BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2040/21

In the matter of:

Mr. Jayprakashsing Rutnah

Appellant

v.

The District Council of Riviere du Rempart

Respondent

Determination

The Appellant applied to the Respondent for building and land use permit (BLUP) for the construction of a reinforced concrete building at ground floor, including a boundary wall of 1.8 metres high, for residential purposes, at Poudre d'Or link road, Mon Loisir, Riviere du Rempart. The decision of the Respondent, taken by the Permits and Business Monitoring Committee (PBMC) on the 29th July 2021, was communicated through the National Electronic Licensing System. The grounds of refusal contained therein are as follows:

(i) Site lies Outside Defined Settlement Boundary by approximately 500 metres, Land Conversion Permit not submitted,

(ii) Site lies within the buffer zone of a poultry pen.

In the course of the hearing, the objection in relation to the land conversion permit and the site being in the buffer zone of a poultry were not insisted upon by the Respondent and were dropped.

It came out (as per Document C filed) that the Appellant had submitted a first application for BLUP, which was also rejected by the PBMC on the 24th June 2021 on the sole ground that the site lies outside the defined settlement boundary by approximately 550 metres and the Land Conversion Permit was not submitted.

For the purposes of the present matter, however, an appeal has been lodged by way of a Notice of Appeal dated 19th August 2021, and is against the decision dated 29th July 2021, the grounds of appeal being as follows:

(i) The decision to refuse the BLUP is not in accordance with section 117 of the Local Government Act, policy and guidelines.

(ii) The Appellant avers that the said decision is unfair, unreasonable and is in breach of the principle of natural justice inasmuch as:

(a) The Appellant was not given the opportunity to submit further information

(b) The Respondent failed to make an *in concreto* assessment of the proposed development

(c) The site is situated on the edge of the actual *in concreto* settlement boundary, and thus, the Policy SD3 instead of Policy SD4 should have been applied thus

giving rise to a general presumption in favour of development on the edge of settlement boundaries.

(iii) The sequential approach for release of land for residential purpose would apply inasmuch as:
  (a) There are already developments in the vicinity of the site.
  (b) Adjacent plots to the site are either developed or have obtained development permits and fitted with water and electricity supply is readily available.
  (c) The land is neither essential for the purpose of agriculture, nor located within an irrigation zone.

(iv) The Respondent failed to take into consideration that the site *in lite* is exempt from an application for land conversion permit and took into account irrelevant factors.

(v) The assessment of the Respondent is flawed an unreasonable since the latter has come up with inconsistent and new grounds of refusal over two similar applications.

In the statement of case filed, the Appellant made a chronology of the two applications that he had submitted to the Council and highlighted the discrepancies in the decision, firstly, the approximate assessment of the distance from the settlement boundary, secondly, the fact that the Respondent had not liaised with the Ministry of Agro-Industry and Food Security on the need for a land conversion permit and, thirdly, the criterion that was newly added, namely, the presence of a buffer zone due to the presence of a poultry pen.
Annex D to the statement of case refers to the guideline issued by the Ministry of Agro-Industry and Food Security on the exemption from application for land conversion permit for land up to 2 hectares (4,7392 arpents), and Annex E is a document from the notary public certifying that the land is located in an area where development is permissible in accordance with an outline scheme.

In its statement of defence, the Respondent maintained the position that the application had been assessed and rejected based on clear planning grounds and reasons and that the procedure and decision-making process it adopted was in line with the provisions of the Local Government Act 2011 and same cannot be impeached.

The evidence:

At the hearing, the Appellant deposed and produced copies of the two decisions of the Respondent as Documents A and B. He highlighted that the limb related to the land conversion permit, as well that relating to the site being within the buffer zone of a poultry pen had been dropped. The sole issue before the Tribunal is that of the site lying outside settlement boundary by 550 metres (as per Document B).
The Appellant explained his contention that he had not been convened for any explanation nor for further documents, which the Council ought to have considered. His view is that there had not been any assessment at all, nor any site visit for which he was made aware. Furthermore, he explained that, at the request of the 'preposés' of the Respondent, he had submitted a second application after the rejection of his first application. The second rejection was based on a different distance, approximately 500 metres, as per the letter, which is revealing as to the assessment conducted by the Respondent.

It is clear that the Appellant was dissatisfied with the decision, more specifically upon finding an additional ground of refusal (the presence of a poultry pen which had been added and which was dropped by the Respondent in the course of the hearing).

Whist restricting ourselves to the sole ground of refusal, namely, that the site is located outside defined settlement boundary, we feel the concern felt by the Appellant on the manner in which the assessment of the application had been done by the Respondent. On this score, we turn to the testimony of the representative of the Respondent. We have been struck by the lack of precision and the numerous inconsistencies in her testimony, which revealed a poor and approximate assessment of the whole neighbourhood, so much so that her evidence was unreliable for the purposes of assessing the planning merits of the proposal.
The Tribunal conducted a site visit in order to get a clearer picture of the premises, but the representative of the Council was not in attendance and we had to be 'guided' on the site by another officer, who could not shed light on the issues that were referred to in the course of the cross examination. and which required clarifications. Our 'constat' on the site was that there was the presence of other developments in the vicinity, namely, the presence of a business venture dealing in the manufacture of herbal products, and which was connected water and electricity supply.
The site was not far from the Schoenfeld By-Pass Road, which appears to be a busy road.
The internal access to the site was not tarred, yet vehicular movement was possible. It came out that there had been a BLUP delivered by the Respondent to a residential development quite near the Appellant's site, but at any rate, located outside defined settlement boundary. The justification that was given on behalf of the Respondent (conceded after thorough cross examination) was that it was an approval based on hardship ground.

<u>The Planning Considerations</u>:

The contention of the Appellant is that Policy SD 3 should have been applied in the assessment done by the Respondent instead of Policy SD 4 by reason of the fact that there were residential developments in the vicinity of the proposed development, and that the application ought to have been assessed as a hardship case.

Policy SD4 lays down that "*There should be a general presumption <u>against proposals</u> for development <u>outside settlement boundaries</u> unless the proposal, among other exceptions listed in the policy, has been shown to have followed the sequential approach to the release of sites identified in SD1, SD2 and SD3 and there are no suitable sites within or on the edge of settlement boundaries, and ………. is capable of ready connection to the existing utility supplies and transport networks or can be connected without unacceptable public expense….*

Or where; the proposal is from a small owner seeking residential property for themselves and their close kin and <u>can be considered as a hardship case</u>, provided that in the opinion of the relevant authorities such release would not encourage large scale removal of land from agriculture… ".

Policy SD3, on the other hand, provides that "*There should be a <u>general presumption in favour of development</u> on the edge of but outside settlement boundaries providing such development proposals are aimed at consolidating gaps in an otherwise built up area……. or where the proposal is from a small owner seeking residential property for themselves or their close kin and <u>can be considered as a hardship case</u> provided that in the opinion of the relevant authorities such release would not encourage large scale removal of land from agriculture… ".*
The Appellant's contention is that the qualification under the hardship exception was material as it would have a bearing on the outcome of the application. The issue of hardship arose in the course of the mediation that was conducted at the outset, and which gave rise to the affidavit (produced on the 17th January 2023 as Document F), establishing the status of the Appellant as

the owner of the sole property, subject matter of the appeal. Yet this was turned down by the Respondent on technical grounds, i.e not on the actual status of the Appellant, nor as to his means, but based on guidelines from the Town and Country Planning Board which approved certain conditions in the process of assessing applications made under the hardship consideration. In this particular case, the Respondent relied on the condition that 'The land should have been owned as at 30 September 2005 and the fact that the land did not accrue to the Appellant through donation/inheritance after 30 September 2005'.

We agree that the Respondent has to abide by guidelines from the parent Ministry. Yet, it has been rightly pointed out that this is an administrative guideline and the conditions contained therein are not part of the planning instruments (PPG nor Outline Planning Scheme) *per se*. This administrative guideline introduces new elements, namely the cut-off date for the ownership of the land and the specific condition that the land should be accrued by way of donation/inheritance, and those elements have not gone through the legislative process.

Strict adherence to this technical limitation has caused the Respondent to be unable to consider the proposed development within the exception based on hardship, which would have yielded fairer results. The exceptions contained in Policies SD3 and SD4 are set out in the Outline Planning Scheme, which was modified by a legislative process. Such is not the case for the circular from the Town and Country Planning Board. Land Use is an important matter as it is a corollary of the property right of the owner. Such matters ought to be addressed through higher legal norms and not left to mere administrative policies.

It is true that the local authority works in compliance with the policies set out by the Ministry of Housing and Lands. Nonetheless, it is our view that the application of the any such policy has to be purposive. The restrictive and technical approach taken has achieved no other purpose than preventing the exception based on hardship to be applied to the Appellant, who, as per his affidavit, owns only this plot of land. Furthermore, the averments of the Appellant that the land is not essential for agricultural purposes, nor is it in an irrigation zone and no land conversion permit is required, have not been rebutted.

Policy SD3 or SD4:

The standpoint of the Appellant is that the site for the proposed development is in fact on the edge of development. The presence of residential developments, the proximity of the Schoenfeld By Pass road, the availability of utility connections, the commitment of the Appellant that the site is capable of such connections without public expense (as undertaken by him and as required under Policy SD3) are matters that ought to have weighed in the decision of the Respondent. In the same manner, the fact that a land conversion permit was not required for the said development (although being a ground of refusal that was dropped at the hearing) was a consideration that had unnecessarily weighed in the balance at the decision stage.

The call from the Appellant is that the actual reality on the ground, namely, as listed above, are activities akin to those within settlement boundaries (the presence of another residential development, the proximity with an important road (Schoenfeld By-Pass), are such that the proposed development can qualify as being on the edge of settlement boundaries, where development is permissible under specific conditions. We have elaborated above on the need for an '*in concreto*' assessment of the site.

The evidence on record has revealed an assessment of the application which has been done in an approximate manner. The representative of the Respondent conceded that she may have been inaccurate in her identification of the plot belonging to the Appellant. She also revealed

a lack of precision on the measurements taken in her assessment, so much so it has come out that the measurement from site from the settlement boundary in a most unscientific manner. This is why we agree that this application has been treated without a fair assessment of all the parameters that ought to have been considered. The Respondent's strict application of Policy SD4 had been based on elements that were not certain. An assessment that is not based on a 'google map' approach but on an '*in concreto*' analysis of the site could have given another perspective. Besides we have seen that the 'google map' approach has given rise to grounds of objection that could not be sustained and had to be dropped at the hearing.

In the light of the above, we find there is substance in the grounds of appeal raised by the Appellant, although some grounds have not been retained. We do not uphold the first ground at paragraph 4 of then Statement of Case, as not having been substantiated. We do not uphold the ground at section 5 (a) that there had been breach of natural justice as the Appellant had not been given the opportunity to explain or submit further information. As rightly pointed out by counsel for the Respondent, there is no legal obligation to call for a meeting or hearing, these being at the discretion of the local authority.
On the other hand, the unfairness and unreasonableness of the decision have been revealed by the flaws in the assessment conducted by the Respondent's representative and her overall evidence at the hearing. Grounds 5(b) (c), 6, 7 and 8 have, in our view, been amply substantiated and we find that they provide reason enough for us to reverse the decision of the Respondent.

The appeal is accordingly allowed. The decision is remitted back to the Respondent for it to grant the BLUP with conditions that it deems necessary for the proposed development.

Delivered on the 16th November 2023 by:

Mrs. V. Phoolchund-Bhadain, Chairperson ....

Mr. Radhakrishna, Acheemootoo, Member ....

Mr.Roshan H. Seeboo, Member ....