in practice, prove to be a duplication of resources and an academic exercise. What is under assessment is one development project. The assessment by the EIA Committee under the EPA (Environment Protection Act) and that by the PBMC under the Planning and Development Act should not be done in isolation. The above-mentioned provision of Policy ID4 on 'Mitigating measures' (supra) and the integration of the EIA conditions as part of the specific condition contained in the BLUP is clear indication of the interlink between these two processes. As such we do not find that the Respondent has faulted in its decision to grant the BLUP with conditions. We also find, for all the above-mentioned reasons, that there is no substance in the grounds of appeal raised by the Appellants.

The appeal is accordingly set aside. We hasten to stress that the onus is on the Respondent to monitor the compliance with the BLUP and the conditions contained therein.

Delivered on 26th November 2019 by:

Mrs. Vedalini Bhadain, Chairperson

Mrs. Brinda Kaniah, Assessor

Mr. Soondren Karupudayyan, Assessor