

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1934/20

In the matter of:-

Best Deal Property Development Ltd.

Appellant

v/s

Ministry of Housing and Land Use Planning

Respondent

DETERMINATION

1. This is an appeal against the decision of the Respondent ["the Ministry"] for having rejected the application of the Appellant for the subdivision of a plot of land of an extent of 4009 sq.m into 11 lots for residential purposes, situated at L'Amitie. The sole ground for refusal which was communicated to the Appellant vide letter dated 3rd February 2020 is:

"Site is found about 80m outside settlement boundary as per Planning Scheme."

2. The 3 grounds of appeal as per the Appellant's notice of appeal are as follow:

"(a) The Respondent erred in refusing the application in as much as the presumption against development had been rebutted in the present circumstances.

(b) The Respondent failed to take into consideration the fact that the present application was compatible with the sequential approach.

(c) The Respondent failed to take into consideration the presence of utility facilities and access to the site in question."

3. The case for the Appellant is based on the contention that the site is connected to the utilities and accessible to vehicles, that there is existing development in the vicinity and that there are 2 residential properties opposite the subject site. The case for the Respondent is essentially based on the fact that the proposed development for residential purposes being outside settlement boundary will offend policy SD4 of the Outline Planning Scheme of Pamplemousses/Riviere du Rempart ["OPS"] and that the subject site will be affected by the Bois Rouge Canal, which is qualified as an Environmentally Sensitive Area ["ESA"] as per the OPS. The Appellant was represented by its director, Mr. Sailesh Kanhya and the main witness for the Respondent was Mr. Jugroo, Development Control Officer at the Ministry. We have duly considered the evidence on record as well as submissions of Learned counsel appearing for the Appellant, the Respondent's counsel having chosen not to submit.

Under Grounds (a) and (b)

4. It is the contention of the Appellant that the Respondent erred in refusing the application in as much as the presumption against development had been rebutted since there are developments surrounding the site and that it was compatible with the sequential approach. It is not disputed that the subject site is located 80 m outside the settlement boundary as per the OPS. The evidence reveals that the site is accessible through two accesses, Avenue des Talipots and Avenue Tinamous, from the public road of Mon Piton-Riviere du Rempart, a main artery classified as A6. Approximately 70 metres of the access roads from the main road are tarred and the remaining 70 metres leading up to the subject site is untarred. It is not disputed that at the start of the access roads there are developments, as can be seen from the arial map marked Doc C. The evidence on record, photographs produced and marked Doc D, D1, D2, D3 and D4 show that the developments are predominantly residential ones, as confirmed by Mr. Jugroo. The 2 houses opposite the subject site can also be seen from Doc C are also residential buildings but with no evidence of whether they have Building and Land Use Permits ["BLUP"] or are illegal constructions. There are however big unconsolidated gaps of several metres of bare land between the cluster of residential buildings which is found at the start of the access roads leading onto the subject site

and the site *in lite*, as noted from Doc C, which defies the sequential approach as required under Policy SD4 of the OPS of Pamplemousses-Riviere du Rempart.

5. A relevant part of Policy SD4 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...”*** [stress is ours]

From the above extract, it is clear that for an application to be considered as falling within the exception of Policy SD4, which is the policy that regulates development proposals situated outside settlement boundary as is the case here, it should satisfy the sequential approach to the release of land and that there is no suitable land either within or on the edge of the settlement boundary. That is the first and main exception allowed under the policy and the other exceptions are supplementary as can be gauged by the use of the word “and” at the end of the first bullet point under Policy SD4.

6. We find that since the subject site is to be found 80 metres outside the settlement boundary and there are unconsolidated gaps between the residential cluster found within the settlement boundary and the subject site, the main criterion for treating the application under the exception has not been met. We therefore, find that there are no grounds for considering this application as falling under the exceptions set out in Policy SD4. Since there is no evidence as to the legality of the 2 houses found adjacent to the site, which are the only 2 developments in the immediate vicinity of the site while the other developments are some 70 metres away closer to the tarred parts of the access roads, as per testimony of Appellant's representative and shown by him in photo marked D4, these cannot be considered as "developments surrounding the site". They are random stand-alone developments as matters stand. The Respondent rightly applied the appropriate policy to reject the application on the ground that residential development cannot be done outside settlement boundary in this case when it does not satisfy the sequential approach in the first instance. These grounds therefore fail.

Under Ground (c)

7. It is the contention of the Appellant that the Respondent failed to take into consideration the presence of utility facilities and access to the site. As per the testimony of the Appellant's representative, electricity, water, telephone lines are all available on the site and there are access roads, albeit only partly tarred, leading to the site from the main road. Although one of the exceptions under policy SD4 favours applications for development sites which are connected to utility supplies and transport networks without unacceptable public expense, the presence of utilities on the site can only carry weight provided the first condition under the exceptions in Policy SD4 of the OPS is applicable. It cannot be a ground per se to allow the proposed development. The development must first satisfy the sequential approach. Having reached the conclusion above that the sequential approach has not been satisfied, we believe that this ground of appeal automatically fails.

8. We have also addressed our minds to the averments made by the Appellant in its statement of case that the application is in line with the National Strategic Plan of the region and that the development proposal being residential in nature is conducive to the surrounding amenities. While we do agree that the development as it seems to be progressing in the area close to the A6 road, appears to be predominantly residential in nature, it is possible that with the sequential approach being followed and the gaps in between be filled over time the site ultimately becomes apt for residential development. However, at this stage there is no reason to depart from the application of Policy SD4. The Respondent cannot be taxed for having rightly applied the relevant policy.
9. It was raised as a ground in the Statement of Defence of the Respondent that the subject site will be affected by the Bois Rouge Canal, which is qualified as an Environmentally Sensitive Area ["ESA"] as per the OPS. We do not subscribe to this ground in as much as the Respondent did not raise this as a ground of refusal in their refusal letter nor was it canvassed at length in the course of the Hearing before the Tribunal. It appears to us to come as an afterthought in the Statement of Defence thereby depriving the Appellant of the chance to address this issue in its Statement of Case. No expert evidence was adduced by the Respondent on this issue to see how the proposed development will be affected by the canal. If at all, one would have thought that the canal would be affected by any development to the land due to their proximity. Without expert evidence on how the quality of the water would be impacted by any proposed development, the Tribunal cannot adjudicate on it. This ground of refusal is set aside.
10. For all the reasons set out above, we find that the Respondent correctly applied the relevant policy to reject the application. The appeal is set aside. No order as to costs.

Determination delivered on 9th March 2022 by

Mrs. J. RAMFUL-JHOWRY
Vice Chairperson

Mr. S. BUSGEETH
Member

Mr. R. SEETOHUL
Member