BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

**ELAT 91/12**

**In the matter of:**

**Kumaraswamy Bulramaya & Ors**

**Appellants**

**v/s**

**The District Council of Flacq**

**Respondent**

**In the presence of:**

**Societe M. R. Rambarran Bros**

**Co-respondent**

**DETERMINATION**

1. The appellants are the heirs of late Vasudeva Bulramaya, who had initially lodged the appeal. Societe M. R. Rambarran Bros is the co-respondent in whose favour the Building and Land Use Permit ['BLUP'] was granted on 15th March 2011 for an extension to be made to the ground floor of an existing building which is to be used as workshop for screen printing under corrugated iron sheet. The Council initially resisted the appeal but reversed its stand on the basis that one of the conditions, namely condition number 2 stipulated in the BLUP has not been complied with and again changed its stand and decided to resist the appeal. All parties were legally represented.

2. It is noteworthy that the Tribunal, before a differently constituted bench, gave a ruling dated 1st September 2017 on a point in law that was raised by the Co-respondent to the effect that the Tribunal had no jurisdiction to hear this case in as much as the issue relates to a condition of the BLUP which imposes an obligation on a third party (who is infact the lessor of the property leased to Societe M.R.Rambarran Bros.) who is not a party to the present proceedings. Reference to this ruling will be made in due course.

3. We will not reproduce the testimony of witnesses or submissions of Counsel save where we deem it fit to do so. It suffices to say that we have duly considered all evidence adduced as well as submissions of Counsel appearing for all three parties. Our starting point is to look at the impugned decision. The Appellants are aggrieved by the decision taken by the Council to grant the BLUP for the reason that by virtue of the development, which has been given approval, nuisance is being caused to them in terms of noise and dust pollution. It is not disputed that the area where the co-respondent is carrying out its business, at Royal Road, Bel Air, is a residential area. This is not only confirmed by the representative of the Respondent but also found in the application form submitted by the representative of the co-respondent to the Council and also by the officer who assessed the merits of the application and has classified the area as being within settlement boundary. This is, in planning terms, an area where residential development is favoured.

4. The type of area having been established, the type of development must be one that can gain planning acceptance within a residential area. We are alive to the fact that the appeal before us is one regarding an application for an extension of a workshop, which in essence means that the workshop pre-existed. Nevertheless, it is our view that we need to look at the basis of the development to see if the issues in dispute bear some validity. The application made the co-respondent is one of an industrial nature, as is evidenced from several documents including the application form on record, and referencing given by the Council as well as from the testimony of the co-respondent's representative. The business is described as "textile industry" and the development

sought by the co-respondent is an extension of the workshop on the ground floor under CIS roof.

5. The extension of the existing premises can only come as an extrapolation to the main industrial development that has been approved by the Council. Being given the fact that the area is a residential one found within settlement boundary of the Outline Planning Scheme, the applicable policy is **Policy ID2 of the Outline Planning Scheme of Flacq**relating to developments permitted in residential areas and reproduced below:

*"ID 2*

***Small Scale Enterprises and Home Working***

***Proposals to operate or extend office/business uses or small scale enterprises from residential properties should only be permitted if the use is ancillary to the principal use as residential. Criteria should include:***
**(i)** ***Premises are of a suitable size and design to accommodate theadditional activity and all its ancillary requirements such asparking, loading area and adequate setbacks from neighbouringproperties.***
***(ii) No neighbours' objections within a radius of 50 metres.***
**(iii)** ***no serious adverse impact on residential occupiers in the areaor the character of the neighbourhood particularly in regard tonoise, smoke, fumes, smells, dust nor excessive vehiclemovements or loading and unloading of goods and products;***
***(iv) Sufficient parking space within the curtilage of the propertyavailable to accommodate any staff or visitors;***
**(v) Safe access from the roadway.**
***Storage of materials should be able to be contained within the cartilage of the property. The operator of the office/business use or small scaleenterprise should reside at the premises...***

*...Industrial uses such as panel beating and spray painting, manufacture of furniture and vehicle repairs are not normally acceptable uses within residential areas due to dust, noise, fumes,*

*vibration and other adverse environmental effects. Examples of potentially acceptable small scale enterprises include cooking of sweets and food preparation, sewing and small scale clothing manufacture, repairs to electrical goods, minor car/mechanical and bicycle repairs, artists repairs, artists studios, offices such as book keeping, administration, professional services etc.........For both the use of home as office or other small scale enterprise the key consideration is whether the overall character of the dwelling and surrounding amenity will change as a result of the proposed use. If the answer to any of the following questions is 'yes' then the proposed enterprise, by reason of its nature or scale is likely to be unacceptable:*

- *Will the home no longer be used mainly as a private residence?*
- *Will the enterprise result in a market rise in traffic or people calling?*
- *Will the enterprise involve any activities unusual in a residential area?*
- *Will the enterprise disturb your neighbours at reasonable hours or create other forms of nuisance such as noise, dust, fumes or smell?"*

**6.** It is clear from the above provision that for a development to gain planning acceptance within a residential area, the type of activity being carried out must be conducive to the character and amenity of a residential area such that it is not disruptive to the neighbourhood. The Appellants, whose parents' house is contiguous to the premises where the co-respondent operates its business, have objected to the development on the basis that with the extension being on the side closer to their property, the activities generated are causing nuisance mainly in terms of dust. This appears to be their main concern although they also invoked noise nuisance. Their case is that one of the conditions attached to the BLUP have not been respected, namely condition 2, that the wall be adequately fenced. It is their contention that despite several attempts being made by them to either get the Council to ensure compliance to the conditions attached to the BLUP or by reporting the matter to the concerned authorities such as the Ministry of Health and Quality of Life and the Ministry of Environment, up until now the wall has not been adequately fenced.

7. We have gone through the record. This is a case which had been lodged before the Town and Country Planning Board ["TCPB"]and transferred to this Tribunal following the enactment of the Environment and Land Use Appeal Tribunal Act 2012. The representative of the Appellant stated that all documents regarding their case had already been submitted to the TCPB which is now found in the file of the Tribunal. From the minutes of the meeting held at the Moka Flacq District Council on 26th October 2010, it would appear that the representative of the Co-respondent stated that the business of the Co-respondent has intensified and hence the application for extension.The Appellants' representative on the other hand had stated that the Appellants were willing to come to a compromise provided that there was an undertaking regarding the construction of an appropriate septic tank, that the yard was properly fenced and tarred as their premises were only some fifteen metres away.

8. The owner of the property, Mr. Panjanaden, was subsequently convened and as per minutes for meeting before the Permits and Business Monitoring Committee ["PBMC"] held on 7th December 2010, the BLUP was approved on conditions that the plans submitted should show that "the outlet be properly enclosed" and that the undertaking of Mr. Panjanaden for fencing be inserted in the condition. There also a letter on record dated 7th April 2010, that is after the granting of the BLUP to the Co-respondent, under the signature of the then acting Chief Executive Mr. Ramanjooloo addressed to Mr. Panjananden stating at the third paragraph *"As part of expost exercise, it has been observed that needful has not yet been done and the PBMC of 03 March 2011 is of the view that the premises should be tarred and fenced at the earliest as previously decided by the PBMC of 19 March 2008. In this context, it would be highly appreciated if you could indicate the date when your proposing to execute the abovementioned works."*

9. Mr. Purdhun, Senior Environment Officer, posted at the Department of Pollution, Prevention and Control of the Ministry of Environment and Sustainable Development, testified and produced a report, Doc A, wherein he averred that the parking area of the Co-respondent's premises was untarred and simply had a layer of rocksand, sand and

soil. It was also stated therein that there was no boundary separation between the parking area and the premises of the complainant. In his report it was also mentioned that there was no dust rising at the time of the site visit since there was no vehicular movement in and out of the parking area but *"based on the untarred flooring of the parking area, there would a high probability of dust rising when vehicles go in and out."* His report also makes mention that dust was found to be accumulated around the window panes, with pictures clearly showing so, and as part of the recommendations made, it was stipulated that the complaints were justified and the matter was brought to the attention of the Council to take the appropriate action and follow up to be maintained by the Council . We have no reason to doubt the veracity of the observations made and conclusions reached by this expert from the Ministry.

**10.** Doc B on record, report from one Mr. Saminathen, Senior Health Engineering Officer, from the Ministry of Health and Quality of Life, to show that back in 2008 also the Appellants had complained about the dust pollution emanating from the same parking area. In any event, we believe that if a large parking area is not covered with any material to keep the soil settled, it is likely to make the soil particles rise with every movement of vehicles or even the wind. Infact condition 21 of attached to the BLUP stipulates *"The site of the construction works shall be properly fenced and screened to avoid propagation of dust/mud to the immediate environment."* We believe that the Council, in its application of the **policy ID2** should not have granted the BLUP the moreso as there has always been an objection from the immediate neighbour in respect of dust pollution, which the Council should have taken on board prior to issuing another BLUP for the extension to accommodate the intensification of the existing development.

**11.** Learned Counsel appearing for the Co-respondent submitted that whether the parking is tarred or untarred, whether it is fenced or not is not the issue before the Tribunal but it is rather whether the BLUP was rightly granted and whether the conditions attached to the BLUP were satisfied or not. We believe that from a planning angle, the Council's decision to grant a BLUP for the extension was incorrect since this type of industrial

activity in itself cannot be categorized as **"Small Scale enterprise and home working"** that is allowed within a residential area within the **Policy ID2** *supra*.Therefore, it stands to reason that a BLUP for an extension of this development cannot be considered on its own without looking at the broader issues. In the present case, an extension to an already "bad neighbour development" cannot be assessed in a piecemeal fashion to see whether part of the building can be assessed as a good development and granted a BLUP. By virtue of the fact that the nature of the business of the Co-respondent is such that a parking area is a requirement and that parking area is untarred and next to the residential building of the Appellants, the dust is affecting the day to day life of the Appellants. The air pollution has been an issue for them for years such that they are not able to have a peaceful enjoyment of their property.

**12.** The representative of the Co-respondent does not dispute that they knew that the second condition of the BLUP was not complied but their position is that they being tenants of the property, it is for the landlord to incorporate the changes in the building. According to the annexes of the Statement of Defence of the Respondent produced before this Tribunal on the 11th June 2013, the minutes of the hearing held before the District Council of Moka Flacq on Tuesday 26th October 2010 show that the applicants of the BLUP as represented by Mr. Raffick Rambarran and Mr. Manodge Rambarran, stated that they were not the owners of the property where they already have an existing business which they are carrying out but that they were willing to incur the costs of any changes that needed to be brought to the premises subject to the authorization of the owner Mr.Panjananden Muneesawmy. It was decided that the committee would convene a meeting with Mr. P. Muneesawmy. According to the minutes of PBMC held on Tuesday 7th December 2010, the matter was taken up and it was decided by the committee that "the undertaking of Mr. Panjanaden for fencing to be inserted in the condition".

**13.** Counsel for the Co-respondent raised the issue of whether the Council is empowered to impose and ensure compliance of conditions attached to the BLUP where such condition is dependent on a third party who is not a party to the case at hand. The BLUP dated 15 March 2011 and issued to the Societe M.R.Rambarran Bros contains a condition (at number 2) attached to the BLUP which stipulates *"The property to be fenced as per undertaking given by Mr. Panjanaden Muneesawmy on 02 December 2010."* We believe that this issue had been dealt with extensively in a ruling delivered by a differently constituted bench of this Tribunal in this case itself before it started anew. An extract of that ruling is reproduced as we believe that it is still good law by which we stand guided:

*"In planning law, an important factor to consider is the relationship of the proposed development on adjoining or other land in the locality including but not limited to any negative effect that may be felt. It is of course then for the authority or the tribunal to weigh up these considerations along with all other relevant considerations relating to the application, and make an assessment of the situation to determine whether in the light of all relevant considerations it is appropriate to grant approval of the BLUP, and if so, subject to what conditions. Now, conditions must also be valid and they are considered to be valid if pass the test of validity. The test of validity of planning approval was set in the English case of* ***Newbury District Council v Secretary of State for the Environment [1981] AC 578****, and subsequently endorsed by the High Court of Australia in* ***Western Australian Planning Commission v Temwood Holdings Pty Ltd [2004] 221 CLR 30****. From these cases, it can be gathered that (with the exception of the last condition which though not mentioned in the caselaw above, was subsequently added to the test of validity in Western Australian jurisdiction) a condition is considered to be a valid one if:*

*(i) it has a planning purpose,*

*(ii) it fairly and reasonably relates to the development,*

*(iii) it is not so unreasonable that that no reasonable authority could have imposed it, and*

*(iv) the condition is certain and final."*

***14.*** The Tribunal thus considered the validity of conditions imposed by local authorities by making the analysis, "*We agree with Counsel for the Co-respondent to the extent that the local authority should not impose conditions on an applicant to the extent that it is unenforceable. It seems that in law such a condition may fail the test of validity. A condition may be unenforceable on the ground that the local authority has no power to secure compliance with the condition. In the case of* ***British Airports Authority v Secretary of State for Scotland [1980] JPL 260****, a condition was imposed in the grant of permission for development at Aberdeen Airport concerning the flight path of aircraft taking off and landing at the airport. The condition was concerned with matters over which the applicants had no control, since statutory authority to prescribe the direction of flight or aircrafts lies with the Civil Aviation Authority. Since there were no steps that the applicants could take to secure the result required by the condition, for that additional reason, the authority was held to have no power to impose it under the relevant statutory authority...*

*...The Council has a duty to impose conditions to control development not only to enhance the quality of the development but to ameliorate any adverse effects that might otherwise flow from the development such as encroachment on the existing use rights of other adjoining land owners/users. This is a matter which vests within the administrative discretion of the local authorities but subject to scrutiny by judicial or quasi-judicial bodies such as this Tribunal. In imposing a condition to have the proposed development adequately fenced, the Council was simply exercising its jurisdiction of ensuring control over the development such that the proposed development did not affect and was not a constant nuisance to adjoining land users, who have a right to a peaceful enjoyment of their property, the moreso as there were complaints made by the appellants before the same committee of the District Council of Moka Flacq on Tuesday 26th October 2010 in the presence of the co-respondents and respondent's representatives. The condition imposed by the Council is with regard to the state of the premises where the development is to take place and this was done so that the proposal can gain planning acceptance. If the Co-respondents are to operate on those premises, they are to ensure*

*compliance with the conditions imposed and it was on the basis of the undertaking given by Mr. P. Muneesawmy, that the Council issued the BLUP for the extension to the Co-respondents, in the first place. Now, this cannot be a one way traffic. If the BLUP was granted to the Co-respondents upon the Council being satisfied at the time that the development* *<u>as proposed</u>* *(with the undertaking given by the owner of the property in lite) would not affect the adjoining land users, the co-respondents cannot say that they were not privy to the undertaking which was granted to their benefit. The condition imposed by the Council was to make the premises for conducive to the development proposed, and not on any third party as such. For reminders, it was an undertaking given by the owner of the premises, Mr. Panjananden Muneesawmy, not a condition imposed on him."*

*15.* We believe that the Tribunal was correct in its approach as set out above and therefore find no reason to depart from this stand. Furthermore, as far as the law is concerned, we do not agree with the submissions of learned Counsel for the Co-respondent that the Council is precluded from imposing conditions. The Council is fully entitled to impose such conditions as it deems fit. **Section 117 (10) of the Local Government Act 2011** clearly stipulates at subsection (a) that *"<u>Every Outline Planning Permission or Building and Land Use Permit shall be issued subject to such conditions as the Municipal City Council, Municipal Town Council or District Council may deem appropriate</u> and on payment of such fee as may be prescribed by regulations made by the Council."*(stress is ours). If these conditions cannot be complied with by the developer, then it amounts to a lacuna in its application of the development proposal for which the Council should have rejected the application or cancel the BLUP for incapability of enforcement of the condition attached.

*16.* It was submitted on behalf of the Co-respondent there was no evidence of consent being given by the landlord to Societe Rambarran Bros. as the latter was not privy to any meeting between landlord, Mr. Muneesamy and the Council. We do not believe that

this argument holds because if this is meant to suggest that there was no consent by the landlord to erect any wall or fence his property, this again goes against the granting of the BLUP to the Co-respondent. It is tantamount to the premises not being conducive to gain planning acceptance to accommodate within the amenity of a residential area an extension for the purposes of intensification of the industrial activity of the Co-respondent.

17. For all the reasons set out above, we believe that this appeal is with merit. The Council was wrong to have issued a BLUP and wrong not to have cancelled the BLUP following the non-compliance of conditions set out. This is part of ex-post control and part of the duties of the Council to ensure compliance with planning laws of this country. The Council is therefore ordered to cancel the BLUP for the extension made to the ground floor of the existing building which is being used as workshop for screen printing under corrugated iron sheet. We note that the Council may always consider a fresh application by the Co-respondent after the appropriate changes have been made regarding tarring of the carpark and erection of an adequate boundary wall to abate the nuisance being caused to the Appellants. The Council is called upon to exercise due care in the application of its policies, the moreso when it comes to residential areas. Afterall it is enshrined in the Constitution of this country that every citizen has a right to enjoy his property, and this encompasses the right to a peaceful enjoyment of his property. The appeal is allowed. No order as to costs.

Determination delivered on 24th October 2019 by

| **Mrs. J. RAMFUL** | **Dr. B. MOTAH** | **Mr. H.MEETOO** |
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| **Vice Chairperson** | **Assessor** | **Assessor** |