

BY HAND DELIVERY AND EMAIL

THE APPEAL AUTHORITY

Office of the Municipal Manager

STELLENBOSCH MUNICIPALITY

e-mail: municipal.manager@stellenbosch.gov.za

Cape Town Office

18th Floor 1 Thibault Square
Cape Town 8001 South Africa
P O Box 1474 Cape Town 8000
Docex 15 Cape Town
Tel +27 21 405 5100
Fax +27 21 405 5200
www.werksmans.com
enquiries@werksmans.com

YOUR REFERENCE: LU 8567

OUR REFERENCE: JJT/sj/Blauuwkliip 510 Appeal

DIRECT PHONE: + 27 21 809 6143

DIRECT FAX: +27 11 535 8593

EMAIL ADDRESS: jtruter@werksmans.com

20 December 2020

Dear Madam

**APPEAL IN TERMS OF SECTION 79(2) OF THE STELLENBOSCH MUNICIPALITY PLANNING
BY-LAW, 2015 ("the By-Law"): APPLICATION FOR CONSOLIDATION, REZONING,
SUBDIVISION, DEPARTURE, ETC. ON PORTIONS 52, 53, 54 AND 71 OF THE FARM
BLAAUWKLIIP NO. 510, JAMESTOWN, DIVISION OF STELLENBOSCH ("The Property")**

- 1 We act on behalf of the landowner and applicant – Blaauwklippen Agricultural Estates Stellenbosch (Pty) Ltd ("our client")

- 2 On 12 September 2018 the applicant met with the relevant planning and engineering officials to discuss the proposed development of a residential estate on the abovementioned properties. A copy of the pre-submission meeting's minutes is attached (**Annexure A**).



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- 3 After the pre-submission consultation, the development proposal was finalised and on 17 September 2018 the applicant submitted a land use planning application to the Stellenbosch Municipality to obtain planning approval for the "Blaauwklippen aan Rivier" residential estate.
- 4 On 27 November 2020 – more than two years later – the land use planning application served before the Municipal Planning Tribunal ("MPT") for a decision. At this meeting the MPT refused the application without any further discussion or interrogation of the merits of the application, based on the planning officials' misrepresentation that the proposed uses are inconsistent with the MSDF due to alleged heritage impacts. It is our submission that the information presented by the officials as the premise for their allegation (that the proposed uses are inconsistent with the MSDF) was both legally and factually incorrect and that these errors in fact and law were material to the MPT's refusal of the application. A copy of the MPT's decision letter is attached hereto (see **Annexure B**). Our client has requested the audio recordings of the MPT meeting which will be transcribed and which will support the aforesaid contentions.
- 5 The MPT's decision letter informs the applicant and objectors of their right to appeal in accordance with Section 79(2) of the By-Law within 21 days of the date of registration of the decision letter. According to our calculation the 21 day appeal period therefore expires on Wednesday, 23 December 2020.
- 6 Our client has instructed us to appeal the decision by the MPT which we hereby do.
- 7 We attach a copy of the completed Appeal Form and proof of payment of the appeal fee (see **Annexure H**).



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- 8 We confirm that all the interested and affected parties will be informed of the appeal within 14 days. Proof of these e-mail notices will then be submitted to the Appeal Authority.
- 9 This appeal has been prepared with the specialist town planning inputs of TV3 Architects and Town Planners.
- 10 The format which this appeal will adopt is as follows:
 - 10.1 At the outset we will deal substantively with the MPT's planning decision, its reasons for the decision and the grounds of appeal which are motivated in greater detail below, but which may be summarised as follows:
 - 10.1.1 The decision was based on misrepresentation by the planning officials in respect of the correct spatial planning status of the property and the alignment of the proposed development and its associated uses with the MSDF;
 - 10.1.2 The planning officials' misrepresentation resulted in the MPT basing their decision to reject the application on material errors in fact and law;
 - 10.1.3 The MPT rejected the application without considering the merits of the application and, as a result the MPT failed to exercise its discretion in accordance with the criteria set out in section 42 of SPLUMA, section 49 of LUPA and section 65 of the By-Law;
 - 10.1.4 The decision is irrational and unreasonable and reflects material inconsistency in decision-making by the MPT;



10.1.5 The decision is in violation of our client's rights to administrative action which is lawful, reasonable and procedurally fair as contemplated in the Constitution and entrenched in the Promotion of Administrative Justice Act, 2000 ("PAJA") and is susceptible to judicial review.

THE MPT'S REASONS FOR THE REFUSAL OF THE APPLICATION:

11 The following reasons were presented by the MPT for their decision to refuse the land use planning application:

11.1 **Reason 1: That the proposed development deviates from the provisions of the prevailing agenda and strategy of the Stellenbosch Municipal Spatial Development Framework (MSDF) as contemplated in terms of Section 19 of the Land Use Planning Act (LUPA).**

11.1.1 At the MPT meeting the members were informed by Mr. Bernabé de la Bat (Manager: Spatial Planning) that the proposed development is inconsistent with the MSDF and that the MPT can therefore not take a decision on the land use planning application.

11.1.2 It is our client's submission that Mr de la Bat knowingly misrepresented the correct status of the Heritage Inventory as the basis for his view that the proposed development is inconsistent with the MSDF.

11.1.3 As a result of Mr de la Bat's material misrepresentation of the correct spatial planning status, the MPT refused the application without considering the merits of the proposed uses.

- 11.1.4 According to the MSDF's Stellenbosch Framework Plan, the application area is located within the Stellenbosch town's approved urban edge and is partially located in an urban character area. See Figure 1 below.

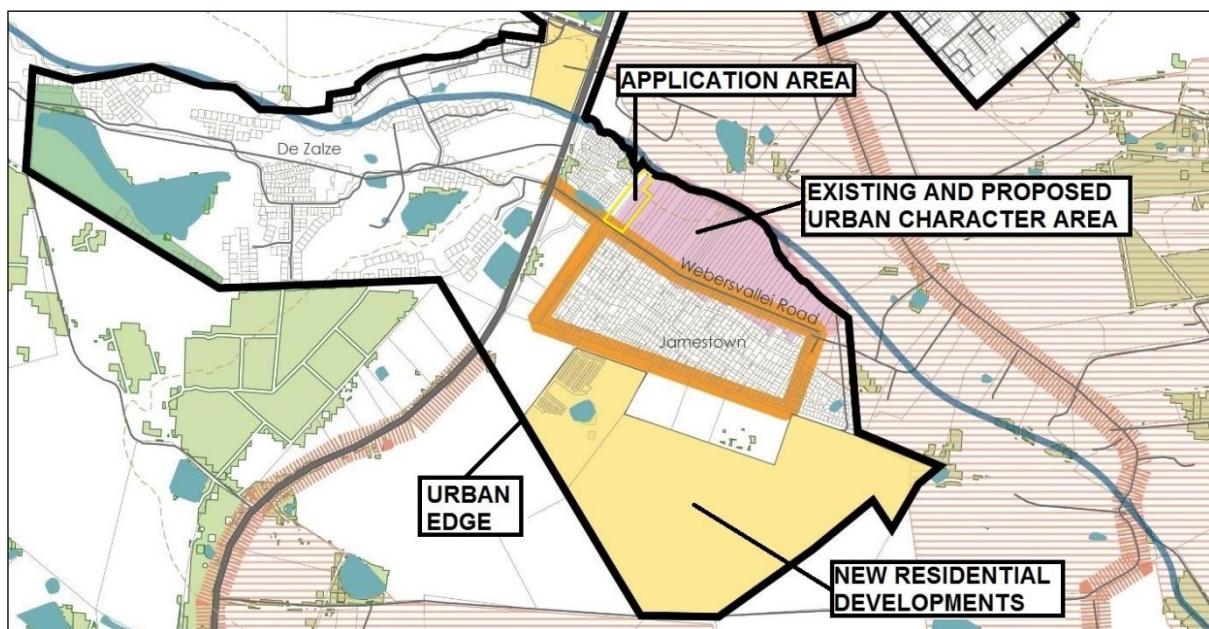


Figure 1: Extract of the MSDF's Stellenbosch Framework Plan (19 November 2019)

- 11.1.5 The subject property was incorporated into the Stellenbosch urban edge as far back as 2010. In August 2019 Council approved the current iteration of the MSDF and re-confirmed the urban edge for Jamestown (that included the subject property), and earmarked the subject property for future urban development on an activity route.

- 11.1.6 As the Municipality states in its MSDF:

*"Urban edges are also employed to ensure development in a planned manner for the settlement as a whole. **Both the Municipality and private land owners and***

developers are provided with some certainty as to the preferred focus of development for a planning period."

(Own emphasis)

- 11.1.7 The comment by the Manager: Spatial Planning, Heritage and Environment understates the significance of the subject property's inclusion within the urban edge and its designation in the MSDF for urban development.
- 11.1.8 Once approved, the SDF forms part of the IDP, which, in terms of section 35 of the Systems Act, has the following status:

"35 Status of integrated development plan

- (1) An integrated development plan adopted by the council of a municipality-*
- (a) is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality;*
- (b) binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's integrated development plan and national or provincial legislation, in which case such legislation prevails; and*

(c) binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a by-law.

(2) A spatial development framework contained in an integrated development plan prevails over a plan as defined in section 1 of the Physical Planning Act, 1991 (Act 125 of 1991).

11.1.9 The effect of the above provisions have been described as follows by Gildenhuys J in **Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae) 2008 (4) SA 572 (W)**:

"[33] In terms of the Municipal Systems Act, each municipal council must adopt a single, inclusive and strategic plan for the development of the municipality. This is the so-called integrated development plan. One of the core components of an integrated development plan is a spatial development framework. The spatial development framework incorporates an urban development boundary as one of its components.

*[34] An integrated development plan adopted by the council of a municipality **is the principal strategic planning instrument which guides and informs all planning and development within the municipal area. It binds the municipality in the exercise of its executive authority. The municipality's urban development boundary as contained in its spatial development framework delineates which areas within the municipality are allocated for urban development. It is a very important town-planning instrument.***

(Own emphasis)

- 11.1.10 The MSDF states in Section 5.3 (on page 67) that, *“Other infill opportunities also exist in Stellenbosch town, specifically in Cloetesville, Idas Valley, Stellenbosch Central, along the edges of Jamestown”*.
- 11.1.11 The MSDF states in Table 19 (on page 69) that, *“Support inclusive infill development on vacant public land within Cloetesville, Idas Valley, Stellenbosch Central and Jamestown”*.
- 11.1.12 The MSDF states in Table 28 (on page 102) that the development and land use management focus in Stellenbosch town should be the *“Broadening of residential opportunities for lower income groups, students, and the lower to middle housing market segments”*.
- 11.1.13 Contrary to the view held by the MPT (based on Mr de la Bat's misrepresentation of the spatial planning status) it is therefore clear that the proposed infill development (to provide middle-income housing along the edge of Jamestown) is consistent with the MSDF as the application area is located within the Stellenbosch town's urban edge and is earmarked for some form of urban development (an urban character area is however not clearly defined by the MSDF). According to the Department of Environmental Affairs and Development Planning's circular No 0021/2020 (dated 15 October 2020), *“Section 19(2) [of LUPA] states that if an MSDF does not specifically provide for the utilization or development of land as contained in a proposal, but the proposed utilisation or development is not in conflict with the relevant designation in*

*an MSDF, then the utilization or development is regarded as being **consistent with the MSDF**".*

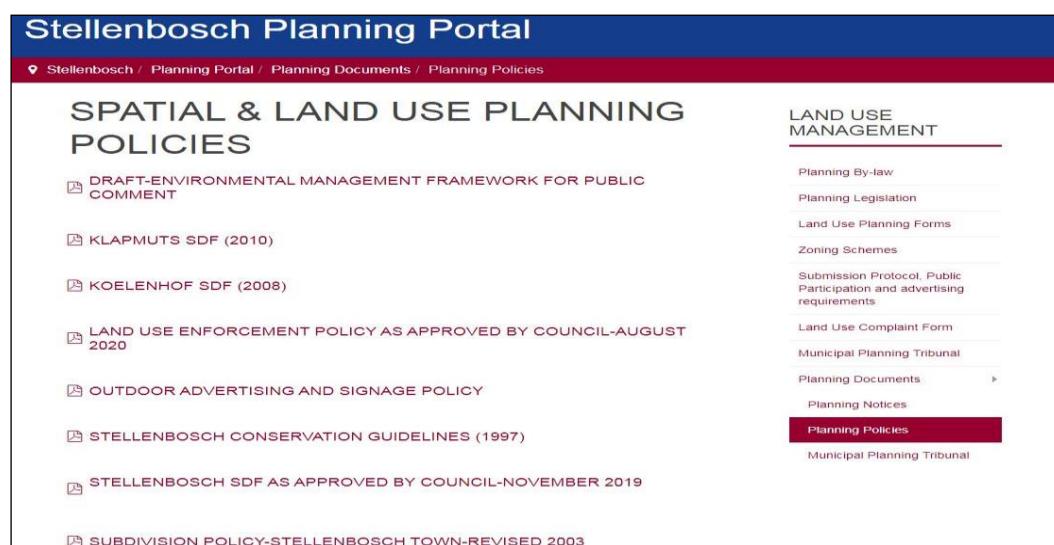
11.1.14 We point out furthermore that, in the course of the Municipality's consideration of the application it was referred to various line functionaries within the Municipality for their comment, including the Manager: Spatial Planning. At no point in this process (or in his response) did he ever adopt the view, let alone inform the applicant, that the development proposal is inconsistent with the Heritage Inventory and MSDF and that it cannot be considered by the MPT. A copy of his comments is attached hereto (**Annexure C**). This in itself is contrary to the Municipality's constitutional obligation to ensure that administrative action is lawful, reasonable and procedurally fair as contemplated in section 33 of the Constitution and entrenched in the Promotion of Administrative Justice Act, 2000 (PAJA").

11.2 **Reason 2: That the proposed development deviates from the provisions of the Stellenbosch Heritage Inventory and Management Plan for the water erven in Jamestown.**

11.2.1 The *Heritage Inventory and Management Plan for Tangible Resources in the Stellenbosch Municipality* report (dated 8 May 2018) – commonly referred to as the "Heritage Inventory" – was endorsed by Heritage Western Cape on 25 June 2018.

11.2.2 At the MPT meeting on 27 November 2020, the members were informed by Mr. De la Bat that during the September 2018 Council meeting, Council formally approved and adopted the Heritage Inventory and that the Heritage Inventory is now Council policy that must be complied with. This is false.

- 11.2.3 He expressed the view further that the development proposal is inconsistent with the council approved Heritage Inventory and can therefore not be considered by the MPT. This is also incorrect for the reasons motivated in detail below.
- 11.2.4 Regrettably, as a result of this misrepresentation by Mr de la Bat, the MPT did not consider the application on its merits and refused the application outright, based on what we say were errors in fact and law. The manner in which the application was presented by Mr de la Bat, and the MPT's failure to consider the application on its merits, based on Mr de la Bat's misrepresentations, was furthermore in violation of our client's rights to administrative action which is lawful, reasonable and procedurally fair, and is reviewable on various grounds in terms of PAJA which are described below.
- 11.2.5 We have not been able to obtain a copy of the Council resolution approving and adopting the Heritage Inventory and according to the Stellenbosch Municipality's website the Heritage Inventory is not a listed planning policy. See Figure 2 below.



The screenshot shows the Stellenbosch Planning Portal. The top navigation bar includes links for Stellenbosch, Planning Portal, Planning Documents, and Planning Policies. The main content area is titled 'SPATIAL & LAND USE PLANNING POLICIES' and lists several documents with small icons:

- DRAFT-ENVIRONMENTAL MANAGEMENT FRAMEWORK FOR PUBLIC COMMENT
- KLAPMUTS SDF (2010)
- KOELENHOF SDF (2008)
- LAND USE ENFORCEMENT POLICY AS APPROVED BY COUNCIL-AUGUST 2020
- OUTDOOR ADVERTISING AND SIGNAGE POLICY
- STELLENBOSCH CONSERVATION GUIDELINES (1997)
- STELLENBOSCH SDF AS APPROVED BY COUNCIL-NOVEMBER 2019
- SUBDIVISION POLICY-STELLENBOSCH TOWN-REVISED 2003

On the right side, there is a 'LAND USE MANAGEMENT' sidebar with links to:

- Planning By-law
- Planning Legislation
- Land Use Planning Forms
- Zoning Schemes
- Submission Protocol, Public Participation and advertising requirements
- Land Use Complaint Form
- Municipal Planning Tribunal
- Planning Documents
- Planning Notices
- Planning Policies
- Municipal Planning Tribunal

Figure 2: List of municipal planning policies (according to the municipal website)

- 11.2.6 We have however, obtained a copy of the September 2018 Council meeting's agenda and the Heritage Inventory was not one of the items considered by Council. A copy of the agenda is attached hereto (**Annexure D**). Bearing in mind the fact that the Conservation Management Plan ("CMP"), which includes the Heritage Inventory, was still in draft form in 2019, Mr de la Bat's contention seems all the more implausible.
- 11.2.7 On 30 November 2020, our client's town planning consultant contacted Mr. Kaizer Makati, the municipal heritage officer to establish whether the Council had formally adopted the Heritage Inventory. His response was that "*The Stellenbosch Council have not yet formally approved and adopted the Heritage Inventory, however Heritage Western Cape have approved our Inventory*". A copy of his e-mail is attached hereto (**Annexure E**).
- 11.2.8 A reading of the CMP (and Heritage Inventory) makes it clear that it is a "broad brush", high level planning policy which aims to assist decision-makers in exercising their discretion in considering planning applications. The CMP expressly states that "*The overall approach taken by this CMP is heritage conservation management at a landscape scale.*"
- 11.2.9 What Mr de la Bat sought to do is to elevate a draft council policy which has no formal approval status or force of law, to peremptory, binding legal status. This tainted the decision-making discretion that was supposed to have been exercised by the MPT.
- 11.2.10 While we accept the fact that the Heritage Inventory (that forms part of the draft CMP) includes comment on Jamestown, and that it has been endorsed by Heritage Western Cape, we reiterate that it remains a policy (whether formally adopted by Council, which

we dispute, or not) which does not have the force of law and which is intended to guide decision-making, based on the exercise of the decision-maker's discretion once the application has been considered on its merits with due regard to all laws and applicable policies. We maintain that the Heritage Inventory was a draft policy which had not yet been adopted by Council but even if that view is incorrect, the MPT still had an obligation to consider the application on its merits which it failed to do, instead approaching the MSDF as if it was a straightjacket which prevented the exercise of discretion. This was an error in law.

- 11.2.11 Regardless of the Heritage Inventory's status, we point out that the proposed development was approved in terms of section 38(2) of the NHRA by the relevant heritage resources authority, Heritage Western Cape on 25 May 2018. Heritage Western Cape based their decision on their view that "*there is no reason to believe that the proposed development will impact on heritage resources...*" A copy of their letter of approval is attached (**Annexure F**).
- 11.2.12 The Stellenbosch Municipality's Integrated Development Plan (May 2018) states on page 125 that "*A local authority must provide for the protection of a heritage area through the provisions of its planning scheme or by-laws under the National Heritage Resources Act*". In other words, the zoning scheme is the relevant legal planning mechanism that a municipality must use to protect sensitive heritage areas.
- 11.2.13 On 29 May 2019, Council finalized and adopted the new Stellenbosch Zoning Scheme By-law. In Chapter 25 of the Zoning Scheme By-law, five urban and rural conservation areas (i.e. heritage areas) are identified for protection. These urban and rural conservation areas consist of Stellenbosch Urban, Franschhoek Urban, Jonkershoek

Valley, Dwars River Valley and Ida's Valley, but it did not include Jamestown as a protected heritage area.

- 11.2.14 It is our submission that the MPT was misled on the official status and legal significance of the Heritage Inventory and the proposed development's consistency with the MSDF. We submit that the appeal must be upheld on this basis alone, however, the MPT's subsequent failure to consider the application on its merits due to the aforementioned errors in fact, gave rise to a further appealable irregularity.
- 11.3 **Reason 3: That no site-specific circumstances as contemplated in terms of Section 22(2) of the Spatial Planning and Land Use Management Act (SPLUMA) was presented.**
- 11.3.1 Our client's town planning consult, who was responsible for the preparation and submission of the relevant application, and all engagements with the Municipal officials relating to the application, forcefully disagrees with this contention.
- 11.3.2 Firstly, our instructions are that the applicant was never requested to present site-specific circumstances as to why the proposed development should be considered on a site-specific basis (since the planning officials never gave any indication that the proposed development was considered to be inconsistent with the MSDF).
- 11.3.3 Secondly, if the MPT had studied the planning assessment report in more detail, they would have seen the following site-specific circumstances contained in the planning reports, that support the proposed development and would have justified a departure

from the provisions of the MSDF (assuming that the proposed development is inconsistent with the MSDF which we dispute):

- 11.3.3.1 Heritage Western Cape (from a heritage point of view) supports the proposed development of the application area.
- 11.3.3.2 Western Cape Government: Agriculture (from an agricultural point of view) supports the proposed development of the application area. A copy of their letter of no objection is attached hereto (see **Annexure G**).
- 11.3.3.3 The application area is located inside the Stellenbosch town urban edge in an urban area and is too small to farm.
- 11.3.3.4 The application area was used for ±21 years for residential purposes.
- 11.3.3.5 There is a significant need for housing opportunities and the MSDF supports middle-income residential developments "*along the edges of Jamestown*".
- 11.3.3.6 The application area is surrounded by similar residential developments.
- 11.3.3.7 Engineering services are readily available for the proposed development.
- 11.3.4 We maintain that the proposed development is consistent with the MSDF, and that the MPT's contention that the applicant did not present site-specific circumstances as contemplated in terms of Section 22(2) of SPLUMA is incorrect, but in any event unreasonable and administratively unjust.

11.3.5 In order for the MPT to determine whether a proposed development is inconsistent with the MSDF they were required to consider and interrogate the application on its merits, not simply adopt the views of the planning officials in this regard which is what we submit the MPT did. If they had adjudicated and interrogated the application independently and on its merits, they would have arrived at the ineluctable conclusion, *inter alia*, that Mr de la Bat's submission in respect of the status and legal import of the Heritage Inventory was wrong.

11.3.6 If the MPT independently, having considered the application on its merits, arrived at a conclusion that it is inconsistent with the MSDF (which we dispute), that is not the end of the matter. They were then required to independently consider the site-specific circumstances and whether these justify a departure from the provisions of the MSDF. This they also patently failed to do, instead relying on the flawed submissions of Mr de la Bat without independently interrogating these submissions.

11.4 **Reason 4: All the Jamestown "water erwe" – including the application area – should rather be used for agricultural activities.**

11.4.1 Although not formally listed as one of the MPT's reasons for refusal, at the MPT meeting Mr. De la Bat recommended to the MPT members that the application area (and all the other "water erwe" on the Blaauwklippen River) should not be developed, but rather farmed.

11.4.2 The application area is ±2.4ha in extent which does not constitute a viable agricultural land unit. Furthermore, the application area was used for ±21 years as an informal

residential settlement. The soils have been disturbed and contaminated by the historic residential land uses, and the application area can therefore not be effectively farmed.

- 11.4.3 The retirement village of La Clemence is located directly west of the application area, on the Blaauwklippen River. See Figure 3 below.



Figure 3: The La Clemence residential development (west of the application area)

- 11.4.4 This gated residential estate was approved by Council based on the site's historic non-rural land uses (i.e. that it was historically not used for agricultural purposes). However, no acknowledgement was given by the MPT to the application area's historic non-rural land uses. If the same rules were applied to the proposed development (than for La Clemence), then the application should also have been approved by the MPT.



THE DECISION REFLECTS A FAILURE BY THE MPT TO EXERCISE ITS DISCRETION LAWFULLY AND REASONABLY IN ACCORDANCE WITH THE CRITERIA SET OUT IN SECTION 49 OF LUPA AND SECTION 65 OF THE PLANNING BY-LAW:

- 12 It is a trite principle of our law that the executive, in every sphere, are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.¹
- 13 In this matter the MPT derived its powers from Section 60 of the By-Law, read with the decision-making criteria set out in section 65 of the By-Law and section 49 of LUPA. The MPT was obliged to act within the powers lawfully conferred on it in terms of the By-Law and LUPA and we submit that it failed to do so thereby rendering its decision *ultra vires* and unlawful.
- 14 The following words of Harms J A in **Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA)** at paragraphs 6 and 7 are apposite to the MPT's reliance on the (draft) Heritage Inventory and MSDF:

"I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound Government, in order to bind the public, policies should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear...."

¹ *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para. 58. See also *Chief Director of Education v Harris* 2001 (4) SA 1297 (CC) at para. 9 – 13.

- 14.1 In *Pharmaceutical Manufacturers Association of South Africa : in re Ex Parte President of the Republic of South Africa*² Chaskalson P said:

*"It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries **should not be arbitrary**. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."*

- 14.2 It is clear from the manner in which the MPT arrived at their decision that they mistakenly adopted the view of Mr de la Bat to the effect that the proposed development is inconsistent with the Heritage Inventory, that the Heritage Inventory is in fact formal council policy and that it overrides the relevant heritage resources agency, HWC's approval of the proposed development and is inconsistent with the MSDF. It is clear that both de la Bat and the MPT approached the Heritage Inventory and MSDF as if it was peremptory and binding law which absolved them of a duty to consider the application independently and on its merits. This was an appealable and reviewable irregularity which tainted the MPT's exercise of its decision-making discretion as it failed to have regard to the application on its merits and simply adopted the planning official's recommendation and reasons without independent interrogation.

² 2000 (2) SA 674 (CC) at para. 85

- 14.3 In the circumstances the MPT's decision fails to take into adequate (if any) consideration the other decision-making criteria set out in section 65 of the By-Law and section 49 of LUPA. The MPT has given undue weight to a draft Heritage Inventory while ignoring, or paying lip-service to, the relevant considerations as prescribed under the By-Law, SPLUMA and LUPA.
- 14.4 The MPT has furthermore patently failed to have adequate regard to the merits of the application and its proposed uses. Had it done so it would have arrived at the inescapable conclusion that the proposed uses are desirable and should be permitted.
- 14.5 The MPT is not empowered under the By-Law and LUPA to refuse an application purely on the strength of the draft Heritage Inventory and alleged non-compliance, as a result, with the MSDF. To do so is clearly *ultra vires* under the By-Law and LUPA, read with section 42 of SPLUMA.
- 14.6 In a recent judgment by Davis, J in the matter of the *Durbanville Community Forum versus the Minister for Environmental Affairs and Development Planning and others*³ relating to a mixed use development known as "Uitkamp" involving over 600 residential units outside the Durbanville urban edge, he stated as follows:

*"Insofar as applicants' reliance on spatial planning and policy generally, including the WCSDP is concerned, it is clear that the Minister was not prevented by these policies from granting an environmental authorisation. **Planning policies are guidelines to be considered in the course of the decision making process and do not***

³ Case number 13854/2013 handed down on 24 DECEMBER 2014

constitute binding law which gives or takes away rights. See MEC for Education Gauteng Province and Others v Governing Body Rivonia Primary School and Others 2013 (6) SA 582 (CC) at paras 54-55." (Own emphasis)

15 Section 49 of LUPA sets out the "*basis of assessment of land use applications*" and provides as follows:

"When a municipality considers and decides on a land use application, the municipality must have regard to at least—

- (a) the applicable spatial development frameworks;*
- (b) the applicable structure plans;*
- (c) the principles referred to in Chapter VI;*
- (d) the desirability of the proposed land use; and*
- (e) guidelines that may be issued by the Provincial Minister regarding the desirability of proposed land use."*

16 It is our submission, having regard to the MPT's reasons for the refusal, that it clearly did not comply with section 49 of LUPA and it has patently not considered the merits of the application in order to arrive at a decision in respect of the desirability of the proposed uses.

17 Chapter V of the By-Law sets out the "*CRITERIA FOR DECISION-MAKING*" and provides, *inter alia*, as follows:

17.1 *General criteria for consideration of applications:*



17.1.1 *Section 65. (1) When the Municipality considers an application, it must have regard to the following:*

(a) the application submitted in terms of this By-law;

(b) the procedure followed in processing the application;

(c) the desirability of the proposed utilisation of land and any guidelines issued by the Provincial Minister regarding the desirability of proposed land uses;

(d) the comments in response to the notice of the application, including comments received from organs of state, municipal departments and the Provincial Minister in terms of section 45 of the Land Use Planning Act;

(e) the response by the applicant, if any, to the comments referred to in paragraph (d);

(f) investigations carried out in terms of other laws that are relevant to the consideration of the application;

(g) a registered planner's written assessment in respect of an application for—

(i) a rezoning;

(ii) a subdivision of more than 20 cadastral units;

- (iii) *a removal, suspension or amendment of a restrictive condition if it relates to a change of land use;*
 - (iv) *an amendment, deletion or imposition of additional conditions in respect of an existing use right;*
 - (v) *an approval of an overlay zone contemplated in the zoning scheme;*
 - (vi) *a phasing, amendment or cancellation of a subdivision plan or part thereof;*
 - (vii) *a determination of a zoning;*
 - (viii) *a closure of a public place or part thereof;*
- (h) *the impact of the proposed land development on municipal engineering services;*
- (i) *the integrated development plan, including the municipal spatial development framework;*
- (j) *the integrated development plan and spatial development framework of the district municipality, where applicable;*
- (k) *the applicable local spatial development frameworks adopted by the Municipality;*

- (l) *the applicable structure plans;*
- (m) *the applicable policies of the Municipality that guide decision-making;*
- (n) *the provincial spatial development framework;*
- (o) *where applicable, a regional spatial development framework contemplated in section 18 of the Spatial Planning and Land Use Management Act or provincial regional spatial development framework;*
- (p) *the policies, principles and the planning and development norms and criteria set by the national and provincial government;*
- (q) *the matters referred to in section 42 of the Spatial Planning and Land Use Management Act;*
- (r) *the principles referred to in Chapter VI of the Land Use Planning Act; and*
- (s) *the applicable provisions of the zoning scheme.*

- 18 It is our submission that the MPT's reasons for the refusal reveal a wholesale failure to apply the factors set out in section 65 of the By-Law, to consider the merits of the application and to arrive at a balanced decision in the light of its consideration of all these factors.
- 19 For instance it is clear that the MPT did not have adequate, if any regard to :

- 19.1 *The application submitted in terms of this By-law (section 65(1)(a)).*
- 19.1.1 If the MPT had done so it would have arrived at the inescapable conclusion that the application should be approved on its merits;
- 19.2 *The procedure followed in processing the application (section 65(1)(a)).*
- 19.2.1 Considering the chronology set out above it is clear that Mr de la Bat has belatedly raised the proposed development's alleged non-compliance with the MSDF as a reason for the MPT to reject the application without considering it on its merits.
- 19.3 *The desirability of the proposed utilisation of land and any guidelines issued by the Provincial Minister regarding the desirability of proposed land uses (section 65(1)(c)).*
- 19.3.1 Again, had the MPT considered the application on its merits it would have arrived at the conclusion that the proposed uses are desirable. The MPT failed to have appropriate if any regard to the desirability of the proposed uses.
- 19.3.2 In the light of the view adopted by the MPT, which was based on the misrepresentation of the correct spatial planning context by Mr de la Bat, the MPT failed to interrogate and consider the application independently on its merits. Had they done so they would have arrived at the conclusion firstly that Mr de la Bat's submissions regarding the status of the Heritage Inventory and the proposed development's alleged inconsistency with the MSDF were incorrect and secondly and in any event (assuming that de la Bat was correct, which we dispute), that there were a number of factors and

circumstances which justified a departure from the provisions of the MSDF. That would have led the MPT to the inescapable conclusion that the proposed development is desirable on, *inter alia*, the following grounds:

- 19.3.2.1 It is located inside the Stellenbosch town urban edge;
- 19.3.2.2 It is consistent with the MSDF;
- 19.3.2.3 Heritage Western Cape has approved the development (with full knowledge of the Heritage Inventory);
- 19.3.2.4 The application area has been used for ±21 years for residential purposes;
- 19.3.2.5 The application area is not a viable agricultural land unit and cannot be effectively farmed;
- 19.3.2.6 Western Cape Government: Agriculture supports the proposed development;
- 19.3.2.7 Council has approved similar residential developments in Jamestown (e.g. La Clemence and Aan de Weber).
- 19.3.2.8 The proposed development will lead to the sensible densification and integration of an urban neighbourhood;
- 19.3.2.9 Engineering services are available; and

- 19.3.2.10 The proposed development will benefit the broader community of Stellenbosch by creating new employment opportunities, by supporting the further development of tourism (by providing tourist accommodation for Blaauwklippen Farm's guests) and by supporting local economic development.
- 19.3.3 The proposed development will also support the following SPLUMA development principles:
- 19.3.3.1 Address the imbalances of the past by promoting an integrated community (*spatial justice*);
- 19.3.3.2 Optimise the use of existing resources and infrastructure (*spatial efficiency*);
- 19.3.3.3 Is located in an area that is sustainable, that will limit urban sprawl and will result in communities that are viable (*spatial sustainability*);
- 19.3.3.4 Spatial plans, policies and land use management systems must be flexible to ensure sustainable livelihoods (*spatial resilience*); and
- 19.3.3.5 All spheres of government must ensure an integrated approach to land developments and policies, legislation and procedures must be clearly set out in a manner which informs and empowers the public (*good administration*).
- 19.3.4 The MPT did not provide any reasons addressing these submissions by our client in its motivation report which supports our contention that the MPT failed to engage with

the motivation and take an independent decision based on the merits of the application as they were statutorily obligated to do.

- 19.4 *The comments in response to the notice of the application, including comments received from organs of state, municipal departments and the Provincial Minister in terms of section 45 of the Land Use Planning Act; (section 65(1)(d)) and the applicant's responses (section 65(1)(e)).*
- 19.4.1 There is no opposition to the proposed uses from any organs of state and all comments received from the public and organs of state were comprehensively and adequately addressed in the town planner's comments and responses report. The MPT clearly did not have regard to this fact or, if it did, it failed to place adequate, if any, weight on this factor.
- 19.5 *A registered planner's written assessment in respect of the application (section 65(1)(g);*
- 19.5.1 Our client's town planner presented a comprehensive written assessment in support of the proposed uses as contemplated in section 65(1)(g) of the By-Law. The Motivation Report concluded that the proposed uses were desirable and should be permitted. The MPT clearly did not apply their mind properly to this report as they were obliged to do.
- 19.6 *The impact of the proposed land development on municipal engineering services (Section 65(1)(h);*

- 19.6.1 It is clear from the Motivation Report and the specialist assessments on which it relies, that the proposed uses will not present any additional impacts on municipal engineering services.
- 20 It is our submission therefore that the decision by the MPT represents a wholesale failure to have proper, if any regard to the decision-making criteria set out in section 49 of LUPA, section 42 of SPLUMA and section 65 of the By-Law.

THE DECISION IS IRRATIONAL AND UNREASONABLE AND REFLECTS MATERIAL INCONSISTENCY IN DECISION-MAKING BY THE MPT

20.1 The MPT has a Constitutional obligation to determine land use applications in a manner that is reasonable, fair and rational. This contemplates consistency in decision-making. Having regard to the following land use applications which were approved by the MPT it is clear that they have not acted consistently in exercising their mandate and, as a result, the decision to refuse the proposed development is irrational, unreasonable and unfair:

20.1.1 Example 1: Enkanini informal settlement:

20.1.1.1 At the MPT meeting of 27 November 2020 an application for subdivision, consolidation, rezoning and amendment of the municipal urban edge on Erf 2175, Kayamandi (Application No. LU/8597) served before the MPT for a decision.

20.1.1.2 The development proposal consists of residential erven, flats and commercial land uses, and aims to formalise the Enkanini informal settlement.

- 20.1.1.3 A portion of the application area is located outside the urban edge, is zoned for agricultural purposes and forms part of the proclaimed Pagegaaiberg Nature Reserve.
- 20.1.1.4 The development of this portion of the application area is clearly and materially non-compliant with the MSDF as it is located outside the urban edge and is identified by the MSDF as a "protected area". Furthermore, the circumstances presented by the applicant were considerably less persuasive than those presented in our client's application motivation report in justifying a departure from the provisions of the MSDF.
- 20.1.1.5 Notwithstanding this, the MPT saw fit to approve the Enkanini application.
- 20.1.2 Example 2: Kreefgat informal settlement
- 20.1.2.1 The next item on the MPT's agenda (at the MPT meeting of 27 November 2020) was the application for consolidation, rezoning and subdivision of Farms 510/52, 510/53, 510/54 and 510/71, Stellenbosch (Application No. LU/8567).
- 20.1.2.2 The development proposal consists of residential erven and flats and aims to replace the Kreefgat informal settlement with a formal residential development.
- 20.1.2.3 The application area is located inside the urban edge and is partially located in an "existing and proposed character area" (which does not exclude all forms of development).

- 20.1.2.4 The development of the application area is therefore considered compliant with the provisions of the MSDF.
- 20.1.2.5 However, the MPT refused to even assess the merits of the land use planning application based on the perceived non-compliance of the development proposal with the MSDF.
- 20.1.3 The two development proposals listed above, were similar in context, yet with Enkanini (which was patently less aligned with the MSDF than the Kreefgat proposal) the MPT was of the opinion that regardless of the non-compliance with the MSDF, they may still evaluate the application and approve it, while they rejected the Kreefgat application without evaluating it further on its merits, based on perceived non-compliance with the MSDF. This was irrational, unreasonable and administratively unjust.

THE DECISION IS IN VIOLATION OF OUR CLIENT'S RIGHTS TO ADMINISTRATIVE ACTION WHICH IS LAWFUL, REASONABLE AND PROCEDURALLY FAIR AS CONTEMPLATED IN THE CONSTITUTION AND ENTRENCHED IN PAJA AND IS SUSCEPTIBLE TO JUDICIAL REVIEW:

- 21 In the light of the above, aside from being susceptible to being overturned on appeal, the MPT's decision is also susceptible to judicial review in terms of PAJA on the following grounds:
- 21.1 It was taken because irrelevant considerations were taken into account or relevant considerations were not considered (section 6(2)(e)(iii) of PAJA);

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- 21.2 It is not rationally connected to the purpose of the empowering provision (section 6(2)(f)(ii)(bb));
- 21.3 It is not rationally connected to the information before the MPT (section 6(2)(f)(ii)(cc));
- 21.4 It is so unreasonable that no reasonable person could have decided thus (section 6(2)(h));
and
- 21.5 It is otherwise unconstitutional or unlawful (section 6(2)(i)).
- 21.6 Finally, we submit that the MPT's decision breaches the requirements of the principle of legality, for all the reasons set out above.

CONCLUSION:

- 22 For the reasons motivated above we ask that the MPT's decision be overturned on appeal.
- 23 We thank you for your consideration of these appeal submissions.

Yours faithfully



WERKSMANS ATTORNEYS



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Per: **JUSTIN J. TRUTER**