IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

IN THE MATTER OF:

Cause Number: ELAT 507/13

LES TERRACES DE MARTELLO LTEE.

Appellant

v.

MINISTRY OF HOUSING AND LANDS

Respondent

RULING

The appeal is against the decision of the Ministry of Housing and Lands for having refused the application submitted by the Appellant for the subdivision of a plot of land of 7850.83 square meters into ten lots for residential purposes. The proposed development is situated at Quatre Bornes. The reasons for refusing the application are contained in a letter dated 9 September 2013, which are basically the following:

(i) The proposed development is not considered to sustain or enhance the landscape character of the area as per the requirements of policy LS2, 2. relate to the scenic landscape character of the land, the land being in an environment sensitive area,

(ii) The proposed development does not comply with the requirement of policy EC1, relating to development in Environment Sensitive Areas (ESA),

(iii) For any development within an ESA clearance from the Ministry of Environment must be obtained,

(iv) The proposed development is contemplated on a site zoned as Mountain Slope and Scenic Landscape Area and as per policy EC2 of the Quatre Bornes Outline Scheme (Public Deposit Version 20 April 2013) there is a general presumption against development on slopes of more than 20% (whereas the gradient of the site varies from 40.9% to 54.4%).

The Appellant lodged the appeal on two grounds as contained in the notice of appeal: firstly, that there are other residential buildings that have already been built and others under construction within the surrounding area, and, secondly, the developments that are being carried out are also against the conditions as listed in the refusal letter. He also annexed photos of surrounding constructions.

At the outset, we note that the grounds of appeal, as set out in the notice of appeal, are not precise, nor concise, but make a statement of fact or observation by the Appellant. They hardly address, nor attempt to ask the Tribunal to make an assessment of the propriety of the grounds of refusal of his application. It is only in the statement of case that a prayer is made by the Appellant along those lines.

The Respondent has raised a preliminary objection which relates to the chronology of the application in relation to the governing instrument for the assessment of the proposed development. It is the Respondent's stand that the application for a development permit was made on the 30 May 2013, at the time when Outline Planning Scheme for Quatre Bornes Municipal Council Area deposited on 20 April 2013 was applicable, and it is not the revoked Outline Planning Scheme (OPS) (by GN 1035 of 2013) which should be applied. The Respondent would have acted unlawfully had it considered the application on the basis of the revoked one.

The submissions made by counsel for the Appellant and Respondent respectively revolved around the legal status of the 'new' outline planning scheme as opposed to the revoked one. By 'new', what is referred to is the OPS that was 'under deposit' at the time of the assessment of the application (reference is made here to the OPS deposited by GN 1039 of 2013 which is referred to as 'draft OPS' by the Government Notice itself and which had been deposited for consultation and representations from the public).

The Respondent's stand is that the OPS deposited by GN 1039 of 2013 is the only instrument that could govern the Respondent's decision. The Respondent has applied the policies contained therein (namely policy LS2 and EC2) in its decision. As such, its decision cannot be flawed. We have no difficulty in accepting this position, being given that the Respondent could, by no means, make a decision on the basis of an OPS which had been revoked by Government Notice 1035 of 2013.

On the other hand, the Appellant had no issue with the application of the 'new' OPS and submitted that 'the contention regarding the disparity between the revoked and the new OPS is only an academic issue and that it was the OPS of 20 April 2013 (new OPS) that was applicable both at the time of the processing and the decision'. It is the application of the 'new' OPS that calls for attention. Government Notice 1039 of 2013 clearly spells out that that the 'new' OPS is a draft OPS which has been deposited for any person wishing to make representations to the Town and Country Planning Board in respect

thereof. The Appellant, for this reason, refers to the 'new' OPS as a 'Draft Scheme under preparation'. The Appellant relies on the drafting of section 7 subsection 5 of the Town and Country Planning Act which stipulates that "*The local authority shall, in dealing with an application under section 117 of the Local Government Act 2011, shall have regard to the question whether the proposed development is in any way likely to contravene an outline or detailed scheme being prepared in respect of the area concerned*".

The Appellant's submission is that the use of the terms 'shall have regard to' creates an obligation upon the planning authority to do a balancing exercise and have regard to all considerations including the chronology of the preparation and submission of the application, the fact that the deposited OPS had not been approved yet and was liable to change, that the subject site was within settlement boundary and there had been a failure of the Board to give notice of the said modification to the owner.

We must say that the whole process of revoking a scheme whilst the corresponding new instrument, namely the 'new' OPS, is still under deposit and calls for representations from the public, is indeed a process which is questionable. It is our view that policies that govern planning decisions should have certainty so that both the authority and applicants stand on firm ground as to the basis on which decisions are taken and also the date from which any modified policy is in force.

Be that as it may, we take into account that the law maker has provided that the assessment of a proposed development be done within the parameters of the OPS under preparation by 'having regard to it'. In this respect, the policies contained in the 'OPS under deposit', namely policies LS2 and EC2, are important for the decision of the Respondent.

We do not subscribe to the view that, as submitted by the Appellant, the authority has to do a balancing exercise on the abovementioned criteria. Although the 'OPS under deposit' may be subject to modification in the light of representations made within three months from the date of the deposit, this does not entitle the Respondent to have regard to extraneous factors, namely chronology and even less, the issue of the failure by the Board to notify the owner of the said modification. The operation of section 24(5) of the TCPA (i.e. notification and compensation) is not a matter that can be assessed within the present proceedings. Any omission of the authority in relation to the notification, and eventually compensation is a matter to be taken before the appropriate forum.

On the basis of the above, we uphold the preliminary objection raised by the Respondent that ex facie the statement of case, the Appellant invited consideration to be given to the revoked OPS. Although the Appellant conceded in submission that it is the OPS under deposit that is applicable, he went on to introduce considerations that

were outside the scope of the OPS under deposit. We do not subscribe to the view that, by providing that the authority must 'have regard to' potential contravention to an OPS or 'OPS being prepared', the Legislator intended to cater for a balancing exercise by the authority. The Respondent could only apply policies as contained in the 'OPS under preparation' at the time it took the decision.

In addition to the above, we have to state 'proprio motu' that the grounds of appeal as contained in the notice of appeal amount to no ground at all. The prayers as contained in the statement of case refer to the actions that the Appellant intends to take with a view to address the environmental concerns and have consultations with the authorities for this same purpose. It is our view that such a course of action cannot be part of the Tribunal's consideration and cannot be part of the prayer to the Tribunal as contained in the statement of case of the Appellant. This is why proprio motu we raise that the appeal cannot proceed along these parameters. The Appellant may consider exploring prayers (vi) and (vii) at the level of the authority before engaging into any appeal process. The appeal is set aside for all the above reasons.

Delivered by:

Mrs. V. Phoolchund-Bhadain, Chairperson

Mr. V. Reddi, Assessor

Mr. G. Seetohul, Assessor

Date: 31st May 2017