ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No: ELAT/333/13

In the matter of:

Mr Ramdass Bheemul & Others

Appellant

v.

Ministry of Housing & Lands (Morcellement Unit)

Respondent

In the presence of:

District Council of Grand Port

Co-Respondent

DETERMINATION

The appeal is against the decision of the Morcellement Unit for having refused an application made on 12 December 2011 for the subdivision of land belonging to the Appellants of an extent of 1308m². The appellant wished to excise the land into two equal plots for residential purposes.

The grounds of refusal as contained in a letter dated 3 January 2013 (Document E) are two-fold: firstly, the property lies approximately 150 metres outside settlement boundary and, secondly, it lies within the catchment area of the Midlands Dam. The sworn land surveyor Mr. Nathoo deposed on behalf of the Appellants and conceded that the property lies outside settlement boundary and within the catchment area of Midlands Dam.

The Appellants' evidence is to the effect that the Respondent had granted a permit for the subdivision of a plot to one Mrs. Peetambur, which was also outside settlement boundary and was at a distance of 320m away from the proposed site. It however came out from the evidence of the witness for the Respondent, Mr. Gunnoo, Senior Planner at the Ministry of Housing and Lands that there had been a change in the planning instrument applicable to these respective applications, namely that the application submitted by Mrs. Peetambur was examined under the purview of the Outline Planning Scheme of September 2006 and the Development Management Map attached

thereto. This instrument did not provide for boundaries for the Midlands Dam. The subsequent application submitted by the Appellants was made in December 2011, when the Outline Planning Scheme showing the catchment area and boundaries of the Midlands Dam came into force (Doc J and J1). As such the newly implemented instrument justified the decision of the Respondent.

This stand is supported by the Co-Respondent's representative, Miss Bosquet. The legal basis for this stand is Section 5(2) of the Morcellement Act.

It is on record that although evidence was led in relation to the permit granted to Mrs. Peetambur, the Appellants no longer relied on this evidence for their case.

The legal issues raised:

It is submitted on behalf of the Appellants that the Respondent has failed in its duty to take a decision and it followed blindly the recommendations of the Grand Port/Savanne District Council. (*the letter dated 3 January 2013 from the Morcellement Board, Ministry of Housing and Lands stated that the application had not been approved 'as per the views of the Grand Port Savanne District Council' stating that the site lies outside settlement boundary and is found within the catchment area of Midlands Dam).* Therefore the decision should be quashed and remitted back to the Morcellement Board to take a decision.

1. **Fettering its discretion: ground of appeal?**

At the outset, we must say that we concur with the submission of the Respondent that this is tantamount to raising a new ground of appeal which had not been raised at the time of lodging the appeal. Section 5 sub-section 4(a) of the Environment and Land Use Appeal Tribunal (ELUAT) Act 2012 clearly spells out that the notice of appeal must be in the form set out in the schedule and it must set out the grounds of appeal **concisely and precisely**. The issue of 'fettering the discretion" was not raised in the notice of appeal.

Although it is true that section (3) (b) ELUAT Act provides that the proceedings before the ELUAT "shall be concluded with as little formality and technically as possible", this Tribunal is guided by the pronouncement of the Supreme Court on the importance of statutory procedural requirements: In **Rosunally and Others v. The Mauritius Revenue Authority and the Assessment Review Committee 2012 SCJ 380** the position of the Supreme Court is as follows:

"In our view a close parallelism can be drawn between section 93 of the District and Intermediate Court Courts (Criminal Jurisdiction) Act which deals with the procedure governing appeals from decisions of lower Courts....Numerous decisions of this Court have established the procedural requirements governing appeals should not be lightly disregarded and non-compliance with the procedures laid down will not be condoned unless such non-compliance is shown not to be due to the acts or omissions of the appellant or his legal advisors."

We therefore find that the Appellants' failure to raise this point as a ground of appeal at the time of lodging the appeal is a bar to this ground being introduced at this stage.

2. Jurisdiction of the Tribunal to review the decision making process

It is the contention of the Appellants that the Respondent was duty bound to inform the Appellants of the requirements of the new policies that were applicable to developments in that particular area. Reference is being made here to Policy EC2 of the Outline Planning Scheme in relation to the conservation of water resources. This policy prohibits the development of land within the catchment areas of 30 metres of the high water level of the dams and adjacent to rivers, rivulets, streams and open canals. A proviso in this policy may allow development in this zone subject to clearance from the Water Resources Unit, among others.

The Appellant's position is that in failing to inform the Appellants of this policy, the decision of the Respondent is flawed and should be reviewed. We do not subscribe to this view. First, there is no duty in law on the Council to advise the applicants of any existing policies. Second, the Appellants cannot attempt to challenge the decision-making process of the Respondent, without showing that any flaws in the decision-making process of the Respondent have rendered its decision null and void. As the Tribunal has stated on many occasions, the jurisdiction of the Environment and Land Use Appeal Tribunal (ELUAT) as per section 4(1)(a) of the ELUAT Act is 'to hear and determine appeals.' By way of an appeal this Tribunal is to consider primarily the merits (planning and others) of the decision reached by the first instance body. The ELUAT was not put in presence of any compelling evidence that the decision of the Respondent was ultimately wrong on its merits. On the contrary, the Respondent has argued that it has acted within the parameters of section 5 of the Morcellement Act, as amended, which provides that:

1. *Every developer shall make his application to the Board for a morcellement permit*
2. *"No person shall make an application under subsection (1) unless-*

(a) *The proposed morcellement is in conformity with the outline planning scheme or detailed scheme, in respect of the planning area where the proposed morcellement is to be carried out.*

It has been stated on behalf of the Appellants that they do not contest that the site is outside settlement boundary and within the buffer zone of the Midlands dam. It has also been submitted that the issue of a development closer to the Midlands Dam (i.e that belonging to the Mrs. Peetumbur) is not relied upon. Therefore the grounds for rejecting the application are not being challenged. In view of this stand, we do not find that the present appeal calls for our consideration, being given that the evidence on record clearly comforts the position of the Respondent in its decision.

For the above reasons, we find no reason to interfere with the decision of the Respondent to reject the application made by the Appellants.

The appeal is therefore set aside.

Delivered on 7th February 2017 **by:**

Mrs. Vedalini Phoolchund- Bhadain
Chairperson

Mr. Vimalen Reddi
Assessor

Mrs. Ayesha Jeewa
Assessor