BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1660/18

In the matter of:-

ROBERT JOSEPH BERNARD MONTOCCHIO

Appellant

v/s

DISTRICT COUNCIL OF FLACQ

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Council for having refused the granting of an Outline Planning Permission ["OPP"] to the Appellant for the construction of 17 identical residential units at ground and first floor (eco-lodges) at Choisy Bras D'Eau, Poste De Flacq. The reasons for refusal were communicated to the Appellant via a letter dated 29th June 2018 as per document annexed to the Statement of Case ["SOC"] post marked 2nd July 2018, which are as follows:
    1. The subject site lies outside settlement boundary by some 120 metres, consequently, there is no sequential approach to development.
    2. The proposed development does not comply with Policy SD3 and SD4 of the Moka Flacq Outline Scheme.
    3. The site lies within "Proposed Airport Safeguarding Area" identified on the Development Management Map of the Moka Flacq Outline Scheme. Consequently, the proposed development does not comply with **Policy NA1**- (Northern Airport Safeguarding)- Development within Airport Noise Constraints Zone of the Moka-Flacq Outline Scheme whereby no development should be permitted within this zone.

2. The Grounds of Appeal as per the Notice of Appeal are reproduced below in *italics*:

    1. *In the absence of an effective date being given to the applicant, the date of the application of the 11th June 2018 is deemed to be the effective date.*
    2. *In the absence of any decision being taken within 15 days of the effective date of the 11th June 2018, the Applicant is deemed to have been granted within 15 days thereof in application of s 117(7)(a) of the Local Government Act of 2011;*
    3. *In entertaining and determining the present application the Respondent did not exercise its discretion at all and or judiciously;*
    4. *It has failed and or refrained from treating all Applicants for similar and or larger projects on an equal footing;*
    5. *In entertaining and determining the present application the Respondent took into consideration irrelevant and extraneous matters;*
    6. *And any other reason that the Appellant raise in due course.*

3. At the outset, Senior Counsel appearing for the Appellant, Mrs. N. Bundhun informed the Tribunal at the sitting of the 26th September 2023 that the first two grounds of appeal were being dropped and therefore the hearing proceeded on the remaining three grounds of appeal **and she also submitted in law on the plea *in limine* previously raised before a differently constituted bench**. However, we note that in the course of the hearing especially in the cross-examination of the Respondent's head planner, despite having dropped the first 2 grounds of appeal, they were heavily canvassed by Appellant's counsel.

4. The case for the Appellant was substantiated by the deposition of a town planner, Mrs. Vijayal Sunassee, Chartered Town Planner and the Appellant himself. The Respondent was represented by its Head of Planning Department, Mr. Koonjul. Both parties were legally represented. The Tribunal has had a visual appreciation of the site in the course of an on-site visit on 17th April 2024. We have duly considered all the evidence placed before us as well as the submissions made on behalf of both parties.

I. CONTEXT ANALYSIS

5. The subject site is of an extent of 1 883.48 sq.m in Bras D'Eau located in close proximity to Bras D'Eau Forest Post. The proposed development is being presented as an eco-tourism project for the construction of 17 residential one storeyed eco-lodges since the site lies within the State Land Forest Reserve. There already exists in close proximity to the subject site a dense residential development in the nature of a morcellement, which the Appellant terms as "Naturo Villas", comprising storeyed concrete buildings, as was noted during the visit on site.

6. In the course of the site visit, and as confirmed by witness Mrs. Sunassee, it was also noted that there are well tarred access roads in the area and leading to the site. The area is also serviced with electricity. The subject site is agricultural land with a foresty appearance which can be described as being "en etat sauvage".

7. By way of background, the Appellant had received a morcellement permit for agricultural development in November 2016 for the subdivision of this property into smaller lots. However, the CWA refused the granting of water connection on the ground that it did not have the capacity to service an agricultural morcellement. Hence, the present project is an alternative usage of the Appellant's property. A conditional clearance was later obtained from the CWA.

II. THE LAW AND PLANNING INSTRUMENTS

8. The subject site being situated outside settlement boundary within the State Land Forest Reserve at Bras D'Eau, the applicable planning scheme is the Outline Planning Scheme of Moka/Flacq ["OPS"]. The relevant policies are **Policy SD4** which regulates development outside settlement boundary. **Policy NA1** is also applicable since the site lies within the **Airport Noise Constraint Zone** for the proposed northern airport. The **Planning Policy Guidance on Eco-Tourism** ["**PPG**"] and policies on **ESA** will be considered

in view of the nature of the present case. The **Local Government Act 2011** ["LGA"] will also be considered.

III. THE EVIDENCE

A. The Appellant's case

9. The case for the Appellant in essence is that the application being at this stage one for Outline Planning Permission, the Respondent could have granted it with several conditions which could have been taken on board by the Appellant as the Council would still have the prerogative to re-assess the application at BLUP stage. The proposed development being more in line with an eco-tourism development, would fit in more homogenously in an area closer to nature, hence outside the settlement boundary where the subject site is located and away from habitation. The site being outside settlement boundary does not offend **Policy SD4** of the **OPS**.

10. The Appellant also contends that the Council dealt with his application in a discriminatory manner in that there is a residential development of very heavy density which is in very close proximity to his property that has been granted a BLUP in spite of falling partly outside the settlement boundary whereas his development proposal has been rejected despite being low-key and in harmony with the natural surrounding environment. Furthermore, the **Policy NA1** invoked by the Council to reject the Appellant's application has not been applied to the neighbouring residential developments which also fall within the Airport Safeguarding Noise Constraint Zone or has been incorrectly applied in his case as the permission could have been granted with a note as is normally done.

B. The Respondent's case

11. Mr. Koonjul testified essentially that the subject site lies outside settlement boundary by 120 metres and is located in the Airport Noise Constraint Zone and is also about 120 metres away from the "Naturo Villas" project. It lies within the State Land Forest Reserve

which is an ESA. **Policy SD4** is applicable as the site is outside settlement boundary where development is generally not allowed except in some circumstances new development may be allowed provided certain conditions were met and the sequential approach needs to be applied which is a linear step by step progression along the main road, which is not the case in this application. **Policy NA1** is applicable because there is an airport operational area earmarked for a potential airport in the future and therefore there is an airport noise constraint zone regulated under the said policy where development should not be permitted as per the Development Management Map within which the subject site lies. The local authority cannot ignore government policies as they are still in force and there has been no official communication to suggest otherwise hence these policies must be applied. The Council has granted BLUP development which lie within or on the edge of settlement boundary as in the case of Naturo Villas.

IV. GROUNDS OF APPEAL

A. Under Grounds 1 and 2

12. These two grounds were dropped but later heavily canvassed hence we shall deal with them. It is the contention of the Appellant under these 2 grounds that in the absence of an effective date being given to the applicant, the date of the application of the 11th June 2018 is deemed to be the effective date and that in the absence of any decision being taken within 15 days of the effective date of the 11th June 2018, the Applicant is deemed to have been granted within 15 days thereof in application of **s. 117(7)(a) of the Local Government Act of 2011**.

13. The evidence on record is that the application was deposited on 11th June 2018, as evidenced by receipts marked Doc E and Doc F. It is to be noted that Doc F, which is an acknowledgement receipt of registration of the application, makes mention of "REGISTRATION OF APPLICATION FOR BUILDING AND LAND USE PERMIT" but in fact it is undisputed that the application is for an OPP. "**Outline Planning Permission"** is defined under **section 6A** of the **Town and Country Planning Act** to mean "*a permission for the*

development works sought from a local authority at an early stage and irrespective of whether a Building and Land Use Permit is to be granted or not and before any substantial costs are incurred in relation to the development works."

14. In terms of the procedural steps that the determination of application for an OPP follows at the level of the Council, it is similar to that of an application for a BLUP under **section 117 of the Local Government Act 2011** with few exceptions. **Section 117 (5) LGA** provides:

" On receipt of an application under subsection (4), the Chief Executive of the Municipal City Council, Municipal Town Council or District Council or his representative shall –

(a) not later than 8 working days from the date of receipt, seek from the applicant any additional information, particulars or documents in relation thereto; and

(b) on the effective date, issue to the applicant an acknowledgement receipt in respect of the application."

Therefore, within a time frame of 8 days from the date of submission, if the application is in order, the applicant is informed of the effective date and if it is not in order he is requested to submit further information.

15. The communication of the effective date is important for computation purposes, to determine whether the application has been submitted within the statutory time frame. The difficulty that we have in the present case is that the evidence is rather flimsy on whether the effective date was communicated or not. The Appellant gave no evidence on whether he had received any communication from the Council regarding the effective date. The Respondent's witness, Mr. Koonjul, stated that he was not posted at the Council at the relevant time. He stated on several occasions that he could not answer the questions that were put to him on the issue. He stated he only had in his possession the minutes of proceedings of the PBMC of 28th June 2018 when a decision was taken in respect of the Appellant's application. When put specifically to him according to his

records, his answer was geared towards what happens in the normal course of things without being specific as to what happened in the present context. It was not within his personal knowledge so he could not answer.

16. We do not believe that the ends of justice will be met if the computation is made in the absence of strong evidence that can show a clear effective date. In any event, there had initially been a motion to drop these grounds which was re-iterated in the submission of the Appellant, these grounds therefore fail.

B. Under Ground 3

17. The Appellant contends that in entertaining and determining the present application the Respondent did not exercise its discretion at all and/or judiciously. This ground of appeal as couched aligns with judicial review principles because it challenges the Respondent's exercise of discretion in its decision-making process, which is a key basis for judicial review, hence challengeable before another forum. In fact, 'failure to exercise discretion judiciously' suggests that even if discretion was exercised, it was done in an unreasonable, arbitrary, or improper manner, which is beyond this Tribunal's remit. The jurisdiction of this Tribunal is to assess whether the Council's decision was right or wrong based upon the Council's application of the planning instruments and the principles of planning law to decide whether the application at hand can gain planning acceptance. From the reasons of refusal as set out in the refusal letter, Doc G, it appears that the Respondent has considered, based on the location of the subject site, the relevant planning instruments and made an assessment on the planning merits of the case. Hence, the present matter is well within the jurisdiction of this Tribunal. However, the Tribunal cannot assess the decision-making process as it would amount to the Tribunal acting beyond its jurisdiction. This ground is therefore set aside for lack of jurisdiction.

C. Under Ground 4

18. The Appellant contends that the Respondent has failed and or refrained from treating all applicants for similar and or larger projects on an equal footing. The Appellant based their case on the Council's assessment being discriminatory because the Appellant's project is very low-key compared to the development of Naturo Villas, a few metres away, which is very dense and which has not complied with the settlement boundary. This ground of appeal does not relate to any of the grounds of refusal. However, since the ground raised can be taken to mean that the application of planning principles for similar projects has been done incorrectly by the Council, we shall consider its merits.

- **Density of the developments**

19. We have taken onboard as per the planning brief, the development proposal is meant to have 17 identical eco-lodges of ground plus one spread out on land of an extent of approximately 4 Arpents. It is intended to be a "low-key" development with materials of construction being wood and Corrugated Iron Sheet. It is intended to have an endemic garden, a meditation area, and a swimming pool although the Appellant is not insisting on a swimming pool and he stated he would abide by any condition laid down by the Council. From the evidence adduced by the Appellant, Doc J and Doc K, the residential development of Naturo Villas is done in 2 phases-with the second phase involving an additional 175 lots predominantly residential. The Appellant explained that provision was also made at Naturo Villas for a club house and commercial lots, hence it was not only residential lots.

- **Site lies within ESA**

20. According to the **Development Management Map ["DMM"] of the OPS** of the area, marked Doc M, is it noted that sizeable part of the subject site falls within the State Forest Land which is regulated by **Policy EC1** as can be noted from the legend. This is the policy applicable for Environmental Conservation. The **Policy EC1 on Conservation of Environmentally Sensitive Areas (ESAs)** is reproduced hereunder in italics:

"Further to more detailed identification, mapping and classification of Environmentally Sensitive Areas (ESAs) by the Ministry responsible for Environment and in addition to any requirements under the Environment Protection Act 2002 as amended, the natural functions, biodiversity, habitat and amenity of ESAs should be protected from adverse effects of development.

The ESA study has assessed the relative importance of different ESAs for their long term maintenance of their integrity. Each ESA type has been categorized on their sensitivity in maintaining environmental functions and provides sufficient flexibility in proposed land uses to strike a balance between environmental protection and sustainable development needs.

Where the ESAs are indicated on the Development Management Maps there should be a general presumption against development other than for educational or environmental management purposes or in order to sustain local economies or where development is deemed to be in the national interest and is acceptable on planning and environmental grounds. In case of discrepancy between the ESAs shown on the DMM and the ESA map at the Ministry of Environment, the project proponent should consult the Ministry of Environment.
Any development proposed within ESAs will be required to first obtain an Environmental Impact Assessment licence under the Environment Protection Act 2002 as subsequently amended, prior to seeking a building and land use permit.

Development adjoining ESAs should obtain the prior approval of the Ministry responsible for Environment and should be in accordance with the policies defined in the Study of Environmentally Sensitive Areas (ESAs) in Mauritius and Rodrigues.

Opportunities for the sustained management of ESAs, which may form part of developments, should be pursued through planning agreement/obligation mechanisms. In all such cases, proposals for development within or adjoining Environmentally Sensitive Areas will need to demonstrate how they contribute to maintaining and

enhancing the environmental character of the area and that they comply with relevant criteria in the Design Guidance outlined in SD5.

For the purposes of this Policy, ESAs are defined as follows:

- *State Lands including State Forest Lands and privately-owned Mountain Reserves;*
- *Habitat for Endemic Flora and Fauna - which have strong links to the Reserves identified in Policy EP 1;*
- *Mountain Slopes and Range Peaks – for moderately steep to steep/ very steep hillsides and mountain slopes and ridgelines;*
- *Coastal Features - including parts of the coastline and coastal wetlands and mangroves;*
- *Water Resources - major aquifers, surface water catchment areas and identified reservoirs and boreholes and existing weirs; and*
- *Geological Features - the location of lava tubes and pits which are associated with cave networks and groundwater supplies.*

Justification: ESAs represent national environmental assets and their on-going management, protection and enhancement is vital if sustainable development goals are to be achieved. The intent of policy EC 1 is to reinforce a general presumption against major development in or adjacent to identified ESAs. The adoption of a precautionary approach to development is considered appropriate; the policy also incorporates the principles of Policies SD 2, SD 3 and SD 4 requiring additional environmental information for developments when considered necessary to inform the decision-making process.

The management of ESAs is achievable within this policy through permitting environmental management measures in sensitive locations. This should enable private sector management of ESAs, some good examples of which currently exist in tourism developments in the Eastern Tourism Zone where longer term maintenance, monitoring and enhancement measures have been put in place.

Identification of ESAs on the Development Management Map should afford protection while more detailed studies are completed. As the boundaries of ESAs become more well-

defined, Policy EC 1 and supporting mapping base should be adjusted." [underlining is ours]

21. A considerable part of the subject site falls within the State Forest Land and from our reading of this policy, State Forest Lands are considered to be ESAs which deserves protection against development save under very specific grounds such as *"educational or environmental management purposes or in order to sustain local economies or where development is deemed to be in the national interest and is acceptable on planning and environmental grounds.*" In fact as highlighted above, it appears that a precautionary approach should be adopted in such cases to protect *"the natural functions, biodiversity, habitat and amenity of ESAs*" from adverse effects of development. Most importantly, the policy provides that in such instances, it is important that where there is a development proposal an EIA Licence should be obtained prior to seeking a BLUP. There is no evidence on record to suggest that an EIA licence has been obtained.

22. There is no doubt that any interference with nature in its pure and pristine state, through undertaken works, will inevitably have an impact, whether visible to the naked eye or not. Therefore, conducting an Environmental Impact Assessment ["EIA"] is not only a rational necessity but also provides assurances that appropriate measures will be implemented to mitigate and minimize environmental harm. The obtention of an EIA licence being of utmost importance should, in our view, have been the starting point in this case.

23. Under the Sixth Schedule of the now repealed **Environment Protection Act 2002**, "conversion of forest land to any other land use" as well as "land clearing land" fall in the list of undertakings requiring an Environmental Impact Assessment. This has been imported into the new **Environment Act 2024**, to show its present validity.

24. The evidence on record establishes that the subject site and its surrounding area fall within the State Forest Land, as identified by the DMM, and are therefore entitled to protection under **Policy EC1** of the **OPS**. In our considered view, it is an Environmentally Sensitive Area ["ESA"] and its protection takes precedence. Accordingly, we find that the

Council's decision to refuse the granting of the OPP was correct. We hasten to add that we note this was not part of the grounds of refusal but it was canvassed by the Respondent and the Appellant who denied that it was an ESA. The Tribunal is entitled to take such evidence on board and make a determination on the planning merits of the matter at hand.

- **Comparison with Naturo Villas**

25. A few metres from the Appellant's property, which according to Mr. Koonjul's evidence is approximately 120 metres, lies the very dense residential development of what the Appellant termed as "Naturo Villas", which we later came to know is owned not only by Naturo Villas. That property also lies partly within the State Forest Land as indicated by the DMM and from the visual appreciation that we had on site, the property was predominantly surrounded by forest, save for its frontage which was accessed by a well tarred road.

26. The Council's stand is that according to the **OPS**, the property of Naturo Villas falls within the settlement boundary which had been created at the time that the OPS came into force in 2006. This being the case, the Council has to apply **Policies SD1 and SD2** to allow residential development within the settlement boundary and such development cannot be stunted where it has gained planning acceptance under the **OPS**. While residential development with masses of concrete does not seem to be in harmony with the surrounding natural environment which is considered to be an ESA, it begs the question as to why the authorities created a settlement boundary in the forest where the ecology is comparatively least compromised and biodiversity is very rich. However, both planners, Mrs. Sunasee and Mr. Koonjul explained that this settlement boundary within which Naturo Villas lies had existed since its inception in 2006.

27. Since we are not here sitting on appeal of the Council's decision with regard to Naturo Villas whose existence has been "legitimated" by the creation of a settlement boundary, nor do we have knowledge of the circumstances under which the development came about, we cannot make ant pronouncement on it and we consider it to be a stand-alone

development. The Council has to assess each application on its own planning merits, which it has. As regards the village of Bras D'Eau, it also falls within the settlement boundary.

- **Wind turbines**

28. As regards the wind turbines, another large "development" of dissimilar nature found not too far from the site, there is no evidence to show since when these have existed hence no proper comparison can be made as such, including any application of height restriction set out under **Policy NA1** of the **OPS**.

29. The Appellant's case is that the development of Naturo Villas does not fall squarely within the settlement boundary as testified by Mrs. Sunassee through Doc C. However, Mr. Koonjul could not answer whether that was the case as he stated he did not have the precise coordinates to be able to plot them on a survey map. Whether Naturo Villas falls partly outside the settlement boundary does not make the application of the Appellant more meritorious. Each case is to be decided on its own merits. The fact remains that subject site is found in an area that deserves environmental conservation under the **Policy EC1** of the **OPS**. This ground therefore fails.

D. Under Ground 5

30. It is the contention of the Appellant that in entertaining and determining the present application the Respondent took into consideration irrelevant and extraneous matters. To support this ground, the Appellant presented evidence showing that the Council did not properly assess the project because it failed to apply the guidelines outlined in **Policies SD4** and **NA1** correctly.

- **Application of Policy NA1**

31. One of the reasons advanced by the Council for refusing the OPP is that the site lies within the proposed Airport Safeguarding Area identified in the DMM of the Moka/Flacq Outline Planning Scheme. As far as **Policy NA1** is concerned, there is a provision in the Outline Scheme for a proposed airport in Plaine des Roches, and this policy is in respect of any noise that is likely to be generated by the airport, which would be noise-prone. The relevant parts of **Policy NA1** – **Northern Airport Safeguarding** is reproduced hereunder in italics:

    "The current areas subject to building control and restriction around the proposed northern airport are shown on the development management map. These include areas affected by both potential airport operations and defined safeguarding areas.

    Pending the outcome of ongoing air transport policy review, previous restrictions should continue to apply. Should the review recommend retention of a safeguarded site for a new airport in the North, consideration should be given to the conduct of an Environmental Impact Assessment (EIA) to determine the potential impact of such an airport and its operations on existing and future developments in the area."

32. The justification for this policy in essence is the protection of people against excessive aircraft noise and to ensure that aircraft can operate safely. The policy makers recognize that the prohibition of new development in the affected settlements and tourism areas may cause hardship and so the policy mentions that there is a case for allowing some development provided the developers and occupiers are made aware of the potential nuisance. Under the "justification" part of the policy, it is also stipulated, *"Pending the outcome of a policy review of the air transport sector, Policy NA1 supports continued safeguarding of the proposed airport operational areas including approaches. Development within the airport noise constraints zone as identified on the Development Management Map should not be permitted. Exceptions may be made for development within or on the edge of existing settlements but in all cases the applicant should be made aware of potential noise problem and a statement to this effect should be included in the building and land use permit."*

33. From our reading of the policy that development should not be allowed withing the **Airport Noise Constraint Zone**. The subject site falls within that zone as per the DMM from evidence adduced, **DOC M**. Any derogation may be allowed for development on the edge or within settlement boundary. The subject site does not qualify as benefitting from this derogation since it lies outside settlement boundary.

34. **Policy NA1** applies because the area includes an airport operational zone designated for a potential future airport. Consequently, an airport noise constraint zone has been established under this policy, restricting development as indicated in the DMM. The Local Authority is bound by government policies and cannot disregard them. The policy was implemented to safeguard the designated areas for a possible second airport at Plaine des Roches and remains in force. As there is no official directive from the relevant Ministry or the Town and Country Planning Board to the contrary, the Council continues to be guided by **Policy NA1**, which remains legally applicable as rightly pointed out by Mr. Koonjul. However, he acknowledges that in certain cases, development within the Airport Noise Constraint Zone may be permissible as set out in the policy. He agreed that Naturo Villas and part of the Village of Bras D'Eau also falls within that zone.

35. The fact remains that these two areas of residential development fall within settlement boundary, and hence, a derogation is allowed to be made to the application of **Policy NA1**. Therefore, it can be argued that these two developments fall within the exceptions as provided by the policy. In the same vein, if the policy is to be given its natural meaning, since the subject site falls outside settlement boundary it does not fall within the provided exceptions.

36. We cannot rely on the parliamentary debates that took place in 1993 as conclusive evidence that there will not be any airport and hence there is no need to apply the **Policy NA1**. As long as the policies still find their way in the **OPS**, the Council is not only entitled but duty bound to consider them in their assessment of applications. In any event, we believe that the "travaux preparatoires" of the Parliament are to be referred to by Courts and Tribunals in extremely rare cases where there is an issue of ambiguity in the interpretation of the law, to clarify the intention of the legislator.

37. In the case of **Madelen Clothing Co. Ltd v Termination of Contracts of Service Board and Ors [1981] SCJ 264** their Lordships stated, "*We therefore hold that "travaux preparatoires" are a lawful aid to interpretation. But we hasten to add that one should refer to them only where the law is ambiguous, or self-contradictory, and that even in those cases, one must use the "travaux preparatoires" with utmost circumspection."* This principle was later re-iterated in the case of **Lamusse Sek Sum & Co v Late Bai Rehmatbai Waqf [2012]UKPC 14.** The Tribunal is not the competent authority to dictate to the Council to halt the application of such a policy. The third ground of refusal is therefore a valid one.

38. Mrs. Sunassee testified that **Policy NA1** is not a restrictive policy as the Council has discretion. She also stated that a permit can be granted with a note contained therein that the Council informs the permit holder that it falls within a noise-prone zone protected under **Policy NA1**. Our view is that this is applicable where developments are permissible. Any development that is granted planning acceptance in that zone, the Council ultimately holds the discretion to exempt the application of **Policy NA1** with a proviso that a statement to that effect is included in the BLUP so that the holder is aware of the potential noise nuisance. It is observed that the objective sought by the Appellant, namely to enable individuals to peacefully enjoy his property amidst unspoiled nature, appears to be at odds with the proposed development being located in a zone that may be noise-prone.

- **Eco-lodges better located outside settlement boundary- Policy SD4 application**

39. According to Mrs. Sunassee, the Council could consider the eco-lodges, which is ecologically sustainable development, outside the settlement boundary because an eco-tourism project cannot be within a built-up area but is rather compatible with a natural environment. She is of the opinion that the proposed development will be more apt in a rural area and that it falls within the category of development regulated under **Policy SD4 of the OPS**. The subject site already meets some criteria, according to her, such as ready connection with existing utility supplies and transport networks without unacceptable public expenses. There are electricity lines present, and there had been a

clearance from CWA was obtained in 2018. On the other hand, while Mr. Koonjul agreed that the proposed development is not considered a bad neighbour development under **Policy ID4** of the **OPS**, in support of the second ground of refusal he stated that in line with **Policy SD4** the policy of government is to also preserve land. He further stated that the site is affected by natural drainage path. This is a new element which was neither raised by the Respondent previously, albeit possibly a new element which did not exist back in 2018 when the application was assessed nor was it adequately canvassed before us.

40. We agree that eco-lodges are best placed away from habitation, closer to nature. Eco-lodges tend to be in remote, relatively pristine natural environments such as forests, mountains and exotic islands. Hence, in line with these "green" lodges a lot of emphasis is placed on elements such as environmental responsibility and minimizing negative impact on the environment. In cross-examination, Mrs. Sunassee explained that the eco-lodge is an ecologically sustainable development whereby people would be in contact with nature. The specificities of such developments include using solar power, rainwater harvesting, and being environmentally non-polluting. These elements, we agree are very much in line with ecologically sustainable development which can, under some circumstances, be allowed in areas of natural environment provided the development is in harmony with its surroundings. Such types of development cannot be outrightly rejected as offending **Policy SD4.** In fact, if there is an appropriate place to consider these types of developments, it would most likely be outside settlement boundary as regulated by **Policy SD4**.

41. We bear in mind the fact that the planning brief, although stating that development would be low-key, not high rise, with plot coverage of much less than 40%, did not contain the "green" practices that the Appellant intends to have as these would fall within the category of "reserved matters" under **s.6A of the Town and Country Planning Act** that would qualify it as an eco-tourism development. Mr. Koonjul explained that the project came across as luxury villas and did not comply with the **Design Sheet on Eco-tourism Development in the PPG** since for eco-tourism it has to be modest housing - "la case creole" type chalets.

42. The evidence of Mrs. Sunassee, supported by the planning brief she had submitted to the Council marked as **Doc D**, is for "a proposed eco-tourism/lodges project". Upon close inspection, it appears that there may have been some confusion as to the type of villas intended due to different way in which the project was described. At paragraph 1.1 of **Doc D**, the development proposal is described as "a high-class eco tourism/lodges residential project." At paragraph 1.2 of the document, mention is made of "eco tourism project in the form of lodges...", "for the "Nature" feel atmosphere while being not far from the sea." In other parts of it, the proposed development has been described as "17 self-catering eco lodges on ground +1 floor only, an endemic garden and meditation are in the centre to be a common area...", "it will be a very low-key development on land which is completely flat.", "of very high architectural standards" "the site will be developed into a "gated" type of residential complex", " The key aspirations for the development of the site are to provide quality residential/touristic development in a secluded rural setting...", " ensure development is of high standard of design and finish".

43. Therefore, while we believe that simply stating in the planning brief (Doc D) that "*The project will be designed so as not to reduce nor scar the natural landscape qualities of the environment and will be in sympathy with rather than dominating the natural character of the area and will comply with all provisions of the PPG."* does not suffice, it is important that eco -lodges are very low-key and implement "green" practices which will not compromise the integrity of the surrounding environment. In these circumstances, it may be apt to allow such developments outside settlement boundary provided an EIA licence is obtained, all relevant planning guidelines are respected and a case-to-case assessment is made.

44. Equally important is to be able to convey clearly the correct information to the Council so that there is no room for confusion and an informed decision can be taken. The fact that the Council took the project to be residential luxury villas, the first and second grounds of refusal do not come as a surprise. These are normal pointers used by planners to assess whether the development is within settlement boundary or not, the sequential

approach to the development and if it is outside settlement boundary whether it breaches the provisions of **Policies SD3** and **SD4** of the **OPS**.

- **Sequential approach or clustering**

45. **Doc C** and **Doc M** show that the land surrounding the subject site is undeveloped save for Naturo Villas which is still around 120 metres away from the Appellant's site, as per the evidence of Mr. Koonjul who demonstrated same on the DMM. He explained that **Policy SD4** is applicable as the site is outside settlement boundary whereby for any new development the sequential approach needs to be applied and it is a linear step by step progression along the main road. **Policy SD3** is not applicable as such but it provides the definition of small owners hence the reference.

46. Mrs. Sunassee agreed that there is a gap between Naturo Villas and the subject site but stated that the Council could have considered the property of the Appellant as a natural extension of the L-shape development boundary wherein lies Naturo Villas to accommodate the subject site within the permissible area of development. We do not subscribe this view. It cannot be considered as sequential approach to the development because sequential approach is adopted only where residential development is permissible, which is within the settlement boundary and overspilling outside settlement boundary is allowed as a natural progression in extremely rare cases provided there is no space left within the areas of permitted settlement. "Sequential approach" refers to proceeding in a structured step-by-step way one after the other hence linear albeit possibly ending up in a cluster in the wider scheme of things. In this case there is a gap of approximately 120 metres from the subject site to the settlement boundary of Naturo Villas. The Tribunal considers it to be unsafe to consider the alleged positioning of Naturo Villas outside settlement boundary indicated by Mrs. Sunassee as she did not provide any authoritative evidence in support. The Town and Country Planning Board would have been an apt authority to provide such evidence.

47. Irrespective of the diverging views of the two planners on what constitutes the sequential approach-whether it should be linear along the main road or clustering- we believe it is no longer of relevance in the face of the fact the site is regulated by **Policy EC1**. This ground therefore fails.

- **Eco-lodge**

48. The **Design Sheet on Eco Tourism Development in PPG 1** addresses several aspects of Eco-tourism principles of which one is to "*contribute to the conservation of natural areas and the sustainable development of adjacent areas and communities and it should generate further environmental and conservation awareness among resident populations and visitors."* Therefore, the approach to be adopted should not only be in relation to the use of ecological building materials for its construction, but also for eco-tourism development in the strict sense. Both Mrs. Sunassee and Mr. Koonjul were in agreement on the fact that at OPP stage there is no obligation to submit drawings. The materials to be used for the eco-lodges need not be provided at OPP stage and the Council did not request such additional information either, which we believe should have been asked as this would have given the Council a clearer idea of whether the project would be in harmony with the natural environment. The Council is mandated under the law to request any additional information which would assist in its assessment of the application.

- **OPP not BLUP**

49. The case for the Appellant in essence is that the application being at the stage of an Outline Planning Permission and not Building and Land Use Permit, the Respondent could have granted it with several conditions which he would have abided by. Mr. Koonjul stated that if OPP is granted there would be a legitimate expectation on the part of the Appellant to be granted a BLUP. We believe that on the basis of the planning instruments considered above, more especially in the absence of an EIA licence, the Council was right

not to have granted the OPP although we hasten to add that it should have requested the Appellant to submit an EIA licence.

- **Moka/Flacq as one legal entity inexistant**

50. As regards the point in law that Moka/Flacq as one legal entity does not exist anymore, the prerogative to declare a planning area is vested solely with the President by way of Order under **section 4 of the Town and Country Planning Act**. It is hence, beyond the jurisdiction of this Tribunal to decide on any issue of the validity of an Outline Planning Scheme. Any amendment can only be made upon application to the Town and Country Planning Board in line with the **Town and Country Planning Act**.

51. A differently constituted bench of the Tribunal had considered the same point in the case of **Montocchio v District Council of Flacq [ELAT 1660/18].** We have adopted the same reasoning which we find to be sound.

52. For all the reasons set out above, we find that the appeal to be unmeritorious and is accordingly set aside. The Appellant may wish to consider applying for an EIA licence in line with Policy EC1 should he wish to apply anew. No order as to costs.

Determination delivered on the 21st February 2025

Mrs. J. RAMFUL	**Mr. S. MOOTHOOSAMY**	**Mr. R. SEEBOO**
Vice Chairperson	**Member**	**Member**