

IN THE MAGISTRATE'S COURT OF FIJI AT NASINU

[ENVIRONMENT TRIBUNAL]

ENVIRONMENT TRIBUNAL ACTION NO: 05 OF 2019

BETWEEN

RICHARD WALTLINGS &

[1st Applicant]

SAMABULA AND TAMAVUA NORTH RESIDENT GROUP

[2nd Applicant]

vs.

SANDEEP. K. SINGH

[1st Respondent]

AND

MINISTRY OF ENVIRONMENT

[2nd Respondent]

Counsels : Mr. P. Low for the Applicant's
 : Mr. T. Cagilaba for the Defendant's
Date for Hearing : 5 September, 2022.
Date for Ruling : 13 December, 2023.

RULING

Introduction

1. The Applicants are dissatisfied with the decision of the First Respondent to approve, subject to conditions, the Environmental Impact Assessment (EIA) in respect of the proposed container yard and bond shed for Hunters Investment Limited (HIL).
2. The Applicants' appeal is threefold:

(a) the EIA Report is defective because it failed to properly address specific requirements raised by the Terms of Reference (TOR) and satisfy the various factors highlighted in section 27(2) of the Environmental Management Act 2005 that need to be considered when examining the development proposal;

(b) the Respondents breached the Environment Management Act 2005 (EMA) by failing to comply with the strict deadlines set by legislation; and

(c) the Respondents failed to consider relevant information/evidence which shows that the development activity poses a significant public and safety risk (such as the risk of landslip or soil liquefaction) both during construction and operation.

A Brief History

3. The Applicants are residents living in the vicinity of HIL's container yard (the **Site**). Many of them live on Prince's Road which is at the top of the hill next to the Site.
4. In November 2017, the Applicants raised concerns regarding the clearing, excavation, heavy earthworks, and movement of heavy machinery/containers at the Site to the Respondents. Their complaints included:
 - i. damage to the cliff and hillside that may destabilize the area and potentially impact the structural integrity of their buildings, considering the historical data on geological issues with the area;
 - ii. regular heavy machinery and vibrations which could affect the foundations of the properties up-slope;
 - iii. and noise and activities continuing throughout the weekends past 7 p.m. and even midnight on certain occasions, interferes with the Applicants' rights to the quiet use and enjoyment of their properties.
5. On 10 January 2018, a Prohibition Notice was issued by the Respondents preventing any further activity in the area due to the fact that the Respondents did not have any record of an EIA being approved for the Site.
6. The Respondents prepared a TOR dated 14 June 2018 and an EIA Report was undertaken and prepared by HIL. In February 2019, HIL submitted its EIA Report.

7. On 23 July 2019, the Respondents issued a Review Report on the EIA for HIL's proposed development which listed a number of issues with the EIA Report.
8. On 9 August 2019, the Respondents purported to conditionally approve the EIA Report of HIL. The Applicants appealed the Decision on 29 August 2019.

The Applicant's submission.

GROUND 1: Defective EIA report

9. The EIA report was defective because it failed to address specific questions and requirements raised by the TOR.
10. The EIA report did not include:
 - i. An inventory of avifauna (bird) species within the project area focusing on their ecological significance and population status in Fiji.
 - ii. The tabulation of personnel involved in the preparation of the EIA, their expertise and roles.
 - iii. The significant earthquake hazard evidence demonstrates the inherent instability and vulnerability of the site and potential that the development proposal could result in a landslide or soil liquefaction putting multiple properties and lives at risk.
 - iv. The public concern related to the evidence that was not taken into account in part (c) above.
 - v. The failure to consider whether there were any technical or economically feasible measures that would prevent any adverse environmental impact at the site.
 - vi. The public concern relating to an industrial activity taking place on the site.
 - vii. A cost benefit analysis which must include professional estimation of the loss of residential property values affected by the development.

- viii. The undertaking of a noise study of a commercial container yard, to determine likely levels that will be encountered at the boundary of the proposed development site and noise, vibration and emissions levels to be expected of the proposed development once fully operational on the project area and the surrounding environment.
11. Furthermore, HIL's EIA did not meet the TOR. The following were some of the shortcomings of the EIA report in satisfying the terms of reference (TOR) for the proposed development. The EIA report failed to adequately address a number of issues which were required under the TOS, At the risk of repeating, including:
- i. the potential for geological hazards in the area
 - ii. public concern about the development
 - iii. the technical or economic feasibility of the development
 - iv. the impact of the development on neighbouring residents
 - v. the noise levels from the development

Ground 2: Failure to comply with deadlines set by the EMA

12. The decision to approve the EIA report was made in violation of section 30(4) of the EMA in that the decision was not made within 21 days after the period specified in subsection 30(3) of the EMA had expired. The Respondents were also in breach of regulation 31 of the Environment Management (EIA Process) Regulations 2007 by failing to prepare a review report within 35 days of the submission of the EIA report.

Ground 3: Unreasonableness

13. The Applicants submit that the decision in this case was so unreasonable because the Respondents failed to consider matters which were relevant to the proposed development.
14. These matters include;

- i. The geological history and structural setting of the Tamavua-i-Wai valley where the site is located.
 - ii. Whether the proposed use of the site as a shipping container yard is permissible under the Suva City Council Approved Town and Industrial Development Planning Scheme General Provisions.
 - iii. The potential nuisance caused by the noise and other factors such as the effect of heavy machinery on the slope stability.
15. In addition, a Review Report on the EIA was prepared by the Respondent after Dr. Watling submitted a detailed review of the EIA, which highlighted several issues that were not adequately addressed in making the decision to accept the EIA.
16. To be specific, the EIA is silent and does not address the operational noise as required by the TOR. The EIA provided a noise survey, and not a study of the noise. It did not evaluate the effect of operation noise on neighboring residences. There was no consultation with the concerned neighbors or people directly affected by the development; and the EIA did not evaluate the effect of heavy machinery movement and vibration on slope stability.
17. The above reasons are submitted justifying the position that the appeal should be allowed and the decision to be reversed.
18. It would now be prudent to consider the position of the Respondent on all three grounds of appeal beginning at the first ground.

The Respondents' Submissions

The Position of the Respondent on Ground 1.

19. The Respondents deny that the EIA report was defective and argue that the report did meet the requirements of section 27 (2) of the EMA.
20. The 2nd Respondent took into account section 27 (2) of the EMA when making a determination on whether an EIA would be required or not and decided that a full EIA was to be undertaken and the EIA contained inter alia, the following considerations;

- i. The inventory of avifauna, under Ecological Resources Assessment Report in the appendix of the EIC report;
- ii. The tabulation of the personnel involved in the EIA report
- iii. A Geotechnical Investigation Report that conducted field testing, data interpretation and analysis. This Report concluded that no significant risk to slope stability of the Tamavua Ridge is anticipated as a result of the proposed development.
- iv. A stakeholders Engagement Consultation process was conducted as part of the EIC Report to comply with section 7 of the EMA. The concerns that were raised in these meetings were recorded in the EIA and were taken into account before a decision was made.
- v. Further, under the Suva City Town Planning Scheme 1979, the existing freehold parcel of land are zoned as 'General Industry' to which the storage of containers are permitted as appropriate use of the site.
- vi. The EIC report also considered a Cost Benefit analysis and found that the proposed commercial development will not negatively affect the value of the residential and commercial properties directly above the development site.
- vii. Furthermore, a Baseline Noise Survey was conducted in the vicinity of the area between June and October 2018. The findings were also put into the EIC report.

The Position of the Respondent on Ground 2.

21. In response to appeal ground 2, the EIA report could not be decided within 14 days of the 21-day public review period as required by section 30(3) because section 30(1) mandates the Department to appoint a review committee to review the EIA report. The public review period ended on May 21, 2019, and the review committee was unable to meet until July 2019. The Department also considered additional public review meetings. Only after this process and further clarifications were made was a decision made in August 2019.

The Position of 1st Respondent on Ground 3.

22. The respondents do not believe that the decision made in this matter was unreasonable.

Analysis

23. The crux of the matter lies in the EIA and its approval, which the Applicants have appealed on three grounds:

Deficiencies in the EIA Report:

- i. Lack of thorough assessment of geological hazards and site stability.
 - ii. Inadequate attention to public concerns and potential impacts on residents.
 - iii. Insufficient evaluation of noise impacts.
 - iv. Limited stakeholder consultation.
24. While the Respondents claim to have addressed these issues in the EIA, the detailed examples provided by the Applicants cast doubt on the report's comprehensiveness.
 25. In my mind, it establishes a strong case for an inadequate and potentially flawed EIA.

Breaches of Statutory Deadlines:

26. The Respondents admit to exceeding the mandated timelines for EIA approval stipulated in the Environmental Management Act 2005.
27. While they offer reasons for the delay, such as appointing a review committee, these justifications do not erase the legal violation.
28. In my mind, these breach of deadlines strengthens the Applicants' position and raises questions about the legitimacy of the approval process.

Unreasonableness of the Approval Decision:

29. The Applicants argue that the decision itself was flawed due to the Respondents' failure to consider critical matters:
 - i. Geological risks
 - ii. Land use restrictions
 - iii. Noise impacts
 - iv. Review report inconsistencies

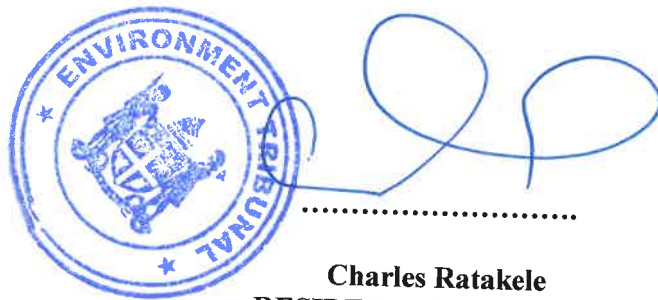
30. While the Respondents claim to have factored these considerations into their decision, in my considered view, they have not and this further fortifies the argument of unreasonableness in the final decision.

Findings

31. Based on the available evidence, the Applicants' arguments appear strong and well-founded. They raise serious concerns about the EIA's adequacy, timeline breaches, and potentially questionable decision-making. While the Respondents offer counterpoints, the arguments submitted lack the substantiality to fully address the violations and shortcomings highlighted by the Applicants.
32. I accept the submissions made by the Applicant and reject the submissions made by the Respondent.

Decision

33. Pursuant to section 53 (3) of the EMA I confirm the appeal.
34. Costs awarded to the Appellant summarily assessed at \$6000.00.



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Charles Ratakele
RESIDENT MAGISTRATE

Delivered this on 13th day of **December, 2023.**