

REZONING DECISION: MUNICIPAL BY-LAW WORDING NOT TO BE WATERED DOWN BY RELIANCE ON CONTEXT OF DELIBERATIONS WHEN THE BY-LAW WAS CONSIDERED

Choisy-Le-Roi Owners (Pty) Ltd v The Municipality of Stellenbosch and Another (10240/2020) [2022] ZAWCHC 71 (11 May 2022)

Stellenbosch's Technopark is zoned to provide for a uniquely styled technology park. The judgment referred to here deals with a rezoning application by the owner of a vacant erf in the area as it sought to erect a mixed use scheme, including residential units. The municipal tribunal refused the application and, in an application for review of the unsuccessful appeal against the tribunal's finding, the court here found in favour of the applicant. It transpired that the factors taken into account by the Mayor, as appeal body for decisions of the municipal tribunal, relied on the context in which the provisions in the municipal planning framework were considered, thereby diluting the text of the gazetted provisions. A review was therefore warranted.

The Judgment can be viewed [here](#).

FACTS

Choisy-Le-Roi Owners (Pty) Ltd ('CLR') owned an erf at Technopark in Stellenbosch. Technopark is an area that since 1996 has been specially zoned under the Stellenbosch Municipality's zoning schemes as 'a technology or science park ...where enterprises associated with research, development, design and related activities in the high-technology sector are accommodated in a park-type work environment ...'.

Ordinary development allowed for this area is aligned with these specific concepts; and permitted 'special development' uses are incidental to this specific character of Technopark.

The provisions of the most recently adopted zoning scheme of the Stellenbosch Municipality (the 2019 Zoning Scheme By-law) remain faithful to the originally formulated concept.

Apart from an hotel - the development of which was provided for in the original concept - there has up to now been no residential use development in Technopark. Residential use development is also not provided for in the zoning scheme provisions for the area.

CLR's property is still undeveloped and used as a parking lot. It applied in 2017 for the rezoning of its property to allow for a mixed-use building development including a residential component.

The rezoning application enjoyed support from the planning officials charged with evaluating it, with qualifications. However, when the application came before the Municipal Planning Tribunal, it was refused. In the reasons given for the refusal, the Tribunal expressed its support for 'a new vision' for development in Technopark that might include alternative land uses, but decided that it would be inappropriate to introduce land uses not originally envisioned for the area before the municipal council adopted an amended policy concerning the future use and development of the area.

CLR appealed to the Tribunal's appeal authority, the Executive Mayor constituting this authority in terms of the By-law. In determining the appeal, the By-law obliges the Mayor to have regard to specific factors.

The appeal authority dismissed the appeal after an oral hearing. It based its finding largely on surrounding circumstances at the time that the spatial development framework ('MSDF') was approved. It appeared that, at the time, mention was made of remodeling the area to some extent to include more forms of development, and Technopark was specifically mentioned; but in the final version of the MSDF that was gazetted, the specific reference

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to Technopark was excluded.

CLR then brought a review against the dismissal of the appeal in the Cape Town High Court.

HELD

- It is trite that the court is not concerned in applications for judicial review with the merits of the impugned decision, but only with its legality. Thus, the fact that a decision might be set aside on review is no prognosticator that a different result will follow when the matter concerned is reconsidered by the relevant functionary upon remittal.
- There was, rightly, an acceptance on both sides that the impugned decision constituted administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000. The grounds for judicial review relied upon by CLS, with reference to section 6 of PAJA, were that the decision was –
 1. materially influenced by an error of law;
 2. made because irrelevant considerations were taken into account and/or relevant considerations were not considered;
 3. made arbitrarily;
 4. not rationally connected to the purpose for which it was taken;
 5. not rationally connected to the information before the appeal authority;
 6. not rationally connected to the reasons given for it by the appeal authority; and
 7. so unreasonable that no reasonable person could have so exercised the Appeal Authority's appeal authority.
- It is apparent from the reasons given by the Executive Mayor (for the refusal of the appeal) that the primary consideration underpinning the decision was the Mayor's understanding that the residential component of the proposed development was fundamentally at odds with the pertinent land use and development guidelines in the Municipality's MSDF. However, in arriving at this conclusion, the Executive Mayor relied on previous drafts and discussions of the MSDF. Therein, amongst other things, reference was made to change the nature of certain existing places to become more "balanced" as local districts. Initially the MSDF specifically referred to Technopark in this context, but in the final draft of the document this reference was deleted. According to the Mayor, this indicated that Council did not consider that Technopark would benefit from housing development for people who work there.
- In addition, the Mayor reasoned that in terms of other draft documents, mention was made of the need to create a detailed spatial development framework for this area aimed at establishing a more balanced community. *(These viewpoints, so the Mayor argued, evidenced a clear rejection by Council of the proposal to permit residential use of Technopark. Instead, the approved MSDF contemplated that Technopark should be developed and promoted to become an even more specialised zone for technological inventions and a hub for specialised business and retaining and developing, to its full potential, the special purpose of Technopark).*
- What the Mayor's reasoning signified was an assumption that the MSDF had to be interpreted against the apparent firm decision of the Council that residential use should not be allowed and that the original vision of

Techno Park should be further developed and promoted. However, no evidence was offered in support of this averment other than some differences between the draft MSDF and the finally adopted framework. No detail had been provided as to the circumstances in which the changes to the draft were effected.

- The relevance of context in certain instances when the meaning of legislation is clarified, must be properly understood to warn against using context as a licence to contend for meanings unmoored in the text and structure of legislation. Rather, context and purpose may be used to elucidate the text. (And, although The MSDF is not a statute, but it is evident from its legislative context described earlier, that it has a similarly binding effect on the municipality and the users and developers of land within its territorial jurisdiction, and it is therefore appropriate to apply the principles of statutory interpretation when construing its provisions.)
- Thus, the Mayor in the appeal, was obliged to construe the MSDF with reference to the gazetted text, rather than relying on inferences drawn from an investigation of the context of the text. The fact that certain of the text that was included in the draft texts had been omitted in the adopted text does not alter the meaning of the language used in the adopted text.
- The Executive Mayor was not permitted to resort to the text of earlier drafts to interpret the gazetted text in a manner that led her to give it a meaning inconsistent with the language actually used.

CONCLUSION

The application for the judicial review and setting aside of the appeal authority's decision was consequently upheld.