

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1572/18

In the matter of :-

1. Dattah Sookun
2. Amrith Sookun
3. Amardeep Sookun
4. Prema Ramrachuya

Appellants

v/s

The Ministry of Housing and Lands

Respondent

DETERMINATION

1. The present appeal is against a decision taken by the Respondent (hereinafter referred to as "the Ministry"), for having rejected an application made by the Appellants for subdivision of a plot of land of the extent of 1016.40 sq.m found at Dagotiere into four lots for residential purposes. The decision of the Ministry was communicated by a letter dated 19th February 2018, which stipulated that the Morcellement Board rejected the application on the grounds "*the proposed site lies at some 100 m outside settlement boundary and is found within the catchment area of reservoirs/dams.*" The Appellant no.1, *inops consilli*, represented all Appellants. The Representative of the Ministry deponed on the grounds for refusal of the application by the Ministry. She was not cross-examined. A Development Control Officer of the Ministry, Mr. Rambarassa, deponed regarding the relevant policies applied by the Ministry in support of the decision to reject the application. Mrs. Seebaluck, Planning Inspector of the Moka District Council also deponed. Both were cross-examined. We have duly considered all the evidence placed before us including submissions of Counsel for the Respondent.

I. CONTEXT ANALYSIS

2. The proposed development site, of an extent of 1016.40 sq.m, lies outside the settlement boundary in the village of Dagotiere. There are no residential buildings in the vicinity of the subject site save for one house. The Valetta Dam is in proximity of the subject site, as per Doc C, an extract of the Outline Planning Scheme of Moka ["OPS"]. As per the title deed, there are general conditions attached to the lot such as "*Pour lui en jouir, faire et disposer comme bon lui semblera...*". The property was acquired by the Appellants as heirs to the estate of their late father Mr. Sewlall Sookun.

II. THE PLANNING INSTRUMENTS AND THE LAW

3. The site being situated in the District of Moka the applicable outline scheme is **Planning Scheme of Moka** and the applicable Planning Policy Guidance is **PPG1** issued under the **Planning and Development Act 2004**. Under the **Outline Planning Scheme of Moka**, the following policies are of relevance:

(I) Policy SD4: Development on land Outside Settlement Boundaries

Development is regulated by **Policy SD4** where there is presumption against development for a site located outside settlement boundary unless a hardship case and/or other specific criteria but the land, should not be located within duly approved agricultural morcellement and ought to have been acquired prior to 30th September 2005.

(II) Policy EC2: Conservation of Water Resources

Development within 30 metres of the highwater levels of the dams and adjacent to rivers, rivulets, streams, open canals or within the catchment areas should not *normally* be permitted, unless the developer has obtained written agreement from the Water Resources Unit/Ministry of Public Utilities and the Sanitary Authority.

III. THE ISSUES

4. The Appellants' version is essentially as per their statement of case whereby it is averred that the plot of land was inherited from their late father. As points advanced in favour of their case, the Appellants have stated that there is a residential building belonging to the Jaan family in very close proximity to the subject site, that there is an NHDC project comprising of some 600 houses and that a VRS morcellement will be coming up soon in the vicinity. It is also averred that the Ministry should have considered approving the application of the ground of Hardship as provided in the OPS.
5. We have it in evidence from the Development Control Officer of the Ministry, Mr. Rambarassa, who produced the Development Management Map, Doc C, which is a document prepared by the Ministry of Housing and Lands, showing clearly the location of the Valetta Dam and the subject site which lies outside the settlement boundary. These documents were not contested by the Appellants nor was the location of the subject site as plotted on the document. The case for the Respondent is that the subject site lies within the catchment area of the Valetta Dam and it is outside the settlement boundary by 100m. It is not denied by the Appellants that their property lies within the catchment area of the Valetta Dam. It was however stated by the Appellant no. 1 that as per Annex D of their statement of case, the report produced by their Land Surveyor, Bruno Dumazel, mentions that the subject site lies within the settlement boundary.
6. While we note that the report of Mr. Dumazel which was prepared for the purposes of the application for division in kind before the Supreme Court indeed mentions that the site lies within settlement boundary, we are not prepared to accept this in the light of the testimony of Mr. Rambarassa who produced the context plan from an extract of the Ministry's Development Management Map for the Moka/Flacq OPS. Mr. Rambarassa enlightened the Tribunal on the location of the subject site.

7. Mr. Dumazel, on the other hand, was not called as a witness by the Appellants to testify before the Tribunal on this issue nor was his report compiled for the purposes of the case before the Tribunal and his report was therefore not tested before this Tribunal. The Tribunal is therefore inclined to accept the version of the Respondent on this issue and conclude that the subject site lies outside the settlement boundary. Apart from the fact that Mr. Rambarassa produced the extract of the Development Management Map of the Ministry of Housing and Lands to substantiate the case of the Council that the subject site is found outside the settlement boundary by about 100m, his map was also used to illustrate that it is found within the catchment area of the Valetta Dam.
8. The policy **SD4** is applicable in this case as the land *in lite* is found outside the defined settlement boundaries but the proposed development cannot be allowed as the application is for subdivision for the purposes of turning them into residential properties. This policy recommends that there is a general presumption against proposals for development, which includes residential development, but that under well-defined circumstances some types of development may be appropriately located outside settlement boundary. This Policy also caters for exceptional cases where residential development such as cases which satisfy the criteria for "hardship" as set out under **Policy SD3**.
9. The case can only be favourably considered as a Hardship case if the development proposal comes from a small owner and the release of the land *in lite* will not encourage large scale removal of land from agriculture and it is not located in an environmentally sensitive area amongst other criteria. Under the "justification" section of this policy it is provided that there is sufficient land available in the district within settlement boundary for residential development within the next 15-20 years and that a sequential approach will have to be adopted to new development for efficient provision of transport, utility facilities and social and community services. We have not been enlightened on the transport networks available on site and the utility supplies or whether they can be readily connected without expense to public

funds although the Appellant no. 1 did mention the Jaan family whose house is 20 feet away.

10. The Planning and Development Officer of the Council, Mrs. Seebaluck, explained that the Council has not given any BLUP for residential developments and that the only Development Permit for residential building was granted to the Jaan family in 2002. We believe that since this permit was granted before the existence of the OPS, a parallel cannot be drawn between that case and the present case. There are now defined settlement boundaries within the OPS of Moka which did not exist back in 2002. The policies will have to be applied the way they exist now and therefore we do not believe that the fact that the Jaan family holds a permit since 2002 can tilt the favour of the Appellants application since releasing the land for residential purpose will put pressure on the authorities to release other adjoining land outside the settlement boundary, when there is still land which has not been released within the settlement boundary and where there is readily available public infrastructure and utilities. Another factor to consider here is also that the land in *lite* is also situated within the catchment area of the Valetta Dam.

11. Policy **EC2** is applicable in this case but only to state that due to conservation of water resources, developments within 30 m of the high water level of dams should not be permitted unless the developer has certain clearances from the relevant bodies. To a question put by Counsel, the witness for the Ministry explained that under Policy **EC2**, the application of the Appellants would not be considered favourably by the Ministry because of the fact that the proposed development was 100m outside the settlement boundary and that had it been within settlement boundary then clearance from the Water Resources Unit would have to be sought by them.

12. As regards NHDC project found in the area was located within the settlement boundary, Mrs Seebaluck explained that there is infact a new project which will be an extension of the existing NHDC project. In any event, this cannot be considered as

a factor for the release of the land of the Appellants as the NHDC projects are subjected to a different scheme with different criteria. Mr. Rambarassa also explained that such projects would normally be accommodated within settlement boundary if possible but if not, they can be done outside settlement boundary "in cases of national interest when having regard to material considerations".

13. The Appellants referred to the presence of a VRS morcellement in support of their case to the effect that there are residential developments in close proximity of the subject site. Mr. Rambarassa explained that VRS morcellement projects, by virtue of **Section 25 of the Sugar Industry Efficiency Act**, are permitted outside settlement boundary as they fall within the socio-economic policies of the Government. We believe that the fact that there is a VRS morcellement is of little relevance to the present hearing which concerns the planning merits of the case and whether the subdivision for the purposes of residential development can gain planning acceptance having regards to the specificities of the locus and the applicable policies.
14. In our view, the Appellants did not substantiate their case with any supporting document or witness. The Tribunal accepts the unrebutted evidence of the Ministry. The Respondent has rightly applied the Policies **EC2** and **SD4** of the **OPS** to refuse the application for subdivision of land for residential development since the site is outside settlement boundary and found within the catchment area of the Valetta Dam. As far as the other buildings in the vicinity of the catchment area are concerned, the Council's representative has deponed that no BLUP has been granted since the policies are in force but that there is only the residence of the Jaan family that received a permit in 2002 and there is a Telecom Tower as well as a CIS structure near it. There are no other developments in the vicinity.
15. The Tribunal takes on board the fact that the Appellants' situation may be in no way different to that of the Jaan family who lawfully owns a house outside settlement boundary and within the catchment area of a dam. This cannot, however, motivate

our finding in favour of the Appellants on account of this putting the Appellants in a less favourable situation compared to those who have acquired a BLUP prior to the Policies being in force. The policies have been implemented for a reason and that is to regulate development according to planning norms. The justification for Policy **EC2** is that the buffer of Dams is needed to ensure that the consumption of water is safe for human beings and that *“Deforestation of the catchment areas causes an increased “peakiness” in surface water run-off, as does increasingly dense development, with a consequential increase in the volume of water that will be lost to the sea and a reduced dry season flow rate.”* Therefore, these policies are there to ensure the protection of groundwater so that it poses no threat to the health and quality of life of people.

16. For all the reasons set out above, we find that the decision of the Ministry was unchallenged and well-motivated. The appeal is set aside. No order as to costs.

Determination delivered on 4th November 2019 by

Mrs. J. RAMFUL

Vice Chairperson

Mr. SOYFOO

Member

Mrs. RAWOOTEAA

Member