BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2061/21

In the matter of:

Farzanah Nawool

Appellant

v.

The District Council Riviere du Rempart

Respondent

Determination

In a Notice of Appeal lodged on the 28th October 2021 the Appellant is appealing against the decision of the District Council of Riviere du Rempart for having refused her application for a Building and Land Use Permit to be issued for the construction of a reinforced concrete building at ground and first floors for residential purposes plus the erection of a boundary wall of 1.8 metres high along a public road, namely at off Sottise Road, The Vale. This decision had been taken by the Permits and Business Monitoring Committee on the 15th October 2021 and communicated to the Appellant on the 18th October 2021. Two grounds have been put forward by the Council, firstly, that the plans have not been certified and signed by a service provider (registered architect and engineer), and secondly, the application does not follow the sequential approach to development.
The Appellant has appealed on three grounds: (i) The signature of a service provider is a mere administrative requirement that could have been rectified by a mere request (ii) The requirement for a Registered Architect and Engineer is not mandatory (iii) Sequential approach is not properly assessed.

In the course of the hearing, counsel for the Respondent informed the Tribunal that the first ground of refusal will not be insisted upon, as this is a matter that can be cured. As such the first two grounds of appeal have no 'raison d'être'. The only ground of appeal that needs to be addressed is the third ground, namely that relating to the 'sequential approach'.

The Appellant deposed and produced an affidavit (Document B) to the effect that the plot in lite is the only one that she owns, having obtained it from her parents. She intends to construct her own house on the land. She also produced copy of a declaration that she made for the purpose of section 28(4B) of the Sugar Efficiency Act 2001 (Document C), certifying that the land, now owned by her, is agricultural land of an extent not exceeding one hectare (10,000m2) in the aggregate, and it is located in an area where development is permissible in

accordance with an outline scheme and the land is not within an irrigation area. She was allocated this plot of land last year and to her knowledge there was never any agricultural development on it. She agreed that the land is outside settlement boundary (by a distance of 450 metres) but added that there are several new residential buildings which are now in place in her area, the nearest one being at about 100 metres from her plot, which appeared to be connected to electricity and water supply. This is why she did not agree with the Council's assessment that there is no sequential approach to development in respect of her proposed development.

The sworn land surveyor who deposed as witness for the Appellant stated that the development 'in lite' is close to other developments as shown on the context plan produced as Document D. The closest residential developments to the proposed site are scattered around and would be between 147 to 188 metres, depending on the point at which measurement is taken. They are all outside settlement boundary and there is electricity supply to the residential buildings, having seen CEB electric poles. The site is otherwise surrounded by bare land and there is no indication of agricultural development. In his opinion there is a sequence of development in the surrounding area. It came out from his cross examination that the road giving access to the property in lite is not tarred. He agreed that the residential properties found outside settlement boundary are scattered and, as such, do not follow a sequential approach.

The representative of the Respondent adduced evidence and explained the characteristics of the land belonging to the Appellant: It is found outside settlement boundary, is far from existing residences, the road leading to it is untarred and the land is surrounded by bare land, these are evidenced by Documents E, E1, F and G produced. A PDS project is located at some 200 metres from the site. This, being governed by a distinct regime, is justified as being of national interest, and PDS development is meant to be located outside settlement boundary.

In her cross examination, it came out that the property in respect of which the application for BLUP has been made has been transferred to the Appellant by her parents after obtaining it by way of succession. This is confirmed in an affidavit produced at the hearing (Document B), where the Appellant has sworn that this property has been acquired by way of inheritance from her maternal grandparents through her own parents and that she does not hold any other property and that she requires the plot for the purpose of constructing her house. She also solemnly affirmed that the plot has not been under cultivation at any point during the past ten years. The representative of the Council explained that for the condition of hardship to be considered, there are certain conditions that need to be fulfilled, one of them being that the land be owned as at 30 September 2005 and consideration may be given to land accrued through donation or inheritance after that date provided a land conversion permit is obtained from the Ministry of Agro-Industry and Food Security. There Appellant, having obtained the land after 30 September 2005, the application made under hardship criteria could not be allowed in the absence of a land conversion permit. The witness maintained in cross examination that the application has been assessed on the basis of the provisions of Policy SD4 and not SD3 because of the distance that separates the plot for the edge of settlement boundary and the distance from the other residential buildings, which were scattered as per her description.

We have given due consideration to the evidence adduced on behalf of the respective parties. It is not disputed by either party that the land *'in lite'* is situated outside settlement boundary. The Respondent has assessed the site in accordance with **Policy SD 4 of the OPS** which gives the guidance as follows:

Development on Land Outside Settlement Boundaries:

There should be a general presumption against proposals for development outside settlement boundaries unless the proposal is one of the six listed exceptions, the most relevant ones for the present matter are reproduced below:

- *Has been shown to have followed the sequential approach to the release of sites identified in SD1, SD2 and SD3 and there are no suitable sites within or on the edge of settlement boundaries **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...*

Policy SD3 sets out another presumption as follows:

Development on the edge of Settlement Boundaries

There should be a general presumption in favour of development on the edge of but outside defined settlement boundaries provided such developments proposals are aimed at:

- *Consolidating gaps in otherwise built-up area; or*
- *Rounding off an existing settlement being contiguous with its existing built-up area and not creating or progressing ribbon development.......*

  Or where:

  The proposal is from a small owner seeking residential property for themselves or 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 large scale removal of land from agriculture .....

  And the proposals:
- *Are capable of connection to existing utility supplies and transport networks or can be connected without unacceptable public expense...*

In her Statement of Case, the Appellant has submitted that the Respondent ought to have assessed the application in the light of Policy SD3 of the PPG being given that the site is on the edge of Settlement Boundary. Furthermore, the development falls within the exceptions contained in Policy SD4 as the developer satisfies the hardship criteria.

The evidence of the Respondent, on the other hand, is that the Appellant has not been able to justify that geographically the site falls within the definition of being 'on the edge of Settlement Boundaries'. Such being the case, the provisions of Policy SD3 are of no relevance. This justifies that the assessment of the site has been done in accordance with the provisions of Policy SD4, i.e. land located outside Settlement Boundaries.

It is our view that Policies SD4 and SD3 are not mutually exclusive. The exceptions set in Policy SD4 refer to the release of sites which follow a sequential approach to those sites identified in Policy SD3 (among others), namely sites found on the edge of settlement boundaries.

We highlight that, having perused the planning policies, there is no definition *'per se'* of *'sequential approach'*, save for the approach explained in the 'Strategic Development Principles and Objectives' of the OPS which defines as one of the key objectives of the OPS the following: " *Using a sequential approach to site development which supports the clustering principle, by seeking to ensure that sites and land parcels in and around already built-up areas and defined settlement boundaries have been looked at before trying to convert more valuable agricultural land...".* 'Sequential approach' is therefore an assessment made on a case-by-case basis depending on the physical characteristics of the land, in particular the distance from the settlement boundary and the presence (if any) of other developments in the immediate vicinity.

By specifying in the refusal letter that the application does not follow the sequential approach to development, it is clear that the Respondent has applied Policy SD4 of the OPS (more particularly the exceptions to the general prohibition set out in paragraph 1 of Policy SD4).

A close reading of Policy SD4 of the OPS shows that it is not a prerequisite that the applicant fulfils the condition that proposed site follow a sequential approach (supra) for the proposal from a small owner seeking residential property for himself and his/her close kins to be considered as a hardship case. The consideration of the hardship criteria seems to be an exception that 'stands alone', and the only restriction in this clause is that *'provided that in the opinion of the relevant authorities such release would not encourage large scale removal of land from agriculture'*. There is the added condition that the proposal is not located in an environmentally sensitive area nor in an area of landscape significance.....or an irrigation zone among others.

The affidavit produced by the Appellant places her application within the criteria that are applicable for the exception under the hardship clause to be applied. This has not been challenged in cross examination Furthermore, counsel for the Respondent stated, in submission, that the Appellant satisfies the hardship criteria except for the Land Conversion Permit and the basic infrastructure. It appears through this submission, that the Respondent is now relying on Policy SD3 in support of its position. Reference has been made to the Town and Country Board Guidelines regarding hardship cases, contained under Policy SD3 of the OPS, which set out conditions to be met for the criterion of hardship cases to be applied. These are as follows:

1. *A small owner is one who owns not more than one hectare (i.e. 10,000 m2) in the aggregate and which may be made up of more than one portion located in different places in Mauritius;*
2. *If a small owner is seeking residential property for himself, none of the properties should be located within settlement boundaries;*
3. *If he is seeking residential property for his close kin, he should have no other land for that purpose (except his own private residential property) within settlement boundaries;*

4. *Close kin is defined to include ascendants or descendants (Parents and their children, grandparents and grandchildren up to the level of first cousin....who do not own any plot of land and who would not benefit from the sale or donation;*
5. *The plot to be released should not normally exceed 422m2 (10 perches) per beneficiary.*

AND

The land in question

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

(b) Should not be located in 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 30 September 2005, subject to Land Conversion Permit being obtained from the Ministry of Agro-Industry and Fisheries and provided parent property was acquired/in possession of original owner prior to 30 September 2005.

6. *The applicant and the beneficiaries where applicable should support their application by way of an affidavit/declaration.*
7. *The eventual beneficiary should be in a position to provide the necessary basic infrastructure to site (water, roads and electricity).*
8. *Hardship criteria should not be used for the release of sites forming part of subdivisions subject of duly approved agricultural morcellements.*

It is our view that the drafting of this guideline raises concern, being contained in Policy SD3, which may tend to indicate that they apply to matters falling under Policy SD3 only. They do not seem to extend to proposals for development outside settlement boundaries under Policy SD4. In addition, the provisions at paragraph (a) (namely that the land in question should be located in an area where development is permissible in accordance with the policies of the OPS) raise questions as to why would there be a need to seek for an approval under hardship consideration if development is permissible.
Be that as it may, being given our view (supra) that Policies SD 3 and SD 4 are not mutually exclusive, both seek to address policies applicable to different zones and both SD3 and SD4 have created an exception in their respective applications based on hardship, which are similar in their assessment. Yet, it is important for local authorities to state the policy relied upon with clarity, the more so that the recipients of their decision have a right of appeal.

The Appellant has, in our view, amply justified the hardship criterion that can be considered as an exception to the general presumption against proposals for development contained in Policy SD4. The need to comply with the requirement that there would not be large scale removal of land from agriculture is addressed in the affidavit, where she stated that the plot has not been under cultivation for the past ten years. The Appellant has also affirmed that the plot has been transmitted to her by succession to her parents and transferred to her and she requires same for the purpose of the construction of her house and that she owns no other property. These affirmations would qualify for 'hardship' under Policy SD4.

As stated above, the drafting of Policy SD4 indicates that the exception based on hardship is a 'stand-alone' one, to be read independently from the exceptions contained at paragraph 1 of Policy SD4. Furthermore, in Policy SD4, the OPS relies on the definition of hardship case given in Policy SD3, which creates a presumption that the Town and Country Planning Board guidelines regarding hardship cases are applicable under Policy SD4. Based on this, the Appellant would be required to comply with the requirements of providing a land conversion permit as well as an undertaking to provide the site with necessary basic infrastructure as set out in Policy SD3.
In view of the above, we find that the Respondent has wrongly applied the issue of compliance to the 'sequential approach to development' in its decision. Although the application was rightly assessed under Policy SD4, the applicable section was that relating to the exception based on hardship (reference to "OR where"). Compliance to the conditions of the Town and Country Planning Board (supra) is required on the basis of the above reasoning.

For all the above reasons, the present appeal is allowed and remitted back to the Respondent for it to consider imposing conditions that it deems necessary for this development and for the Appellant to meet the requirements of the planning policies.

Delivered by:

Mrs. V. Phoolchund-Bhadain, Chairperson ....

Mr. Mohamad S. Suffee, Member ....

Mr. Vishayen P. Veerapa Pillay, Member ....

Date: 29th September 2022