

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

ELAT 2128/22

**In the matter of:**

**Heirs Ramtohul Mungree**

**Appellants**

**v.**

**The District Council of Moka**

**Respondent**

**Determination**

The Appellants applied for a Building and Land Use Permit for the subdivision of a portion of land of the extent of 5898 square metres situated at off B27 Road, Montagne Blanche, for residential purposes. By a decision communicated to the Appellant through the National e-licencing System on the 12<sup>th</sup> August 2022, the Respondent informed the Appellant that the Permits and Business Monitoring Committee had not granted the permit for the reason that: *“As per Policy SD 4 of the Moka Flacq Outline Scheme since the site lies outside Settlement Boundary wherein there is a general presumption against development. However, consideration may be given if a fresh application is made for subdivision of land for agricultural purpose and Survey Plan specifies that the land is to be subdivided for agricultural purpose.”*

In a Notice of Appeal filed on the 25<sup>th</sup> August 2022, the Appellant listed seven grounds of appeal as follows:

1. The site is found on the edge of defined Settlement Boundaries as per the OPS of Moka District Council instead of Outside Defined Settlement Boundary as stated in the refusal letter dated 12<sup>th</sup> August 2022 by the Moka District Council using Policy SD4 instead of Policy SD3.
2. As per Policy SD3, there should be a general presumption in favour of development on the edge of settlement boundary.
3. Besides this plot belonged to our late father Mr. Ramtohul Mungree and will be divided into two lots for residential purpose which will be allotted to Messrs. Mohit and Dhananjay Mungree.
4. Moreover, our close kins will use these plots for the construction of residential buildings, thus the land will be kept clean and tidy for the protection of the environment which is the policy of the Government.
5. Moreover, an affidavit from a Public Notary dated 18<sup>th</sup> March 2022 was submitted to the Moka District Council stating that Heirs Ramtohul Mungree do not possess more than 10 Arpents of land all around the islands. A copy of affidavit and a Declaration

Form under the Sugar Industry Efficiency Act is attached for the Exemption of Land Conversion Permit up to a maximum of 2 hectares (4.7392 Arpents). Annex 4.

6. As the site is 78 M from the main road M-Blanche-Bel Air B27 all basic infrastructures exist i.e. water and electricity will be easily available to the subject site.
7. A context plan is attached showing different residential and commercial buildings whereby BLUP have been issued by the District Council which are found outside Defined Settlement Boundaries.

We find that grounds 1 and 2 relate to the same issue, namely the application of Policy SD 3 instead of Policy SD 4 in the assessment conducted by the District Council. Grounds 3 and 4 do not amount to grounds of appeal as they are merely statements of facts on the ownership and the proposal for development. We find no need to consider them. Grounds 5, and 6 are also matters that do not amount to grounds of appeal. Similarly ground 7 is merely a description of the site which may be relevant in adducing evidence, but does not amount to a ground of appeal, *per se*. Grounds 3 to 7 are set aside at the outset and we shall address grounds 1 and 2 together.

It is the contention of the Appellant that the Respondent ought to have assessed his application for subdivision by applying Policy SD 3 of the Outline Planning Scheme instead of Policy SD 4, as it has done. His whole testimony points towards the fact that his land is situated on the edge of settlement boundary, and one side of the plot, which is rectangular in shape, stretches over the settlement boundary line. This part, in fact, falls within the settlement boundary, as shown in Document B produced. Document B is an extract of the Moka-Flacq Outline Planning Scheme, which the Appellant says he obtained from the Ministry of Housing and Lands. Questions were put to him on the source of the handwritten inscriptions on the map showing built-up areas and residential buildings. He candidly explained that they were placed on the map by himself and he knows the area well, having been living there for years. We do not propose to question this evidence, being given that it was done by the Appellant with a view to enlighten the Tribunal on the location and its surroundings, and, more importantly, because this was not challenged. In cross examination, the Appellant maintained that there were buildings in the vicinity of his premises and they were both residential as well as commercial buildings. The part of his land that falls within settlement boundary is twelve metres in length.

The position of the Respondent, as elicited from the representative of the District Council, is that the land *in lite* was found outside settlement boundary. He attempted to explain that a small part of the plot was found within, and the remaining part of the plot was outside the settlement boundary, as such Policy SD 4 was applied in the assessment of the application submitted by the Appellant.

In the statement of defence filed by the Respondent, reference is made to the plot belonging to the Appellant as being 6035 square metres, instead of 5898 square metres, as per the application for subdivision submitted by the Appellant. We note that no attempt was made to amend this discrepancy by the Respondent. We note also that paragraph 7 of the statement of defence makes reference to “an infinite part of the subject site namely 12 square metres out of 6035 square metres falls on the edge of settlement boundary.”. The Respondent’s representative maintained this in the course of his testimony but subsequently paragraph 7 of the statement of defence was dropped by the Respondent.

After considering the whole evidence on record and the policy that has guided the Respondent in assessing the application, we fail to understand the rationale for relying on Policy SD 4 instead of Policy SD 3. On one hand, the witness for the Respondent maintains that the site *in lite* is outside settlement boundary and, on the other hand, it also states that the plot *in lite* falls

partly within settlement boundary. It stands to logic that if the land is located partly within settlement boundary, the remaining part would be nothing but 'on the edge of settlement boundary'. We note that there is no definition in the planning instruments as to the definition of 'edge'. We take the Oxford dictionary meaning of the word 'edge' which is '*the outside limit of an object, area or surface*'. The land *in lite* overlaps the boundary line or the outside limit of the settlement boundary. It is our view that this is a clear case that the plot, as indicated on Document B, is found on the edge of the Settlement Boundary and that any inference that the land qualifies *in toto* as being Outside Settlement Boundary on the ground that the larger portion of the land falls Outside Settlement Boundary is erroneous. Besides, there is nothing in the Planning Policy Guidance that point towards such an interpretation.

Now, the importance of this qualification is that it determines what policy is applicable.

It is the Appellant's case that, being found on the edge of settlement boundary, Policy SD3 should have been applied by the Respondent in assessing his application.

Policy SD 3 of the Outline Planning Scheme provides as follows:

**"Development on the Edge of Settlement Boundaries:**

There should be a general presumption in favour of development on the edge of but outside defined settlement boundaries providing such development proposals are aimed at:

- Consolidating gaps in an otherwise built-up area; or
  - Rounding off an existing settlement being contiguous with its existing built-up area and not creating or progressing ribbon development; or
  - Infilling (of development) where no strategic gap between settlements is proposed; or
  - Providing industrial uses which may not be appropriate within settlement boundaries;
- And
- Are capable of ready connection to exiting utility supplies and transport networks or can be connected without unacceptable public expenses;

Or, where:

- The proposal is from a small owner seeking residential property for themselves or their close and can be considered as hardship case, provided that in the opinion of the relevant authorities such release would not encourage large scale removal of land from agriculture; or.....

*(Other conditions not being relevant to the present assessment are not reproduced here)*

Having found that the policy that was used to assess the application for sub-division was wrong, this goes to the root of the decision of the Respondent. However, we highlight that Policy SD 3 whilst laying a general presumption in favour of development on the edge of but outside defined settlement boundaries, also lays down certain conditions, as listed above, for its application, the more relevant ones being the first three conditions (*supra*).

It is the case for the Appellant that there is a built-up area within the vicinity of his plot, consisting of both residential and commercial premises. He has shown this by his hand-written drawings on Document B. The Respondent's evidence is that the Council does not view the site as part of a built-up area and also the proposal of the Appellant cannot be considered as

‘infilling of development’. No further evidence was adduced to support this proposition. The presence of one residential development located outside the settlement area, as shown and confirmed by the Appellant, has not been disputed. We have also not been favoured with any explanation as to why the condition relating to ‘Rounding off’ and ‘Infilling’ as per the second and third conditions under Policy SD3 (supra) have not been considered in this assessment.

Furthermore, the representative of the Respondent, in his examination in chief, stated that all the plots contiguous to the subject site are vacant and the nearest residential building which is within settlement boundary is approximately 50 metres from the subject site. This is a matter that was considered by the council. We cannot but observe that this is an indication that the decision was taken on the wrong premise. The mere fact that the contiguous plots are located within settlement boundary, they have development potential by virtue of their positioning. The fact that they lie vacant is immaterial for the purpose of the decision concerning the Appellant’s land. As regards the permit status of the built-up area, the onus is on the Respondent to ascertain same.

When questioned on why the Respondent applied Policy SD4, the representative of the Respondent’s reply was that this particular development does not comply with the conditions of either Policy SD1, SD2 or SD3, and, as such, it had to be considered under Policy SD4 although the site mentioned is partly on the edge of settlement boundary. This clearly comforts our assessment that the premise on which the application was assessed was not justified. The witness went on to state that “the subject site does not comply with all the conditions of Policy SD3. It may comply with some of them but it does not comply with all of them”. We find it necessary to place emphasis on the fact that the conditions listed under Policy SD3, especially the first three conditions (supra), are not cumulative but alternative. The only cumulative condition is that of the capacity of ‘ready connection to existing utility supplies and transport networks or can be connected without unacceptable public expense’. This, in our view, is a matter that the relevant authority could address by way of conditions to be imposed, bearing in mind that there are existing developments in the area.

In view of the above, we find that the first two grounds of appeal raised by the Appellant have been substantiated and we uphold them.

The appeal is allowed and we refer the matter back to the Respondent for it to issue a BLUP with the conditions that it deems necessary to impose.

Delivered on 29<sup>th</sup> June 2023 by:

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

Mr. Mohamad Ismet Suffee, Member .....

Mr. Assen Soogali , Member .....