BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2031/21

In the matter of:

Mr. Azize Mohammad Mamode Ally, Representative of Société Anse d'Albion

Appellant

v.

Ministry of Housing and Land Use Planning

Respondent

Determination

The issue that will determine the matter in this appeal is whether the Respondent had rightly applied the Planning Policies referred to as Strategic Development Policy 4 (SD 4) and H1 respectively in the assessment of the application for the subdivision of a plot of land. It is the contention of the Appellant that the policy that should have been considered for the purpose of his application is Strategic Development Policy 3 (SD3) and not Strategic Development Policy (SD4).

The reply to the application submitted by the Appellant for the subdivision of an extent of 38800 square metres into 77 lots came through the National Electronic Licensing System (NELS), wherein the Appellant was informed that the Morcellement Board had decided that the subdivision project had not been recommended '*due to non-compliance with the exceptions of policy SD4 and H1*'.

Policy SD4 contained in the Outline Planning Scheme (for Black River), is entitled '*Development on Land Outside Settlement Boundaries*' and it sets out a general presumption against proposals for development outside settlement boundaries. It however provides for a list of exceptions.

Policy H1 of the Outline Planning Scheme entitled '*Development in or on the edge of Minor Settlements*' provides that '*In or on the edge of minor settlements for which no settlement boundaries have been defined, development should be permitted subject to the clustering principle and the sequential approach outlined in SD1, SD2 and SD3 and design parameters under SD5*'.

Evidence was adduced on behalf of the Appellant by the planner, who produced a planning report (Document A). Both the planner and the Appellant have taken the position that the site *in lite,* although located outside settlement boundary, is in fact found on the edge of settlement boundary, for which there is a specific policy that applies, namely, Policy SD3.
Policy SD3, entitled 'Development on the edge of settlement boundaries' provides that 'There should be a general presumption in favour of development on the edge of but outside defined settlement boundaries providing such development proposals are aimed at:

- Consolidating gaps in an 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
- Infilling (of development where no strategic gap between settlements is proposed; or
- Providing industrial uses which may not be appropriate within settlement boundaries; or
- … (*other conditions are listed but not reproduced here*)

In order to assess which policy is applicable, we have had to assess the respective versions of the witnesses.
Witness for the Appellant, Mr. Naidoo, Sworn Land Surveyor and maker of the planning report (Document A), made extensive reference to Annex 6 to his planning report, which is a google map on which the site as well as the settlement boundaries have been indicated. This document shows a proximity between the site and the settlement boundary, which the witness measured as being 50 metres. The document shows on one hand that the proximity is at only one corner side of the site and, on the other hand, that there are settlements located outside the boundary line which are scattered in the sense that they are not isolated settlements.
Witness Naidoo also introduced the concept that we should adopt flexibility in assessing the settlement boundary, which he described as being simply a line drawn on a map, as opposed to a natural feature (for example a river or a road), which could be a more indicative boundary. He stated that subsequent to the 'drawing of a line' indicating the settlement boundary, there has been, with the

passage of time, constructions ongoing around that line, so much so that there must be flexibility on the exact location of the nearest point of the site to the settlement boundary. Thus, in his expert opinion, the actual settlement boundary had shifted closer to the site *in lite,* rendering it to be now located on the edge of settlement boundary. There may be some substance in the suggestion that settlement boundaries, or any boundary for that matter, ought to be placed having regards to natural features on the ground. Be that as it may, what is of relevance to us is the position of the site with respect to the actual settlement boundary, as contained in the Outline Planning Scheme.

The representative of the Respondent placed emphasis on the fact that the fifty metres that separated the site from the settlement boundary, as shown on the site plan (Document E) renders the site 'outside' and not 'on the edge' (meaning not adjacent to the boundary). This therefore calls for the application of Policy SD4 in the assessment of the proposed development. In so doing, the exceptions contained in Policy SD4, namely, sequential approach to development is not found and cannot be applied in relation to this site.

We note that this analysis, however, has made no reference to one aspect of the reality 'on the ground' which was revealed through the testimony of the Appellant himself. This is the presence of another morcellement, 'Morcellement Petite Bretagne', for which a morcellement permit had been granted, albeit being outside settlement boundary. The representative of the Respondent explained that the latter morcellement permit has been assessed, and granted, by applying policy SD3, the land being on the edge of settlement boundary. This witness conceded under cross examination that the gap that existed between the settlement boundary (of approximately 50 metres as referred to above by witness Mr. Naidoo) and the boundaries of the subject site no longer exists and is now built up as part of Morcellement Petite Bretagne.
This being the state of things, it was submitted on behalf of the Appellant that the frontier of the settlement boundary has moved and the virtual existence of the settlement boundary as drawn, is not a reflection of the reality.

On the other hand, the representative of the Respondent attempted to rely on the restricted 'exposure' of the land *in lite* to the edge of the settlement by coining the concept of 'ribbon development', namely that the development, if approved, would take place in such a stretch that it would drag such development away from the actual settlement boundary. We note that, firstly, the notion of 'ribbon development' is contained in Policy SD3 and it is an exception to the general presumption in favour of development on the edge of settlement boundaries. Secondly, this reason was never given by the Morcellement Board as aground to reject the application. This is being coined for the first time during cross

examination and would amount to introducing new grounds for the Board's decision.
The Appellant has also stated that his proposed development will meet the condition contained in Policy SD3, namely, that his project is capable of ready connection to existing utility supplies and can be connected without unacceptable public expense.

We have taken into consideration the evidence adduced and the submissions made on behalf of the respective parties.

The evidence on record has unveiled certain issues that call for concern. The Outline Planning Scheme that is being applied in the assessment of proposals for development dates back to 2016. It has been conceded on behalf of the Respondent that the developments that have occurred have changed the reality on the ground, so much so that there have been extensive settlements outside the settlement boundary. Some of these settlements are the result of an approved morcellement (Morcellement Petite Bretagne) for which approval was granted by applying Policy SD3. Others may have been granted by the local authority and no evidence has been ushered on the status of some of them.

We take into account the Appellant's position pointing towards the development that has reached well outside the official settlement boundary, and his application is denied based on an Outside Planning Scheme that has not yet recognised such developments. This is indeed a matter of concern. The Respondent authority is hereby called upon to take stock of this state of affairs and bring corrective measures to rectify this state of things.

Having said this, the Respondent is duty-bound to comply with the schemes that are approved and gazetted and are in force at the time of the decision. This is we refrain from interfering with the decision of the Respondent for having complied with the existing provisions at the time of assessing the application. The settlement boundary may physically be seen to be closer to the site, but this is not an official recognition of the settlement boundary. The Respondent is bound to apply the parameters as set in the OPS that is in force. These parameters are that the site does not qualify as being on the edge of settlement boundary.
Being outside the settlement boundary, the assessment has been done on the basis of Policy SD4. No evidence was adduced before us to show that the proposed project has followed the sequential approach, which is an exception to the presumption against proposals for development outside settlement boundaries, nor any other exception under Policy SD4 been shown.

The need for 'flexibility' has been referred to by the Appellant, inviting the Tribunal to take a flexible approach given the evidence regarding the

development that has taken place near the site. We refer to the judgement of the Judicial Committee of the Privy Council judgement in the matter of **Beau Songe Development Limited v The United Basalt Products Limited and Another 2017 PRV 2**, which has '*highlighted the need for attention to be given to improving the clarity and consistency of the statutory planning document'. The judgment also states that "...their [meaning the Tribunal] first task was one of legal interpretation of the planning documents to be decided by reference to 'the language used, read as always in its proper context', not on a choice (as they put it) between the approaches of lawyers and planning practitioners."*

We are of the view that a flexible approach that may vary according to developments, but not backed up by the proper legal instruments, cannot be legally correct.

We shall therefore not interfere with the decision of the Respondent and the appeal is dismissed.

We furthermore refer the Respondent authority to the observations made in this determination on the need for revised Outline Planning Schemes to be made.

Delivered on the 13th February 2023 by:

Mrs. Vedalini Phoolchund-Bhadain, Chairperson .....

Mr. Mohamad Ismet Suffee, Member .....

Mr. Radhakrishna Acheemootoo, Member .....