IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1707/18

In the matter of:

Coodye Druvanand

Appellant

v/s

District Council of Moka

Respondent

DETERMINATION

1. The present appeal is against a decision of the District Council of Moka (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 excision of a plot of land of the extent of 176 sq.m from a larger portion of 528sq.m situated at Melrose for residential purposes. The grounds of refusal are set out in a letter dated 28th September 2018 under the signature of the Chief Executive addressed to the Appellant as follows

1. **"As per Policy SD4 of the Moka Flacq Outline Scheme since the site**

   (A) lies Outside Settlement Boundary by approximately 150 metres whereby there is a general presumption against development; and

   (B) does not conform to the sequential approach for release of land for development.

2. **As per Policy EC2 of the Moka Flacq Outline Scheme since the site lies within the catchment boundaries of dams/reservoirs."**

2. Both parties were legally represented. The Appellant deponed under solemn affirmation and was cross-examined. The Planning and Development Inspector of the Council, Mr. Hemrage, 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 lodged 12 grounds of appeal together with his notice of appeal. At paragraph 3 of the Statement of case of the Appellant, however, we note that the Appellant avers that the decision/conclusion "reached by the District Council of Pamplemousses is wrong, erroneous, unfair and biased...". This appears to be a mistake since the heading of the Statement of Case and the notice of appeal refer to the District Council of Moka. We shall treat it as one and proceed with the grounds of appeal being lodged against the District Council of Moka as per the notice of appeal, which are reproduced hereunder:

Grounds of appeal

*(i) The mere fact for the plot of land of Appellant of being 150 metres of Outside Settlement Boundary where there is an alleged general presumption against development is **not** an absolute bar on the grant of a permit.*

*(ii) The mere fact for the plot of land of Appellant of being allegedly within the catchment boundaries of dams/reservoirs is **not** an absolute bar on the grant of a permit.*

(iii) The reasons for rejection are vague as to amount to a valid objection in law to the issue of a permit.

(iv) The land at the time it was purchased by Appellant in year 2006, was part and parcel of a "Morcellement" meant for residential purposes.

(v) The land from year 2006 has remained bare land without any cultivation in any matter whatsoever.

(vi) There exists adjacent to the plot of land of Appellant a commercial type building which was constructed in June 2018 and which is being used for wedding and party venues.

(vii) At around 150 metres from the plot of land of Appellant there is the development and construction of a big compound of apartment belonging to the NHDC (National Housing Development Co Ltd) comprising of around sixty flats all fully occupied.

(viii) The reservoir as Outlined by Respondent in fact and in truth lies underneath the developed compound of the NHDC.

(ix) The reasons for rejection of the granting of a permit are vague as to amount to a valid objection in law.

(x) The Executive Committee has improperly rejected the permit by upholding non-accurate and frivolous objections.

(xi) For all intents and purposes having regards to the Town and Country Planning Act, building Act, The Planning and Development Act, the permit ought to have been granted.

(xii) Appellant wants to construct a house on the said plot land for his son who is now married and has a family of his own.

4. The grounds of appeal (iv), (v), (vi), (vii), (viii) and (xii),as couched, do not amount to grounds of appeal but are mere averments and are therefore set aside. No evidence has been adduced to substantiate grounds of appeal (x) and (xi) and they are also therefore set aside. The ground of appeal (ix) is a duplication of ground of appeal (iii) and no evidence was also adduced to substantiate these grounds. They are, therefore, also set aside. We will therefore consider the first two grounds of appeal.

5. It is uncontested that the subject site lies outside settlement boundary and that the Appellant has no land conversion permit. There is a football ground almost opposite the subject site and a multi-purpose hall next to the subject site with just a road between them. Evidence was also adduced regarding the presence of a reservoir as well as NHDC houses in the area. The case for the Appellant in essence was that he wants to build a house for his family and that he was not aware of the Policy SD4 of the Outline Planning Scheme applied by the Council. He did not know that beyond a certain point after the residential development ends, the Council would not issue a BLUP. He was of the view that the other houses were less than 150 metres from his property but agreed that there is a reservoir in the vicinity.

6. The Respondent's witness, Mr. Hemrage, adduced evidence to the effect that as per the plan produced, Doc F, which is a plan of the Ministry of Housing retrieved from Arc Reader map showing that the distance from the settlement boundary to the subject site is about 150 metres. As per his evidence, there are 2 wedding halls and a football ground in the vicinity of the subject site and they are all outside the settlement boundary. He also testified that there are no other residential developments in the area nor has the Council delivered any BLUP for residential development there. This evidence was not contested.

I. Under Ground (i)

7. It is the contention of the Appellant that the subject site being outside the settlement boundary where there is an alleged general presumption against development is not an absolute bar for the obtention of a BLUP. The subject site being outside settlement boundary, the applicable Planning Policy is indeed **policy SD4 of the OPS of Moka-Flacq** 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."

8. It is clear from the evidence before us that the proposed development does not follow the sequential approach since there are no other residential developments around nor has the Council granted any BLUP for residential development there. The NHDC flats, as per the evidence of Mr. ~~Kemrage~~ Hemrage, are found within the settlement boundary where such developments are allowed. The presence of the multipurpose hall, being a bad neighbour development, could not have a residential development near it. The gaps are not consolidated, as can be seen in Doc G, extract of Google map. No land conversion permit was submitted by the Appellant and therefore under the first criterion of Policy SD4 itself, this application cannot succeed.

9. Residential development may be allowed outside the settlement boundary provided it follows the sequential approach and certain criteria are met. However, the "hardship" criterion 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..."* In the present case, the proposed development is for an excision of only 176 sq.m to be excised from a larger portion of 528sq.m for residential purposes so that the Appellant can build a house for his son. This will not, according to us, encourage large scale removal of land from agricultural plots. The Appellant testified that there was a plantation on the subject property but no further evidence was adduced as regards the land being under cultivation. The presence of the multi-purpose hall as shown in the plan, Doc D and in photographs marked Doc E2 and E4, is indicative of the fact the utilities may be readily available to the subject site and the provision of these utilities need not be the responsibility of the Council to provide. Conditions may, normally, be imposed in a BLUP for the Appellant to make provision for his own utilities as well as him not having any right of complaint against the operation of the wedding hall since the wedding hall is rightly situated outside the settlement boundary and far from habitation. This being said, no evidence was adduced by the Appellant as regards whether the present case could have been considered as an exception under the "Hardship" criterion. The definition of hardship in planning law is rather specific and in our jurisdiction, it is set out in **Policy SD3.**

10. This policy however clearly stipulates that "The applicant and the beneficiaries where applicable should support their application by way of an affidavit /declaration." This has, however, not been pleaded in the statement of case of the Appellant. No such evidence was produced by the Appellant before the Tribunal nor was there any indication of any declaration or affidavit having been produced by him with his application before the Council. In the absence of such evidence, the Tribunal cannot and will not surmise on the issue as to whether the Appellant's situation meets the criteria under the "Hardship" category. The Respondent's witness did raise in cross-examination that the application was not made under the "Hardship" exception and hence the Council did not consider it as such. This ground of appeal therefore fails.

Under Ground (ii)

11. It is the contention of the Appellant that his plot falling within the catchment boundaries of dams/reservoirs is not an absolute bar to the grant of a permit. **Policy EC2** stipulates " *Development...within catchment areas should not normally be permitted, unless the developer has obtained written agreement from the Water Resources Unit/Ministry of Public Utilities (WRU/MPU) and the Sanitary Authority that the proposals do not pose a threat to the quality or quantity of surface or groundwater resources...*" Mr. Hemrage stated that the Council has a map of all catchment areas which are prone to flooding and that the subject site falls within that catchment area. As per Doc F, from what we have understood the witness to be stating is that, the interrupted lines show catchment areas prone to flooding. This evidence lacks clarity, and no legend was produced to show that the interrupted lines purport to show flood prone catchment areas. It would therefore be unsafe to rely on such evidence.

12. A clearance from the Water Resources Unit was required to show that the land is not prone to flooding. Although Mr. Hemrage agreed that this document was not requested from the Appellant. His explanation for this was that amendments cannot be made twice. In the absence of crucial evidence as regards whether the relevant authorities, as per **Policy EC2**, consider whether a clearance can be granted to the Appellant, we are unable to accept the Respondent's stand that the subject site falls

within the catchment area since the Appellant was not informed of the requirement of such a document to process his application on that ground. The basis for the application of **Policy EC2** was therefore not established by the Council. This being said, the flimsy evidence from the Respondent does not mean that the proposed development would be on sound planning merits. Assuming the site is within the catchment area, which there is no evidence to suggest one way or another, the Appellant has failed to demonstrate on what basis this may be allowed in his case except for the fact that he could strengthen the foundations when constructing his building. No expert evidence was adduced in support of this contention of the Appellant.

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

Determination delivered on 17th January 2022 by

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