SUMMARY OF THE JUDGMENT

NO FLATS IF ACCESS ROAD LESS THAN 9M WIDE: DO NEARBY LANDOWNERS HAVE STANDING TO ENFORCE SUCH GENERAL PROVISIONS?

Tavakoli and Another v Bantry Hills (Pty) Ltd (1251/2017) [2018] ZASCA 159 (28 November 2018)

Litigation following on building plan approval often involves interpretation of municipal planning laws that bind the general public in the relevant municipality's jurisdiction, or certain groups within the municipality's jurisdiction. The distinction can become a crucial issue. This judgment is a case in point and dealt with a provision forming part of City of Cape Town's general Planning By-Law which precludes the construction of apartment blocks in some instances where access roads are less than 9m wide. Did the claimants, as owners of properties 80m away, have the necessary standing to dispute compliance with the provision?

The Judgment can be viewed here.

FACTS

Tavakoli and DLX Property (Pty) Ltd, owners of properties in Fresnaye (the owners), applied to the High Court, Cape Town, for an order reviewing and setting aside the approval by the City of Cape Town Municipality (the City) of building plans submitted by Bantry Hills (Pty) Ltd (Bantry Hills).

The plans related to the construction of a luxury block of flats on a property situated in the vicinity of (approx. 80 metres from) the properties owned respectively by Tavakoli and DLX. The owners argued that the approval of the building plans contravened item 40(c) of the Development Management Scheme (DMS) which forms part of the City's 2015 Planning By-Law. Item 40(c) precludes the construction of flats 'if the only vehicle access to the property is from an adjacent road reserve that is less than 9 m wide'. The building plans provided for two vehicle access points to the property from two abutting roads, each such road having a reserve less than 9 m wide.

Three issues were argued in the Cape Town High Court, namely (i) whether the owners had *locus standi*; (ii) if so, whether the approval of the plans was unlawful because they contravened item 40(c) of the DMS; (iii) if so, whether the Court should, in the exercise of its discretion, refrain from setting aside the approval.

The High Court found against the owners on (i) and (ii) and the owners then appealed to the Supreme Court of Appeal.

Item 40(c) reads as follows:

> *'40. The following use restrictions apply to property in these subzonings:*
>
> > *(a) Primary uses subject to paragraph (c) are ….*
> > *(b) Consent uses subject to paragraph (c) are ….*
> > *(c) Notwithstanding the primary and consent uses specified in paragraphs (a) and (b), if the only vehicle access to the property is from an adjacent road reserve that is less than 9 m wide, no building is permitted other than a dwelling house or second dwelling.'*

HELD:

- The merits depend on the correct interpretation of item 40(c) of the DMS: Did the restriction apply unless there was at least one vehicular access to the property from an adjacent road reserve that is 9 m or more wide (as contended by the owners), or was it only applicable where there is a single vehicular access to the property and such access is from an adjacent road reserve that is less than 9m wide (as contended by Bantry Hills)? The (related) preliminary issue dealt with the *locus standi* (standing) of the owners.

- The Court found in favour of Bantry Hills, explaining that:

  i. Our courts have held that the question of *locus standi* in these scenarios involves a consideration of the facts, the relevant statutory scheme and its purpose.

  ii. In this regard, it is notable that the DMS is an integral part of the By-Law and has the force of law. It applies to all land within the geographical area of the City and binds all owners and users of such land. Given the City's very large geographic area, owners and users (viewed in their totality) should be regarded as the general public rather than a specific class. This is important for purposes of applying the principle laid down in *Patz v Greene*, which generally holds that where the lawmaker has prohibited the doing of an act in the interest of a person or class of persons, such person may enforce the prohibition 'without proof of special damage'. The corollary is that if the prohibition has been enacted in the public interest generally, a litigant must prove that the violation of the prohibition has caused him damage.

  iii. Thus, if item 40(c) was imposed solely for the benefit of the general public in this sense, the owners – in order to have *locus standi* – needed to establish that they suffered harm from a contravention of the item beyond that which it may be supposed all owners and users in Cape Town suffered. If, on the other hand, item 40(c) was imposed for the benefit of a specific class of

owners and users, or partly for the benefit of such a class and partly for the benefit of the general public, the owners could establish standing by showing that they belonged to the specific class.

iv. (Remember too that the fact that an aggrieved person owns or occupies property covered by a scheme may be a prerequisite for enforcing it, but is not on its own sufficient. Depending on the nature of the provision at issue, one can readily imagine that an owner or occupier may have standing to enforce a provision even though his or her property has a different zoning from the offending property – for example, the owner of a residential property might, in appropriate circumstances, be entitled to complain of a departure from restrictions applicable to a nearby commercial property. Proximity will often be an important consideration though this will depend on the nature of the provision at issue. One cannot say, as it appears that the owners sought to argue in the present case, that a proximity of 80 metres is always close enough.)

v. The starting point is thus to ascertain whether item 40(c) was enacted for the benefit of a specific class to which the owners belong. It is not sufficient, in this regard, that the item in fact operates to the advantage of a class of persons to which the owners belong. It must appear that the lawmaker had the interests of the particular class in mind in enacting the provision.

vi. It was established that the mischief with which the prohibition is concerned is traffic congestion in narrow roads giving vehicular access to high-density properties. The implicated congestion does not extend beyond the narrow road or roads actually giving vehicular access. It is only the properties on the abutting road itself which may be prejudicially affected by the fact that the road is narrow and may become congested.

vii. Therefore, the class which the lawmaker had in mind when enacting item 40(c) comprises the owners and users of properties in the narrow road or roads giving access to the subject property. The owners in the present matter were not such persons.

viii. (It might be argued that the prohibition was also enacted for the benefit of owners and users who are likely to use the narrow roads and thus be ‘affected’ by congestion. On this assumption, one would have to have regard

to the proximity of the relevant properties and the particular features of the road network in the vicinity to determine whether an owner or user has standing on this basis. Any member of the public might notionally use one of the narrow roads but this notional possibility cannot mean that every member of the public has the right, without proof of damage, to complain of a violation of the item. On the facts though and the specific lay-out of streets in the area, the owners however do not form part of the class of persons likely to be affected by congestion in the relevant roads.)

The conclusion is therefore that the owners in the present circumstances did not have *locus standi* by virtue of membership of a specific class for whose benefit item 40(c) was enacted. Even assuming that item 40(c) was enacted not only for the benefit of a specific class but also for the benefit of the general public, i.e. all owners and users of property within the geographic area of Cape Town, the owners needed to prove that the violation has caused or will cause them damage. This they did not do.

In view of this finding, the SCA did not decide the question regarding the proper interpretation of item 40(c).

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