

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

**ELAT 1395/17**

**In the matter of :-**

**Andre Guy Joseph Le Blanc**

Appellant

v/s

**The District Council of Riviere du Rempart**

Respondent

**DETERMINATION**

1. This is an appeal against a decision taken by the District Council of Riviere du Rempart ("the Council"), for having refused to the appellant the granting of an Outline Planning Permission ['OPP'] for the construction of nineteen residential villas at Poudre D'Or Village. The reasons for refusal which were communicated to the appellant vide letter dated 14<sup>th</sup> April 2017 are as follows:
  1. *Site is found outside Defined Settlement Boundary by 150m.*
  2. *No built up in the vicinity.*
  3. *Site is found within scenic zone.*
  4. *Site does not follow sequential approach for release of land under policy LS1."*
  
2. It is important to note that a ruling was delivered by this Tribunal on 14<sup>th</sup> November 2018 following a point in law raised by Counsel then appearing for the appellant. His motion was for this Tribunal to make a finding that the Council, a party to the case before the TCPB, is bound by a decision of the TCPB with the latter having come to the conclusion that the appellant may proceed with the development. The Tribunal set aside the motion of the appellant and we proceeded with hearing the appeal on the merits.

3. We have duly considered all evidence placed before us as well as submissions of both counsel and specific references to certain pieces of evidence will only be made where we deem it fit to do so. We note that the same issues, subject matter of the ruling, were canvassed again by the appellant at the hearing on the basis that the Tribunal was not in the presence of certain evidence at the time that the matter was argued on the point in law.

4. The appellant's grounds of appeal as per his notice of appeal is as follows:

*"The decision against which the present appeal is lodged, is one which is against the principle for the development of the land for residential purposes, as already laid down in the decision reached by the Town and Country Planning Board on the 27<sup>th</sup> January 2011 (ref. TCPB 76/1610—ref.No.Morc/533/10, following an appeal by me against a previous decision of the Pamplemousses-Riviere du Rempart District Council dated 8<sup>th</sup> July 2010 under the sole ground that "The site is found outside the defined settlement boundary and within the scenic landscape area".*

*The District Council of Riviere du Rempart, was a party to the above appeal and is bound by the decision of the Town and Country Planning Board as per the above decision dated 27/01/2011. The above decision of the Town and Country Planning Board was lodged with the application made for the Outline Planning Permission (OPP) and should have been taken into consideration."*

5. The Statement of Case of the Appellant sets out an introduction and a background to the case and five paragraphs of submissions to the Tribunal and a last paragraph containing his prayer to the Tribunal. The submissions of the Appellant to the Tribunal are reproduced hereunder:

*"5. The decision against which the present appeal is being lodged, is one which is against the principle for the development of the land for residential purposes, as already laid down in the decision reached by the Town and Country Planning Board (TCSB) on the 27<sup>th</sup> January 2011 (ref. TCPB 76/1610- ref. No: Morc/533/10 following an appeal by the Appellant in the present case against a previous decision of the Pamplemousses-Riviere du Rempart District Council dated 8<sup>th</sup> July 2010 under the sole ground that "The site is found outside defined settlement boundary and within the scenic landscape area."*

6. *The Respondent was a party to the above appeal and is bound by the decision of the Town and Country Planning Board as per the above decision dated 27/01/2019. The above decision of the Town and Country Planning Board was annexed to the application made for the Outline Planning Permission (OPP) and should have been taken into consideration.*
7. *The decision of the TCPB is clear that in the event that certain criteria are fulfilled, residential development on the site may be permissible and further decided that the appellant could proceed with the development of the site through a master plan for the development of the whole site based on certain principles enumerated in the decision. The decision is furthermore an important precedent which the respondent is bound to take into consideration while processing the application for the OPP.*
8. *Furthermore, Policy SD4 of the Pamplémousses/R. Du Rempart Outline Scheme clearly states:*  
**SD4 Development on Land Outside Settlement Boundaries**  
*There should be a general presumption against proposals for development outside settlement boundaries unless the proposal:*  
*There has been a formal commitment given by the Ministry responsible for Public Utilities, Local Authority, the Town and Country Planning Board, the Ministry responsible for Housing and Lands or other government approved scheme prior to the approval of this Outline Planning Scheme.*
9. *Therefore, the Respondent is acting in bad faith by failing to comply with the directions of the TCPB in the decision reached in 2011 of which the Respondent was also a party."*
10. *From the grounds of appeal and submissions, the case of the appellant appears to rest primarily on the fact, that according to him, his property has already gained planning acceptance for the type of development that he proposes to undertake in the future, that is, for residential land use. However, from the tenor of the submissions and the grounds of appeal of the appellant, the appellant appears to be seeking from this Tribunal some form of acknowledgement and declaration that the Council is bound by a decision reached by the Town and Country Planning Board.*

11. Our starting point is the jurisdiction of this Tribunal which is set out in **section 4 (1)** of the **Environment and Land Use Appeal Tribunal Act 2012** ["ELUAT Act"]. Under this section, the Tribunal can hear and determine appeals under **s.54** of the **Environment Protection Act**, **s.117 (14)** of the **Local Government Act**, **s.7B** of the **Morcellement Act**, **s. 7** and **s. 25** of the **Town and Country Planning Act**. Under **s. 4 (2)** of the **ELUAT Act** the Tribunal may also exercise such jurisdiction as may be prescribed under any relevant Act. The Tribunal therefore has no jurisdiction to consider the merits of an appeal which has already been heard and set aside by the TCPB, the reason being that the Tribunal has been set up to take over the defunct TCPB's appellate jurisdiction. The consequential amendments and the Transitional provisions under **sections 8 and 9 of the ELUAT Act 2012** evidence this. From Doc A produced by Mr. Seetahul, witness for the appellant from the TCPB, it can be gathered that there was an appeal made by the appellant before the TCPB for the excision of a plot of land for residential purposes and that following certain observations, the appeal was set aside by the TCPB. We believe that the matter having been subjected to an appeal before the TCPB cannot now be placed before this Tribunal for enforcement since this Tribunal is neither an enforcement agency nor can it decide on a case which has already been the subject matter of an appeal before a body over which this Tribunal has no authority.

12. We also believe that this issue has been canvassed in our ruling dated the 14<sup>th</sup> November 2018. We do not believe that any new evidence has been adduced that warrants any reconsideration of our ruling except that we have it in evidence that the subject site in relation to the application for excision and that of the OPP is the same. We will not reproduce the reasons already enunciated in our ruling but for the sake of completeness we will place on record again certain points made therein. The appeal before us is in relation to an application for an Outline Planning Permission for the construction of nineteen residential villas at Poudre D'Or Village. This is a different application to an application for excision of land. The purpose may well be for the ultimate residential development of the land. However, different criteria apply for assessing the merits of the excision of land and that of granting an OPP.

13. Agreeably, there may be some overlap in terms of considerations but the issues should not be mixed as they cannot be identical. It stands to reason that the granting of a BLUP for excision of land cannot guarantee an OPP nor can it, by extrapolation, guarantee a BLUP for construction. The Council has the right to assess the application again and it was legally entitled to refuse the granting of the OPP on its application of planning instruments and policies.
14. The Tribunal can take note that there was an agreement reached by the parties before the TCPB regarding the course of action to be taken in the application for excision of the land for residential purposes but cannot impose on the Council that it was bound by any course of action throughout the process until obtention of the OPP or even the next stage, which is, obtention of BLUP for construction of the villas. Similarly, from Doc A, we find no undertaking given by the Council as regards future applications in connection with this project.
15. We cannot surmise either, in the absence of clear evidence on record, that there was a formal commitment by the Town and Country Planning Board to grant the appellant an OPP. The witness, Mr. Seetahul, from the TCPB called by the appellant at no point clearly stated that there was a formal commitment given by the Ministry or the TCPB nor has any documentary evidence been produced to that effect. It is stipulated in Doc A that the Committee was of the view that "residential development on the site might be **permissible**." This, in our view, has been drafted in no certain terms. It is doubtful as to whether it can be taken to be a formal commitment for the purposes of satisfying the criterion under Policy SD4 of the Pamplemousses and Riviere du Rempart Outline Planning Scheme. The appellant also spoke of a letter of intent emanating from the Morcellement Board in 2007, annexed to Doc B, the report of Mr. Foondun. This, in our view, cannot be taken to be a formal commitment as regards the present application. The respondent denied any formal commitment and submitted that this only applied in scenarios where a change in Outline Planning Scheme was anticipated shortly.
16. The submissions of Counsel for the appellant, at page 6 of the written submissions is that the case for the appellant "is not to ask the Tribunal to decide upon the binding effect of

another Appellate body: **But to ask the Tribunal to decide upon the appeal made by the Appellant to the Tribunal, in the light of the provisions of the law and the Planning Instruments.**” Although these are the submissions of learned Counsel appearing for the appellant, the grounds of appeal and the submissions as per the appellant’s statement of case, as drafted, all seem to relate to the decision taken and ratified by the TCPB with regard to the application for excision. There are no grounds of appeal as regards the four reasons of refusal by the respondent as set out in the respondent’s letter dated 14<sup>th</sup> April 2017.

17. We will however proceed to consider the grounds of refusal of the respondent and look at the merits of the application for the OPP on the basis of the evidence placed before us. From the evidence of the respondent’s witness, the four reasons for refusal enumerated in the respondent’s letter are all based on planning considerations and cannot be said to be irrelevant or immaterial in anyway. Infact, two out of the four reasons given by the respondent are undisputed by the appellant. It is not contested that the subject site is found outside defined settlement boundary and that the site is found within scenic landscape zone as per the provisions of the relevant Outline Scheme.

18. As regards the second reason, namely that there is no built up in the vicinity, we have it from the report of Mr. Foondun that the only development that exists outside the settlement boundary and within the scenic landscape zone, is an old church which has existed since very long. Other than the church, there exists in the vicinity but outside the scenic landscape zone, a cemetery and four other buildings.

19. There are two points to be made here. Firstly, the presence of these few buildings and the cemetery cannot, as a matter of common sense, amount to any built up area. We therefore we do not believe that the Council was wrong in its appreciation that there is no built up in the vicinity. We do not subscribe to the contention of Mr. Foondun that the physical circumstances of the site is changing in favour of residential land use simply on the basis of four random buildings which are found not far from the subject site.

20. Secondly, it can also be seen from the report of Mr. Foondun that these buildings are clearly outside the designated scenic landscape zone. The four buildings, whether they have been granted BLUP or whether their very existence can amount to a good reason to allow the application for the OPP is doubtful. Whether these buildings should have been there or not is beyond the scope of this determination. However, their existence does not in our view disrupt the scenic value of the zone as against the proposed development and its location with regards to the access road, which was pointed out by Mr. Foondun, and the fact that the subject site actually falls within the designated scenic zone. This also ties in with the fourth ground of refusal.

21. The fourth ground of refusal is that the site does not follow the sequential approach for release of land under **Policy LS1**. Under this Policy of the OPS, produced and marked as Doc C, which deals with **Conservation of Scenic Landscape Areas**, proposals for development may be allowed if they are done in accordance with the sequential approach to site identification as set out in **Policies SD1 to SD4**. Since the subject site is outside settlement boundary, the relevant policy is **SD4**. As per this policy the proposed development and the site must satisfy a series of criteria and the last part of the **Policy SD4** provides (inclusively):

*“And the proposal:*

- *Is not located in an environmentally sensitive area nor in an area of landscape significance as notified by the Ministry responsible for Environment and Sustainable development; or*
- *Is not occupying a site of long term suitability for agriculture, forestry or an irrigation zone as notified by the Ministry responsible for Agro-Industry and Food Security;*
- *Broadly follows the design principles contained in Design Guidance outlined in SD5”*

22. **Policy SD5** of the OPS provides for **Design Quality and Sustainable development**. Under this policy a series of considerations are to be taken on board including *“ensuring an appropriate standard of design including density, height, bulk and scale and improving areas of poor quality environment”* and *“protecting and enhancing urban open space, green wedges, areas of landscape significance, environmentally sensitive areas and land/water interface areas;”* amongst others. We agree with the submissions of learned Counsel appearing for the respondent, Mr. Sookhoo, that the appellant failed to adduce any evidence to demonstrate to the Tribunal in what way the proposed development satisfied the criteria in

the Design Guidance under **Policy SD5**, which is a criterion to be considered under **Policy LS1**. No evidence was adduced to show in what way the construction of the nineteen villas were to “*contribute to maintaining and enhancing the landscape character of the area*” the scenic value of the area, a factor enunciated under **Policy LS1**. The Tribunal was favoured with the plans of the villas but these did not provide enough information to satisfy the considerations to be taken on board when deciding whether the criteria under the policies enumerated have been met. The appellant has thus failed to show the construction of these villas will maintain and enhance the landscape character of the area.

23. It was submitted by Mrs Saha, Counsel for the appellant, that the application being for an OPP which is a permission for the development of the land. Although this is indeed the case, the Council still needs to be satisfied of the type of development and the design to assist it in its assessment of whether the policies are likely to be respected since the zone has a scenic landscape value and will fall under **Policy LS1** which in turn makes reference to **Policy SD5**. These cannot be by-passed.

24. It is borne out in the evidence of the respondent that no BLUP has been granted in that area for any development except for the church that has existed since long ago. Otherwise the scenic landscape value of the area has been preserved upto now. Evidence was adduced by the appellant to show other residential properties which were found outside the settlement boundary and within scenic landscape zones. It will be beyond the scope of this Determination to make any pronouncement on whether they should have been granted the relevant BLUP for those that have been granted one. However, since two wrongs cannot make one right, we are of the considered view that such evidence does not add any probative value to the case of the appellant. There is also no evidence of development in the vicinity so that the sequential approach for the release of the land can be followed. We have already made observations regarding the four buildings in the area. These are not located within the scenic landscape zone and are to be distinguished from the proposed development.

25. For all the reasons set out above, more especially the grounds of appeal relating mostly to a decision of the TCPB, the appeal is set aside. No order as to costs.

Determination delivered on 30<sup>th</sup> July 2019 by

**Mrs. J. RAMFUL-JHOWRY**

**Vice Chairperson**

**Mr. L. CHEONG**

**Member**

**Me. R. SEETOHUL**

**Member**