BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1976/20

In the matter of :-

1. Prasanath Autar
2. Heirs of Raja Autar
3. Heirs of Narendra Autar

Appellants

v/s

Ministry of Housing and Land Use Planning

Respondent

DETERMINATION

1. This is an appeal against the decision of the Morcellement Board of the Ministry of Housing and Land Use Planning ["the Ministry"], for having refused to the Appellants the granting of a permit for the subdivision of a plot of land of an extent of 2448.1 sq.m into 3 lots for residential purposes at St Francois Road, Petit Raffray. The Appellant no. 1 is the sibling of late Raja Autar and late Narendra Autar and co-owners of the land *in lite* which they jointly bought in 1982. The sole reason for refusal of the application for subdivision sent on 02.10.2020 is *"Site is located outside the settlement boundary of Reunion Maurel Village as per the prevailing Pamplemousses-Riviere du Rempart Outline Planning Scheme. Not recommended as per policy SD4."*

2. The grounds of appeal lodged by the Appellants are reproduced below:
   (a) The decision is the result of an administrative negligence or a procedural error, as on 02.09.2020 via a phone call, a representative of the Respondent informed the representative of the Appellants that the application had already been approved on 24.06.2020.
   (b) The decision is unlawful and irrational in as much as:
      i. The site does not fall under the Reunion Maurel locality.

ii. The Respondent has not made an "in concreto" assessment of the proposed subdivision.

iii. The site is located on the edge of the actual in concreto settlement boundary, and, thus, the policy SD3 instead of policy SD4 should have applied, which there should be a general presumption in favour of development on the edge settlement boundaries.

(c) The sequential approach for release of land for residential purpose would apply in this case for below reasons:

i. There is already residential developments and businesses in the vicinity.

ii. Adjacent plots to the site are either developed or have obtained development permits.

iii. There is water supply on the site, and electricity supply is readily available.

iv. The site is found along a tarred public road, and also serviced by bus stops in both directions within 50 meters of the site.

v. The project would consolidate gaps, rounding off an existing settlement.

vi. The land is neither essential for the purpose of agriculture, nor located within an irrigation zone.

(d) This is hardship case for the below reasons:

i. The co-owners are small land owners, whereby none of them own land to the extent of one hectare in aggregate.

ii. The objective of the project is to seek residential property for their respective descendants who do not posses any residential property.

iii. After subdivision each of the 3 plots would be approximately 14 perches only.

3. We have duly considered the evidence before us as well as submissions of both counsel. The Appellants were represented by one of the Appellants, Mr. Atish Autar, one of the heirs of late Narendra Autar. One of the Appellants, Mr. Raja Autar, passed away after the close of the case and upon motion of Counsel for the Appellants, his heirs have been joined as Appellants. Grounds (a) and (b)(i) have been dropped.

I. Under Ground (b)

4. Under Ground (b) it is the contention of the Appellants that the decision of the Ministry is unlawful and irrational in that it should have come to the conclusion that the subject site is on the edge of the settlement boundary hence applied **Policy SD3 instead of Policy SD4** since it did not make a concrete assessment of the proposed subdivision. We have considered the views of the representative of the Appellants as regards his definition of what the "edge" of the settlement boundary is. He stated that his qualifications are in Finance, Architecture and Planning. Since his qualifications were not produced before the Tribunal nor was he deponing in his capacity as an expert in planning but rather as an Appellant therefore the Tribunal cannot treat him as an expert in planning law. We have considered the National Development Strategy. Indeed, in the map showing an extract of development opportunities in the centre of Rose Hill and it is only on the map that it is mentioned "Walkable Neighbourhood - 400m (5 mins) and 800 m (10 mins)". From the testimony of the witness for the Council called by the Appellant and the Planner from the Ministry, it can be gathered that what qualifies in our planning system as "edge" of settlement boundary is infact the edge or at most some 10 metres beyond the settlement boundary which may be considered as the edge. The Appellant's stand from what we have understood him to be saying is that if 400 metres as per the NDS is a walking distance of 5 minutes then since the subject site is only 365 metres from the settlement boundary then it is close enough to the boundary to be considered as the edge of the settlement boundary.

5. There is no definition provided in the law or the planning instruments as to what exact distance from the settlement boundary can be considered as the edge. We will therefore not read more into the policies than what has been provided, which is that the edge is to be taken for its literal meaning and therefore cannot be extrapolated to hundreds of metres from the settlement boundary. Both witnesses from the planning department of the Council and the Ministry, Mr. Ramjada and Mr. Juggoo respectively were of the same view that "the edge means on the edge".

6. If we are to interpret the edge of the settlement boundary as including hundreds of metres away, it would open the floodgates and the possibility of having a clear delimitation will become vague over time if the threshold is lowered. It was submitted by Counsel for the Appellant that the witness from the planning department of the Council and that of the Ministry were not clear on what would constitute the edge, whether it was right at the edge or 1 or 2 metres from the edge or 10 metres from the edge. Stretching it to several hundred metres would on the other hand, in our view, add to the unclarity.

7. We are comforted in our approach when looking at Figure 4.1 of the **Outline Planning Scheme for Pamplemousses -Riviere du Rempart ['OPS'],** which is the applicable OPS in the present case due to the location of the subject site. It provides an illustration of the broad approach to be adopted when assessing the acceptability of a development in relation to the settlement strategy, as provided under paragraph 4.1 of the OPS. As per the notes provided in the illustration regarding development on the edge of settlement, it is stated *"The proposals would "round off" or "in-fill" existing settlement layout and not affect strategic gaps."* [the stress is ours] This implies that development should be kept within the settlement boundary and at most on the edge of it so that there are clear gaps between existing settlements otherwise if too much development is allowed beyond the settlement boundaries there will be merging of settlements and villages which will not be conducive to proper planning and development. Gaps are important to keep the limits of permitted development. We therefore reject the contention of the Appellant to the effect that 365 metres from the settlement boundary of Reunion Maurel is to be considered as the edge of the settlement boundary and consequently reject the contention that **Policy SD3 of the OPS** should have been applied. The Ministry was correct to apply **Policy SD4 of the OPS** since this development proposal is to be considered as being outside settlement boundary. All submissions made as regards the application of **Policy SD3 of the OPS** to the present case are consequently rejected. This ground therefore fails.

II. Under Ground (c)

8. It is the contention of the Appellants that the sequential approach for the released of land in this case will be satisfied. Having come to the conclusion above that the proposed development falls outside the settlement boundary, we shall consider the subject-matter of the present appeal in the light of the **Policy SD4 of the OPS**, 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***

- *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."

9. Residential development may be allowed outside the settlement boundary as per this policy provided it follows the sequential approach, that is a principle in planning which essentially means to allow development to be done in a particular sequence of one lot after the other in an order of preference from the site that is closest to the settlement boundary and moving sequentially away from it. However as per **Policy SD4** this is only

allowed if there are no suitable sites left within the settlement boundary for residential development. This is the main criterion to be met for a residential development to be allowed under this policy.

10. A context analysis of the site shows that there are infact no residential properties near it. The site is surrounded by agricultural land, as evidenced by an extract of google earth map marked as Doc E1 produced by the Appellant's witness from the Council. It is however well serviced by the B13 road, which is a main road and the site is found on that road. The site is serviced with amenities such as water, electricity, phone lines, public transport system, which is not disputed. The presence of a building is noted next to the subject site which according to the Appellant is a wedding hall that is under construction and there is another building in very close proximity to the wedding hall as can be noted from the same map, which according to the Appellant is not a guest house but a residential property. The Appellant's witness, Mr. Ramjada, from the Council of Riviere du Rempart, stated however that the building of Mr. Gokool is a guest house and that guest houses have been granted permits in the area even 50 metres away from the site as can be seen in Doc E and marked as Lovers Guest House but that within a radius of 150 metres from the subject site no residential developments have been approved. The Appellant testified as to the presence of a nursery for plants, a "Pepiniere", with a house next to it. Witness Ramjada stated that this cannot be considered as a residential development but rather as an agricultural building. The Appellant also purported to show that there was a big house with a swimming pool where the nursery was and that opposite the nursery a villa complex is under construction. But no evidence was adduced as to whether these developments have been granted a Building and Land Use Permit ['BLUP']. The Appellant's witness, though from the Council, could not confirm this. The danger in relying on such evidence is that many of these residential developments could either be houses which have existed long before the planning policies came into force or they could simply be illegal constructions which have never gained planning acceptance.

11. As far as residential development is concerned, the undisputed evidence is that a BLUP for residential development has been given in 2019 to one Mr. Parmessur some 200 metres from the subject site and almost 500 metres from the settlement boundary. It is not disputed that the BLUP was granted on hardship grounds and the house has already been built and is now inhabited. The Appellant also explained that there were some 20 houses which exist in a cluster some 200 metres outside the settlement boundary. He produced photographs showing an aerial view of the cluster buildings, marked as Docs A and A2. Mr. Ramjada testified and produced a report, marked Doc E, to show that the Council has in fact granted a BLUP for residential development on hardship grounds outside the settlement boundary in the same area and that it approved five subdivisions for residential use in 2019 and 2020. The witness also produced a map, marked doc E1, where these approved lots have been plotted.

12. We pause here to make an observation. Although we understand that the Council need not necessarily approve a BLUP application for construction of residential building wherever subdivision has been allowed, as per the testimony of Mr. Ramjada, we fail to see in what way the Council has applied the sequential approach in these cases for the approval of subdivision for residential purposes, from what we read in Doc E and E1.

13. The case for the Ministry is that the Morcellement Board has not approved any subdivision for residential purposes outside the settlement boundary in the area. After all, the OPS provides that no authority shall pass or approve any plan for building or development that contravenes the scheme. While the Respondent cannot be taxed for having complied with the planning policies of the OPS to reach to its conclusion that the application should be refused, we do understand the plight of the Appellants since a number of subdivisions for residential purposes outside the settlement boundary in the same area have been approved. Since we are not sitting to hear and determine a decision of the Council, we shall not comment further on the decision taken by the Council in its wisdom. However, we cannot help but observe that this does bring about an undesirable state of affairs in that in some cases two institutions are adopting approaches which lead to inconsistent decisions.

14. Ultimately it boils down to the issue of what would be the land use of the subject site where there are already residential developments on the opposite side of the road and a few subdivisions for residential development have been approved. There should be more consistency in the application of guidelines and policies so that the approaches of institutions are aligned. Planning is always for the future and a lack of consistency in application of policies will lead to uncontrolled and haphazard development.

15. On the facts of the present case, we find from all the evidence before us especially the maps produced that there are big gaps around the subject site which are yet to be filled. In view of the distance of the subject site, that is more than 300 metres, from the settlement boundary of Reunion Maurel, there is a long way to go before the land can be released for residential purposes on the application of **Policy SD4**. Witness Juggoo from the Ministry described the subject site as a "stand alone" site. The Appellant also adduced evidence to the effect that apart from the wedding hall, other nearby developments to the subject site are a showroom by the name of Rock Solution and a small shop that sells plants at the nursery. The rest of the land between the site *in lite* and the settlement boundary is predominantly agricultural as can be noted from the evidence before us. Granting the proposed development will imply planning acceptance for residential development, but this will not constitute a sequential approach for the release of the land as per the correct application of Policy SD4. We are of the view that the Ministry has correctly applied Policy SD4 and has come to the right conclusion. Soft laws need to be applied correctly unless there is a clear justification for derogating from it, which we do not find in this case: BEAU SONGE DEVELOPMENT LIMITED v THE UNITED BASALT PRODUCTS LIMITED & ANOR [2018] UKPC1.

16. Having come to the conclusion that the main criterion has not been met under Policy SD4, since the word "and" is used at the end of the first bullet point, we need not consider the other criteria set out under this policy. This ground of appeal therefore fails.

III. Under Ground (d)

17. The hardship criterion cannot at this stage be considered by the Tribunal since there is a procedure established before the local authorities which allows them to assess the veracity and validity of this criterion and applications which can be allowed under this exception. The Tribunal is not in the presence of any document or evidence to come to an informed decision as to whether the application does meet the requirement as set out under grounds (d) (i) and (ii) to be allowed under the Hardship criterion. The Tribunal notes on the face of the record as it stands that being given the fact that the subdivision once done will result in lots as averred in ground (d) (iii), amounting to 14 perches each, that is, more than 10 perches which is the maximum plot size requirement, it would appear that the size of the subject property following the subdivision will still not satisfy the requirement in terms of size under the Hardship ground.

18. For all the reasons set out above, we find that the Ministry was correct in its application of the right policy and therefore its decision was not wrong. We, however, invite the Morcellement Board of the Ministry of Housing and Land Use Planning and the Council and other stake holders to align their respective approaches to the land use of properties such as that of the Appellants so that there is more consistency in the applications of guidelines and policies. The appeal is otherwise set aside. No order as to costs.

Determination delivered on 17th December 2021 by

Mrs. J. RAMFUL-JHOWRY	**Mr. P. MANNA**	**Mr. S. SEETOHUL**
Vice Chairperson	**Member**	**Member**