IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1708/18

In the matter of:

Anjanee Kurmah

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 181 sq.m to be excised from a larger portion of 533sq.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, Mrs. Seebaluck, 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 initially lodged some 12 grounds of appeal together with her 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 1979, was part and parcel of a "Morcellement" meant for residential purposes.

(v) The land from year 1979 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 who has been living in her father's house wishes to construct a house for herself on the said plot of land.

4. We note from the grounds of appeal, the 4th, 5th, 6th,7th, 8th and 12th grounds, as couched, do not amount to grounds of appeal. If at all they are in the nature of averments more in line with statement of facts and are therefore set aside. No evidence has been adduced to substantiate the 10th and 11th grounds of appeal and they are also therefore set aside. The 9th ground of appeal is a duplication of the 3rd ground of appeal and in any event no evidence was also adduced to substantiate these grounds so they are also set aside. We will therefore consider the first two grounds of appeal.

5. The uncontested evidence is that the subject site is outside the settlement boundary by some 150 metres and that there is a multi-purpose hall in very close proximity to the site. 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 since there is a multipurpose hall in the vicinity, the Council may also grant a BLUP to the Appellant the more so as the Appellant has no other property and that this can be considered a hardship case and the subject site falls within a residential area given the presence of the NHDC houses not too far away from the subject site. The Respondent took the contrary in that the presence of the Multipurpose hall being a bad neighbour development, could not have a residential development near it and that the NHDC houses are within the settlement boundary where residential development is favoured as opposed to the subject site which is situated outside the settlement boundary. The Council also made it a live issue that the presence of the reservoir renders the proposed development incapable of gaining planning merits since it is falls within a 200 metre buffer.

Under Ground (i)

6. 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** 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."

7. Normally, according to the abovementioned policy, 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..."* Since the proposed development in the present case is an excision of a plot of an extent of

only 181 sq.m from a plot of 533 sq. m, we are convinced that it will not encourage largescale removal of land from agricultural plots, the moreso as no evidence was adduced as regards the land being under cultivation. The presence of the multi-purpose hall as shown in the plan, Doc B, 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 be imposed in a BLUP for the Appellant to make provision for her own utilities as well as her 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. The Appellant also testified that she did not have any other property. This could be considered under the ground of "Hardship", particularly as the extent of land to be excised is rather small. Infact this has not been pleaded in the statement of case of the Appellant but her Counsel simply submitted that the case could be considered on hardship grounds. The definition of hardship in planning law is rather specific and in our jurisdiction it is set out under **Policy SD3.** This policy however clearly stipulates that "The applicant and the beneficiaries where applicable should support their application by way of an affidavit /declaration." 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 her with her 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. This ground of appeal therefore fails due to lack of evidence.

Under Ground (ii)

8. It is the contention of the Appellant that her plot falling within the catchment boundaries of dams/reservoirs is not an absolute bar to the grant of a permit. The Council has failed to satisfy us that the subject site falls within the 200 metre buffer of the reservoir. Infact Mrs. Seebaluck, the Planning and Development Inspector of the Council did not produce any map from the Outline Planning Scheme of Moka ["OPS"] to demonstrate to the Tribunal the exact location of the subject site, the reservoir and that the distance between the subject site and the reservoir was less than 200 metres.

In the absence of such crucial evidence as regards the location of the subject site from the reservoir, we are unable to accept the Respondent's stand that the subject site falls within the catchment area of the reservoir since the presence of the NHDC houses very close to the reservoir seems to undermine to the version of the Respondent. This was put to the witness of the Respondent but she was unable to give a coherent answer except that in respect of the NHDC houses, other policies apply but failed to provide the policies. The basis for the application of Policy EC2 was therefore not established by the Council. This being said, the Tribunal cannot agree with the Appellant's contention since lack of evidence from the Respondent does not mean that the proposed development would be on sound planning merits. Assuming the site is within the catchment boundaries, 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 her case.

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

Determination delivered on 9th November 2020 by

Mrs. J. RAMFUL-JHOWRY	**Mr. SOYFOO**	**Mr. MONAFF**
Vice Chairperson	**Member**	**Member**