IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1863/19

In the matter of:

Rashmika Ramtohul

Appellant

v/s

District Council of Riviere du Rempart

Respondent

DETERMINATION

1. The present appeal is against a decision of the District Council of Riviere du Rempart (hereinafter referred to as "the Council"), for having rejected an application made by the Appellant for a Building and Land Use Permit (hereinafter referred to as "BLUP") for the construction of a house at Schoenfield Branch Road, Poudre D'Or, Riviere du Rempart. The grounds of refusal are set out in a mail dated 6th August 2019

   "As per policy SD4 of the Outline Scheme and the site lies outside defined settlement boundary by approximately 540m"

2. The Appellant was represented by her father, Mr. Ramtohul. The Respondent was legally represented. The Appellant deponed under solemn affirmation and was cross-examined. The Planning and Development Inspector of the Council, Mrs. Padayachi, deponed on behalf of the Respondent and was cross-examined. We have duly considered the evidence before us as well as submissions.

3. The Appellant initially lodged 3 grounds of appeal together with her notice of appeal which are reproduced below:

"(a) My marriage has been fixed for April 2021. I do not own any house nor any portion of land. I have to start construction of my house at the earliest so that I may move in after marriage. The land at the site is being provided to me by my parents to that end.

(b) (i) The area to be released for that purpose will not exceed 10 perches;
(ii) I am in a position to provide the necessary basic infrastructure to the site;
(iii) The Central Electricity Board has already provided me with its clearance for the purpose of the Building Permit;
(iv) The common road facing the site connects access to the Schoenfeld Branch Road;
(v) I have already initiated action for the site to be connected to the water supply;
(vi) The site is not situated in a Gazetted irrigation area.

The points (i) to (vi) in the above paragraph fulfil the conditions under Policy SD4 where a permit may be granted.

(c) Over the past decade, developments have taken place which have visibly pushed the defined settlement boundary outwards. This has significantly reduced the excess limit of 540 metres as stated by Respondent. This is morefully laid down in my statement of case. My nearest neighbour's house is just 75 metres away at the corner of the road leading to my site. He was duly granted a Building Permit by Respondent."

4. The uncontested evidence is that the property in *lite* is situated outside the settlement boundary and was given to the Appellant by her father who acquired it in 2017. The case for the Appellant in essence was that since there are 2 residential properties in the vicinity which have been granted BLUP and that the property will be readily connected to utilities such that no expense will be incurred by the Council, the latter

may also grant a BLUP the more so as the Appellant has no other property and that this case can be considered as a hardship case, according to the Appellant's representative. The Respondent took the contrary view in that the presence of the residential properties being granted BLUP outside settlement boundary was an exception to the rule, for having satisfied the hardship criterion under the relevant policy.

Under Grounds (i) and (ii)

5. These two grounds of appeal seek to address the first ground of refusal which essentially provides that as per Policy SD4, the application cannot succeed. It is the contention of the Appellant that her application falls within the exception to the **Policy SD4**, that is, her application may be considered as a hardship case for the obtention of a BLUP since she has no other property, the land *in lite* does not exceed 10 perches and that she is ready to provide the necessary infrastructure to access her property from the main road. The subject site being outside a settlement boundary, the applicable Planning Policy is indeed **policy SD4 of the OPS of Riviere du Rempart** which is reproduced hereunder

"SD 4

Development on Land Outside Settlement Boundaries

There should be a general presumption against proposals for development outside settlement boundaries unless the proposal:

- *Has been shown to have followed the* ***sequential approach*** *to the release of sites identified in SD 1, SD 2 and SD 3 and there are no suitable sites within or on the edge of settlement boundaries;* ***and***
- *Is for the essential purposes of agriculture, forestry or other uses appropriate to a rural area; or*
- *Is for the re-use or refurbishment of existing buildings set in their own grounds; or*
- *Is considered a bad neighbour development as defined in Policy ID 4; or*

- *In cases of national interest when having regard to material considerations, locational preferences linked to employment creating uses and socio-economic policies of Government, development may have to be outside settlement boundaries and is acceptable on planning, traffic impact and environmental impact grounds; and*
- *Is capable of ready connection to existing utility supplies and transport networks or can be connected without unacceptable public expense;*

Or where:

- ***The proposal is from a small owner seeking residential property for themselves and their close kin and can be considered as a hardship case, provided that in the opinion of the relevant authorities such release would not encourage large scale removal of land from agriculture; or*** [stress is ours]
- *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, provided such a commitment is duly supported by bona fide evidence i.e. original and authentic documents;*

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 National Development Unit; or*
- *Is not occupying a site of long term suitability for agriculture, forestry or an irrigation zone as notified by the Ministry of Agro- Industry and Food Security;*
- *Broadly follows the design principles contained in Design Guidance outlined in SD 5.*

Justification: At the District level there is sufficient land available, committed or vacant within settlement boundaries for residential development and through approved morcellements, VRS and other land conversion schemes to accommodate future residential needs for the next 15-20 years. To conserve remaining land in the District, especially land required for long term agriculture, or land that has an ecological or landscape significance, a sequential approach to new development should be followed which first considers sites within or on the edge of built-up areas in existing settlements before greenfield sites outside settlement boundaries are selected. This presumption

reinforces key NDS objectives for clustered growth and more efficient provision of transport and utility facilities and social and community services. It is recognised however that not all development can or should be accommodated within settlement boundaries and under well-defined circumstances some developments may be more appropriately located outside settlement clusters and the main built-up areas.
The definition of hardship case, small owner and close kin is as defined in SD 3."

6. Normally, according to the abovementioned policy, residential development may be allowed outside the settlement boundary provided it follows the sequential approach and certain criteria are met. The subject site is surrounded by agricultural land with gaps that require infilling. A google map was produced by the representative of the Council clearly demonstrating that at a radius of 400m around the subject site there is mostly agricultural or waste land with no built-up area save for 3 houses, two of which we understand to belong to one Mr. Mungapathee and one Mr. Bichooman respectively. The development would thus not follow the sequential approach which is the pre-requisite when applying **Policy SD4**. This being said, the "hardship" criterion as defined in **Policy SD3** of the **OPS** is an exception to the rule provided certain other criteria are met. The policy clearly refers to *"or where the proposal is from a small owner seeking residential property for themselves and their close of kin..."* In the present case, it is not undisputed that the proposed development is for a plot of an extent of less than 10 perches. Applying the policy **SD4**, we are convinced that it will not encourage largescale excision of land from agricultural plots, the more so as no evidence was adduced as regards the land being under cultivation. The provision of utilities such as water, electricity and even access onto Schoenfield Branch Road can be taken care of by the Appellant as per representations made before the Tribunal by her representative such that the provision of these need not be the responsibility of the Council. Conditions could be imposed in a BLUP for the Appellant to make provision for her own utilities as well as her not having any right of complaint against the Council. The Appellant's representative also testified that the Appellant did not have any other property. This could be considered under the ground of "Hardship", particularly as the extent of land is not sizeable.

7. This being said, the "hardship" ground has not been pleaded in the statement of case of the Appellant but her representative simply submitted that the case could be considered on hardship grounds. The definition of hardship in planning law is rather specific and as stated above, it is set out under **Policy SD3.** This policy however clearly stipulates that "The applicant and the beneficiaries where applicable should support their application by way of an affidavit /declaration." No such evidence was produced by the Appellant before the Tribunal nor was there any declaration made by her or affidavit produced by her with her application before the Council. In the absence of such evidence, the Tribunal cannot conclude that the Appellant's situation meets the criteria under the "Hardship" category nor will we surmise on the issue. The Appellant's representative made some vague statements as regards some documents they had to produce to show the extent of the land but the evidence is too weak and cannot be relied upon.

8. The Appellant's contention is also that since Mr. Mungapathee and Mr. Bichooman have been granted BLUP for their residential buildings, the Appellant's application should also be considered likewise. The Council explained that the BLUP in both these cases were granted under the "hardship" criterion under **Policy SD4**. The Council attempted to explain the factors that weighed in favour of the application for BLUP for residential development in the case of Mr. Mungapathee and Mr. Bichooman as regards the ease of access onto Schoenfield Branch Road and the ready connection to utilities and transport network. The Council has decided in its wisdom to grant the applications of the Mr. Mungapathee and Mr. Bichooman. The Tribunal can only appreciate this evidence. Evidence was adduced regarding the access to the property of Mr. Mungapathee and that of Mr. Bichooman, which are collateral issues and do not go to the crux of the matter and are hence disregarded. Whether the decision of the Council to have granted those two BLUPs was justified or not, is not an issue for the Tribunal to decide. The issue to be decided is whether the BLUP, subject matter of the present case, should be granted. Even if the present application were to be considered under the "Hardship" criterion, like in the case of Mr. Mungapathee and Mr. Bichooman, it does not satisfy the requirement under **Policy SD3** which clearly stipulates that –

"The land in question

(a) Should be located in an area where development is permissible in accordance with the policies of the **Outline Scheme** or **Development plan**, as the case may be, of the relevant **Local Authority;**

(b) Should not be located **within a gazetted irrigation area**;

(c) Should have been owned as at **30 September, 2005.**

Consideration may be given to land accrued through donation/inheritance after 30th September 2005, subject to a Land Conversion Permit being obtained from the Ministry of Agro-Industry and Food Security and provided parent property was acquired/in possession of original owner prior to 30 September 2005."

The subject site, being located outside settlement boundary is neither located in an area where development is permissible nor was the property owned by the father of the Appellant as at 30th September 2005. He only acquired the land in 2017 as per Doc B. Mr. Ramtohul submitted, in an attempt to be treated with parity as Mr. Mungapathee and Mr. Bichooman, that their properties were purchased in 2012. No evidence was adduced to that effect when the representative of the Appellant was in the box nor were any witnesses or documents were produced in support thereof. The Tribunal cannot investigate or conduct its own enquiries with loose information provided without clear evidence substantiating these claims. These two grounds of appeal therefore fail.

__Under Ground (iii)__

9. It is the contention of the Appellant under the second ground of refusal, the site being outside defined settlement boundary by approximately 540m, that the settlement boundary has been pushed. While the term settlement boundary is a term used mostly in planning jargon to define an imaginary line within which the Town and Country Planning Board will allow permissible development especially residential and outside of it, is usually left for agricultural or bad neighbour development. Contrary to the contention of the Appellant, this line does not shift. The settlement boundary is not to be confused with where the line of houses starts.

10. The Council's representative testified to the effect that as per the provisions of the OPS, the subject site lies outside the settlement boundary by 540 metres as per the development map. This has not been disproved and hence accepted by the Tribunal. Doc A, a google map was produced by the Council in support of the distance from the subject site to the settlement boundary. The land *in lite* as a matter of fact is well outside settlement boundary where residential development is not normally allowed. **Doc A** also reveals that as at now apart from the residences of those 2 families and a longstanding residential building found in the area, there are huge gaps with no built-up area. This is not only contrary to the sequential approach but in view of the distance of some 119 metres from the subject site to the Schoenfield Branch Road, as shown in the plans annexed to the title deed, Doc B, should a BLUP be granted considerable public expense will be incurred in order to access it, as rightly submitted by the Counsel for the Respondent. A duly granted BLUP would mean that the Council will be duty bound to provide services such as refuse collection, street lighting, road maintenance and utilities maintenance.

11. From the testimony of Mrs. Padayachi, the access from the subject site to Schoenfield Branch Road is a sugarcane track. The subject site being rather out of the way from the main road, as per the map in Doc B, will mean more State expenditure in terms of maintenance cost which cannot be afforded just for one residential building, the more so in view of the current climate, post pandemic. Mr. Ramtohul sought to challenge the distance from the subject site to Schoenfield Branch Road via a different route to the one taken by Mrs Padayachi in the course of her site visit. No evidence was adduced by the Appellant to the effect that there was an alternative route which was closer to the Schoenfield Branch Road. The Tribunal will not surmise on the issue. Infact, Mrs. Padayachi pointed out that she based herself on the map produced by the Appellant to the Council to access the site and no other access was provided. This ground also fails.

12. The Appellant has failed to satisfy this Tribunal in what way the present application should be treated as an exception to the rule as regards **Policy SD4.** While we gather that she wishes that her case be treated with parity with the cases of the two families

who have been granted BLUP for residential development outside of settlement boundary, the Appellant's case does not satisfy the criteria to be met under the hardship exception. The Tribunal has to abide by the provision of the policies and in this particular case there was no room for any derogation under the "Hardship" exception. It is worthy of note that the subject site is well off the main road by over 100 metres unlike the other two houses which are much closer to it. The Appellant's case as was presented, mostly focused on collateral issues of minimal importance in the planning context and the evidence in support of the planning merits of her application itself was weak while the evidence of the Council in support of its grounds of refusal has been unshaken as was the evidence underpinning the substance of the application.

13. For all the reasons set out above, the appeal is dismissed. No order as to costs.

Determination delivered on 23rd June 2021 by

Mrs. J. RAMFUL-JHOWRY	**Mr. SULTOO**	**Mr. SEETOHUL**
Vice Chairperson	**Member**	**Member**