

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Coram: Samela, J et De Waal AJ
Date of hearing: 17 November 2023
Date of judgment: 19 February 2024

Case No: 12975 / 2022

PETRA WALKER

Applicant

and

THE CITY OF CAPE TOWN

First Respondent

THE MAYOR OF CAPE TOWN

Second Respondent

FOLKES HOLDING (PTY) LTD

Third Respondent

JUDGMENT

DE WAAL AJ:

Introduction

- [1] The Applicant seeks the review of a decision taken by the Second Respondent (‘the Appeal Authority’), which decision was taken in terms of the Municipal Planning By-Law, 2015 (‘the MPBL’) of the First Respondent (‘the City’). The Appeal Authority partially upheld and partially refused the appeal.

[2] The appeal decision, which will also be referred to as the “*impugned decision*”, resulted from an internal appeal brought by the Third Respondent (‘Folkes Holding’) against a decision of the City’s Municipal Planning Tribunal (‘the MPT’). The MPT’s decision was to grant certain departures and to remove certain restrictive title deed conditions in respect of the Applicant’s property, Erf 4[...] Bantry Bay, situated at 4[...] D[...] W[...] Road (‘the subject property’). This decision was overturned in part by the Appeal Authority.

[3] The matter has a long history, not only in terms of the dispute between the Applicant and Folkes Holdings, but also in respect of the land use management scheme applicable to the Bantry Bay area. I shall revert to that history below. Suffice to say for purposes of this introduction that:

3.1. The Applicant required certain departures to regularise an existing outhouse on the subject property which had been built prior to her becoming owner. The departures were required as the outhouse was non-compliant with provisions of the City’s Development Management Scheme (‘the DMS’). I should say at the outset that the granting of these departures has not been challenged.

3.2. The Applicant also required the removal of certain restrictive conditions from the subject property’s title deed. This is what the present matter is about. The restrictive conditions which the Applicant sought to have removed are the following:

“E.(2) No more than one house shall be built on each lot and no dwelling house to be built shall be inconsistent with the environment.

E.(3) Each house shall be used only as a dwelling house.

F.(2) That a space of not less than 4,72 metres in width be left in front of all lots fronting or abutting on the High Level Road, 15,74 metres and the roadway marked Thoroughfare. That a space of not less than 3,15 metres in width be left in front of all lots fronting or abutting on any of the three roads 12,59 metres. Such space may be utilised as gardens or forecourts.

F.(3) That not more than one dwelling be erected on any one lot without the written consent of the Council of the City of Cape Town, and that no more than one-third of the area of any one lot be built upon.”

[4] Title deed restrictions E.(2) and E.(3) shall be referred to as such or as the “*single dwelling restriction*” and title deed restriction F.(3) shall be referred to as such or as the “*consent use restriction*”. Title deed restriction F.(2) is not directly relevant to the dispute.

[5] In what follows I first set out the background and context. I then turn to describe the MPT’s decision-making process; the Appeal Authority’s decision-making process; the legal framework; and the Applicant’s review grounds. Thereafter I set out, in summary form, the most important arguments of the Respondents in respect of the review grounds.

[6] As far as the processes and decisions of the MPT and the Appeal Authority are concerned, I relied to a large extent on the useful description provided to the Court in

the heads of argument prepared by the City's counsel, Mmes M O'Sullivan and A du Toit. This description was not challenged in any material respects by Messrs D Baguley and C Fehr, who appeared for the Applicant or by Mr S Rosenberg SC and Ms T Sarkas, who appeared for Folkes Holdings.

- [7] Although I will comment on various aspects of the documents and the parties' evidence and submissions throughout this judgment, I summarise my analysis and conclusions about the review grounds in the last part.

Background and context

- [8] The application for the removal of the title deed restrictions took place in a particular context, which is somewhat unusual.

- [9] As appears from the documents which served before the City's decision-makers, the title deed restrictions in Bantry Bay long precedes the adoption of a zoning scheme for the City as we know it today. Bantry Bay originally formed part of a larger township, namely Botany Bay Estate township ('Botany Bay') which was created in 1901. When Botany Bay was broken up into a number of lots, the developer imposed conditions on the use of those lots which were inserted as title deed restrictions. The restrictions were meant to fulfil the role of a zoning scheme.

- [10] The largest lot in Botany Bay was Lot HD, which lot was subsequently developed into a separate township in 1928 to form Bantry Bay. In this process, further title deed conditions were imposed by the developer, the Administrator and the Council of the City of Cape Town. Again, the restrictions are similar in nature to what one would find in a zoning scheme.

- [11] Both the Botany Bay and Bantry Bay sets of title deed conditions apply to the subject property.
- [12] As already stated, the creation of the townships of Botany Bay and Bantry Bay preceded the adoption of a zoning scheme for the areas. In lieu of a zoning scheme, the title deed conditions were used to achieve a particular look and feel for these townships. To this end, development parameters and uses permitted were set in the title deeds. At that time, it was for instance regarded important to restrict development in these townships to a single dwelling and that there be generous setbacks for buildings from the streets to create space for gardens and forecourts.
- [13] Although the degree to which this has happened is in dispute, it is safe to say that the actual structures on a significant number of properties in Botany Bay and Bantry Bay are no longer in sync with what was envisaged in the title deed restrictions imposed more than a hundred years ago. There are now even blocks of flats and hotels on some of the properties.
- [14] More importantly – and on this aspect there cannot be any doubt – over time the City’s various zoning schemes drifted further and further away from the vision contained in the old title deed conditions for Bantry Bay. Today residential densification is generally regarded as desirable, for instance. This is not only clear from the DMS, which forms part of the MPBL, but also from a variety of forward-looking policy instruments adopted by the City, such as the Municipal Spatial Development Framework, 2018 (‘MSDF’); the Table Bay District Plan, 2012 and the Densification Policy. The MSDF, for instance, aims to address current inefficiencies in urban form by supporting “*inward growth*”. This is done by promoting densification and diversification of land uses especially in areas that have good

transport infrastructure and are close to economic and other opportunities (such as the subject property). Nowadays the quality of the built environment is preserved through attractive urban design rather than by insisting on low density developments and large gardens (needing lots of water to maintain). An increase in the number of residents in an area can also be considered to improve safety due to more “*eyes on the road*”.

[15] I have culled from the City’s policy documents the above uncontentious bit of background because even though the present review does not relate to the merits of the Appeal Authority’s decision, it remains necessary to assess the review in context. That context indicates clearly that one is essentially dealing in the present dispute with a set of archaic title deed conditions which have existed for a considerable period of time in parallel with, and sharp contradiction to, a set of progressive land use policies and a modern development management scheme, which were adopted by the City after extensive public consultation.

[16] It is further clear from the voluminous sets of papers filed in the review that, despite the obvious chasm between the Bantry Bay title deeds, on the one hand, and the policies and DMS, on the other, an enormous and expensive effort is required, on the part of the relevant property owner, on each occasion when an application becomes necessary in order to bring the historic conditions in line (or even just closer) to the letter and spirit of the DMS.¹

[17] In this regard the plight suffered by the Applicant is illustrative. She bought the subject property in two stages. She eventually became owner of the entire property in 2002. She did not know at the time when she bought that the existing buildings on the

¹ I note that s 48(1) of the MPBL provides that the City may on its own initiative, subject to consultation etc, remove, suspend or amend a restrictive condition in respect of any land unit.

subject property were non-compliant with the title deed restrictions. When she realised this she made several attempts to regularise the building or, as she says, to simply have the same development opportunities as 6 000 private properties in Cape Town (outside of Botany Bay and Bantry Bay). By embarking on this process, the Applicant needed the assistance of lawyers and town planners, no doubt at great cost to her. I summarise her efforts briefly:

- 17.1. In her first effort, the Applicant applied for the removal of the restrictions under the now repealed Removal of Restrictions Act, 1967 (Act 84 of 1967). This application, which at the time had to be made to the relevant provincial authorities, was approved. The approval was however set aside on procedural grounds by the court (pursuant to a review brought by Folkes Holdings).
- 17.2. Another approval by the provincial authorities suffered the same fate in or around 2013. The approval was again set aside again on procedural grounds.
- 17.3. The decision which is the subject matter of the present application thus relates to her third attempt to regularise her house. Again, as explained below, her efforts to regularise the buildings on the subject property came to naught due to procedural irregularities in the process.

[18] I only know what the parties tell me on the papers about the past mishaps. I am in no position to comment on those processes and do not intend to do so. But no matter from what angle one looks at the situation, it is a sorry tale. Bear in mind that one is not dealing with a skyscraper or an hotel in the present instance but with the regularisation of an ordinary house, albeit one comprising three parts. The story is certainly not an advertisement for the kind of stable and predictable regulatory

environment which is necessary to encourage investment in the property sector. A developmental state such as South Africa can ill afford this kind of repeated bungling of administrative decision-making processes.²

[19] Against this background, I do believe it is appropriate to kick off with a reminder that the duty to observe procedural fairness is ever flexible.³ Basic common sense fairness to those affected is what is required from decision-makers. Adherence to administrative justice principles is certainly not a licence for the endless stalling or repetition of processes, especially not at the slightest suggestion of impropriety. As I attempt to show below, perceived shortcomings can be cured sometimes, even on appeal, without causing unfairness to applicants or objectors. It is certainly not always necessary to abort and reboot administrative decision processes when there is a challenge nor is it always the “safest” strategy to cancel and repeat processes. A problem solving mindset is more appropriate.

The MPT’s decision

[20] The Applicant’s land use management (‘LUMS’) application for the departures and the removal of the title deed conditions was accepted, i.e. formally received, by the City on 23 January 2020.

[21] It would have been immediately apparent that if the title deed restrictions were to be removed *without more*, the existing uses permitted in the DMS for the applicable single residential one (‘SR1’) zoning would govern. In other words, in the absence of the title deed restrictions, the floor of underlying rights of an owner of a property in

² **Gaertner v Minister of Finance** 2014 (1) SA 442 (CC) paras 51 – 56 emphasises the importance to a developmental state like South Africa of rigorous and efficient collection of customs duties. In my view this *dictum* applies equally to the efficient assessment and determination of land development applications.

³ **Logbro Properties CC v Bedderson NO** 2003 (2) SA 460 (SCA) at para 8

Bantry Bay would be those contained in the DMS, i.e. the Applicant would have the same rights as property owners with an SR1 zoning in other areas.

[22] With effect from 3 February 2020 the uses associated with an SR1 zoning were amended to include as a primary right an additional use right of a “*third dwelling*”, subject to certain conditions [which are not relevant for present purposes]. That meant for the Applicant that, in the absence of the restrictive title deed conditions, the floor of rights conferred by the DMS would increase further. Most importantly, for present purposes, the February 2020 amendment meant that owners of properties with an SR1 zoning were permitted to have three dwelling units on the property, all of which could be rented out as Airbnb units and each of which could be used – potentially at least – to accommodate up to 5 guests at any one time.

[23] After these amendments came into force, in March 2020, the Applicant’s planner, Mr Tommy Brümmer added to the motivation for the LUMS application. The addition was based solely on the pre-amendment version of the DMS and did not make reference to the effect of the February 2020 amendment of the DMS described above. Mr Brümmer’s motivation:

23.1. Stated that the effect of the granting of the LUMS application would be to permit two dwellings on the site and “*to enable another family to reside in the area*”.

23.2. Did not deal with the consequence of the restrictive title deed conditions being removed, namely that the Applicant, and any future owner, would be permitted to operate three Airbnb units on the subject property. [The original application

also did not deal with the floor of DMS rights which would apply under the pre-amended DMS.]

23.3. Did not address what the parking and traffic related impacts might be were the property to be used as three Airbnb units.

[24] In November 2020, the application was advertised containing the motivation as set out above.

[25] I jump ahead to comment:

25.1. The main concern of the Appeal Authority, which resulted in the impugned decision, was that the Applicant did not inform the public in the amended motivation that the effect of the change in law would be that if the restrictive conditions were removed three dwellings were permissible on the subject property (all capable of being used as Airbnb units, as stated above).

25.2. I shall revert to this aspect again below but the notion of an applicant in a land development application being required to educate the public on the effect of changes in law strikes me as untenable.

25.3. In any event, as I shall also explain below, the Applicant never applied for the abolishment of the restrictive conditions *without more*. She applied for the *relaxation* of those conditions so as to allow two dwellings and a domestic worker quarters on the subject property. That is what she wanted and applied for. The nature of the application never changed. She did not apply for the DMS floor of rights. She had no interest in having three dwellings because she did not have enough parking to meet the DMS requirement for operating

three units. She was also never opposed to appropriate conditions to ensure that the removal of the title deed restrictions kept her use of the subject property to what she applied for, i.e. two dwellings and the domestic staff quarters. In other words, she applied for relaxation of the title deed conditions, to regularise the existing structures on a particular basis and not for alignment of the title deed with the floor of DMS rights (whatever there were, either before or after the February 2020 amendment).

[26] Folkes Holdings and eight other property owners objected. The objection of Folkes Holdings was lodged by 1 February 2021. For present purposes the following contained in the objection is relevant:

“Before setting out the details of our client’s objections, we raise the following point *in limine*: Our client believes that there are already three dwelling units on the applicant’s property. We attach as Annexure “A” copies of three Airbnb adverts in which the applicant advertises three separate flats for hire. One accommodates four guests in two bedrooms while the other two accommodates two guests each in one bedroom. The photographs on the Airbnb adverts show that the two sleeper units are different. Indeed, the description of each are also different. If there are in fact three dwelling units on the applicant’s property, then the objector submits that the application is a misleading one as it seeks not only the removal of certain restrictive title deeds conditions but also departures so as to regularise two alleged dwellings. The objector challenges the applicant to reveal the true position when she responds to this objection. For the purposes of this objection, we will deal with the application as presented, i.e. an application which will allow a second dwelling on the property. If in fact there are already three dwelling units on the property, then we reserve our client’s rights to amplify the objection prior to the MPT hearing in order to deal with the true facts.”

[27] The Applicant responded to the *in limine* point on 12 April 2021 as follows:

“The two units in the outbuilding (in addition to the main house) are advertised by the owner on Airbnb are not authorised and application has not been made for both units in the outbuilding to be regularised.”

[28] The Applicant stated her intentions clearly and there can be no suggestion of a misrepresentation here. She accepted that the units advertised on Airbnb are not authorised but it is reiterated that the application is for two dwellings, with domestic staff quarters on the lower floor of the second dwelling.

[29] On 19 July 2021, Mr W Naude of the City’s Spatial Planning and Environment Directorate (‘the Planning Directorate’) completed a report for the MPT (‘the MPT report’) which recorded at page 4 the contention of Folkes Holdings that there were already three dwellings on the property. The Applicant’s response, which was application was made for two dwellings and the staff quarters, was regarded as acceptable.

[30] The MPT report:

30.1. was thus premised on the LUMS application being for two dwelling units and staff quarters;

30.2. observed, on that premise, that an increase of one additional vehicle to the local road network (caused by one additional dwelling unit) would not have a negative impact;

30.3. found that the impacts on surrounding owners’ rights, caused by increased noise, would not dramatically exceed those of the operation of “*a normal dwelling house(s) on a residential property*”; and

30.4. recommended that the LUMS application for the granting of the departures and the removal of the restrictive titled conditions be approved.

[31] The above are the relevant parts, but I should add that the MPT report deals with much more than the matters listed above. The MPT report is indeed a detailed and impressive document comprising of some 41 pages (without annexures).

[32] On 3 August 2021, the MPT confirmed the recommendation in the MPT report and granted the LUMS application in its entirety ('the MPT decision').

[33] The MPT imposed the following as conditions of approval:

33.1. Condition numbered 2.1 was imposed to address Folkes Holding's concern that the property could be used, and was being used, for three dwelling units (more specifically, three Airbnbs). This condition was that "*the building (envelope and built form and number of units) shall be substantially in accordance with [a plan which depicted the bottom storey of the outbuilding being used as domestic quarters]*" to the satisfaction of the Director: Development Management.

33.2. A further condition was imposed that the Applicant pay a development contribution in accordance with the Development Charges Policy for Engineering Services of the City, which was at that point in time, an amount of R42 195.82.

[34] Whether it was going to be effective or not, the first of the above conditions ('the protective condition') was an attempt to ensure that the use of the dwellings on the

subject property was to be in line with what the Applicant applied for, which was two dwellings and the domestic staff quarters.

The Appeal Authority's decision

[35] On 1 September 2021 Folkes Holdings lodged an appeal against the MPT decision, as provided for by s108(1) of the MPBL. The Folkes Holding appeal:

35.1. Contested only the approval of the LUMS application for the removal of the title deed restrictions E(2); E(3) and F(3) and the protective condition. Folkes Holding claimed *inter alia* that the protective condition did not go far enough and it proposed a reformulation of the condition should the appeal be refused.

35.2. Did not take issue with the approval of the application for departures from the DMS.

35.3. Repeated the concern raised by eight of the objectors, namely that D[...] W[...] Road, Bantry Bay, is a narrow suburban road, with a sidewalk only on one side of the road and that increased development and densification would mean more cars parked on the side of the road and resultant traffic congestion.

[36] The issue of the existing use and how to ensure, by way of a protective condition, that the Applicant's future use does not exceed the two dwellings applied for featured prominently. In this regard, Folkes Holdings stated the following in its appeal:

“6.1 During the interview with the MPT, it was pointed out that the Applicant was letting out three separate units on Airbnb and that in reality the existing structure supported three dwellings and not two. This was also dealt with in the Appellant’s objection– see the third unnumbered paragraph on the first page of the objection and Annexure A thereto which are the adverts on Airbnb advertising all three dwellings for hire.

6.2 The response to this was that the smallest of these dwellings was to be used as servant’s quarters.⁴ To address the Appellant’s concerns, and after discussion amongst the members of the MPT, Condition 1 was decided as being worded so as to ensure that only two dwellings and a servant’s quarters would be allowed. The Condition is worded as follows:

“Development plan

The building (envelope, built form and number of units) shall be substantially in accordance with the plans drawn by Louise Wileman, Project 1702, Drawing # One1/5, Two/1 and 2, Three/1-4,001 -1003, 2001 & 3001 – 3002 all dated 2019-12-17; all Revision 0 (as indicated in the attached Annexure C), to the satisfaction of the Director: Development Management.”

6.3 What the members of the MPT lost sight of was that the building envelope reflected on these plans was an already existing structure and that the applicant was seeking to regularise an unlawful building which contravened the title deed restriction that only one dwelling was permitted on the subject property. The wording of this condition is vague and hardly ensures that the owner of the subject property will stop advertising all three existing units for hire on Airbnb. The concept that the “*building (envelope, built form and number of units) shall be substantially in accordance with the (identified) plans*”

⁴ The reference should be to “domestic staff quarters” as per the DMS definition.

doesn't ensure that what is depicted on the plans as the "servant's quarters" will be used as such.

- 6.4 In the event that the Appellant's appeal is not upheld and the title deed conditions remain removed, the Appellant suggests that Condition 2.1 be reworded as follows:

"Development plan

The existing three buildings (envelope, built form, two units and servant's quarters) shall be entirely in accordance with the plans drawn by Louise Wileman, Project 1702, Drawing # One1/5, Two/1 and 2, Three/1-4,001 -1003, 2001 & 3001 – 3002 all dated 2019-12-17; all Revision 0 (as indicated in the attached Annexure C), to the satisfaction of the Director: Development Management and only used as such."

- [37] Again, whether or not the above were to be effective or not, Folkes Holdings was clearly alive to the danger of the Applicant applying for one thing and then using the subject for another.

- [38] On 18 October 2021 Mr Brümmer responded to the appeal on behalf of the Applicant. In the response, he again referred to the LUMS application as being one to permit two dwelling units and domestic staff quarters within the existing buildings on the subject property. He yet again addressed the concern about the possibility of the first floor of the outhouse being used as a third dwelling unit by stating that the intended use was only for two dwellings (and staff quarters) and not three dwellings. Turning to Condition 2.1 the following was stated by Mr Brümmer:

“3.2 Condition 2.1 of the approval

The concern regarding a third dwelling unit on Erf 4[...] is not justified as application has specifically been made for two units and not three.

At the time the application was submitted, the property formed part of a PT2 parking zone which requires no parking for any land use. Consideration was however given to the fact that there are 3 parking bays on the site and it was considered appropriate that the property only be developed with two units with two bays reserved for the main house and one bay for the smaller second dwelling, as per the standard parking requirements. Parking and transport in the road will not be exacerbated and it is most relevant that the City’s Transport branches have no objection to the proposal, as such indicating that there will be no negative impact on the road infrastructure.

There is accordingly no objection to the condition of approval being amended as suggested by the appellant.”

[39] In other words, the Applicant accept that a protective condition should be imposed to ensure that the subject property was in fact used in the manner applied for.

[40] The City’s Planning Directorate then prepared a report on the appeal of Folkes Holdings. This report was addressed to the Appeal Authority and is dated 8 December 2021. The report recommended that the appeal be dismissed. It was felt that the appeal did not raise any new issues.

[41] In terms of the procedures, the appeal did not go directly to the Appeal Authority. The appeal was first considered by the City’s Planning Appeals Advisory Panel (‘PAAP’). On 22 February 2022, PAAP held a meeting at which various matters were

raised by the legal representatives of Folkes Holding, including that there had been no or insufficient traffic studies conducted taking into account the potential uses of the property which would flow from the removal of the restrictive title deed conditions; and that the MPT decision had extinguished important rights of owners of property owners in D[...] W[...] Street pertaining to amenities and the character of the area in the absence of full information. But the argument which would eventually win the day for Folkes Holdings was expressed as follows (as per the transcript which forms part of the Rule 53 record):

“And before the MPT it was contended that in fact the current land use of the property in question was not as represented in the application. The current land use of the property was to provide for three effectively dwelling units which were utilised in the context of an accommodation establishment, a letting business where these residential units were let out on Airbnb and where in fact, the applicant owner was not resident on the property and one was not dealing with the situation where the dominant use was in fact a single residential dwelling use i.e., a dwelling for the accommodation of the family.

So, the actual use was in fact at odds with what the zoned and use rights were which provides for up to three dwelling units on a single residential property and provides further as a consent use that they can be used for the purposes of a bed and breakfast or an accommodation facility, provided the dominant use remains single residential and that requires also that the owner be resident on the property if one ... if a consent for the purpose in this case a bed and breakfast establishment or accommodation facility is permitted.

That was an issue that in fact the MPT in the face of the objections by the appellant, that the actual land use was not conformity with the application, dealt with merely by saying that in terms of the site development plan *ex facie*, the plan, it provided for two dwelling units effectively and that was referred to as a domestic quarters.

...

This was an application that was put up in fact on ... not on a forthright candid disclosure of the actual position, and that in fact should itself, really be dispositive of the application. An applicant cannot seek to present on a misleading or incorrect basis the factual situation, and then ask the tribunal or the decision-making body to exercise its jurisdiction and its discretion on the basis of incorrect assumptions....

...

So, the point simply is that this was made at the MPT as well and brushed over simply by referring to the development plan and imposing a condition that it can be used in accordance with the development plan, but it is currently being used, contrary to what was being applied for as three Airbnb units.

...

And the point which has not been addressed, is that before an applicant can seek a revision or deletion of title deed conditions which regulate land use, the decision-maker and those advising it must be in a position to assess the contemplated land use and to make recommendations. It does not help if in fact, the functionaries are considering a land use which is in fact not the actual or contemplated land use.”

[42] This was not an argument which had been raised before, at least not in the terms set out above. I say this not because I believe that it was impermissible to raise this issue. I express no view on that.⁵ I mention that the argument was new because it must have caught the City officials and the Applicant’s representative, Mr Brümmer, off guard, which explain their responses set out below.

⁵ Generally, even if an appeal is a wide appeal, argument must be restricted to the grounds of appeal.

[43] When Mr Brümmer responded to the above submission on behalf of the Applicant he initially stuck to the response set out above. He said:

“It is correct that there are three units, there are three kitchens. We have not applied for three units because of a parking shortage therefore, our application was for two units and a domestic staff quarters....”.

[44] In reply, counsel for Folkes Holdings then drove the argument home:

“That is the core problem in this matter. We know that this is three dwelling units, we know that contrary to item 21 of the DMS, the landowner does not live in a dwelling unit. We know that this is unlawful, but you are being asked to ignore all of that and revise land use conditions to facilitate in fact a contemplated land use which in fact is never going to occur and has never occurred from the time of the MPT to today.”

[45] From here the debate lost shape. In a follow-up, Mr Brümmer then stated:

“I just want to say that there is actually, apart from the title deed conditions which are a problem and obviously the building has been illegal since ‘97 when my client bought it, renting out a dwelling unit as an Airbnb is a temporary accommodation, she does not need to live in any of the erven, each of those erven would be effectively a dwelling unit which could be rented out for 30 days to a group of five people in each, that is what the DMS permits at the moment.

So, the argument that is being put before you that there is an illegal use of Airbnb actually is not relevant, because if the title deed was amended today and those two units plus the domestic staff quarter were legalised, they would be able to be rented out as temporary accommodation for 30 days at a time to five people.”

[46] If above is read in context, Mr Brümmer intended to deal with the issue of whether the existing use was unlawful under the DMS. This involved whether the Applicant had to live in the dwelling and the potential use of the subject property under the DMS (the floor of rights). Mr Brümmer did not suggest that the intention of the Applicant was to use the subject property as per what the DMS allowed and differently to what she applied for. That would have been entirely inconsistent with the manner in which the issue was dealt with by Mr Brümmer before.

[47] However, Mr Naude who was responsible for the MPT Report then stated that:

“We were under the impression that the staff, the servant’s quarters would be a servant’s quarters. It is like today the applicant the first time mentioned that it is, even though it is approved as a servant’s quarters for domestic room, is going to be used not as what it is supposed to be and that therefore it is the third dwelling and it is definitely going to require parking.

...you are allowed to have three dwelling units on the property, but then you have to be able to provide parking as well. The reason why they are calling it a servant’s quarters now, is because servants with domestic rooms do not require any additional parking on the property. So, they are trying to get away with that additional parking which they cannot provide on site, and they never applied for parking departure at any point in time.”

[48] But this is not correct. Mr Brümmer never said that the Applicant intended to use the subject property in a way different to her application. What he did say at the PAAP hearing was:

“What is important is that when our client purchased the property back in ‘97, there were already two dwellings on the property and she in fact bought a share of the building with a larger unit and then a few years later she bought

the second share with the second unit and then underneath the whole lot was the domestic staff quarters...

So, she has been really trying very hard to get this legalised and it is correct that there are three units, there are three kitchens. We have not applied for three units because of a parking shortage therefore, our application was for two units and a domestic staff quarters, the quarters right at the bottom..."

[49] In any event, both Mr Naude and the Chairperson of PAAP were alive to the need to impose a protective condition to ensure that the Applicant is restricted to that which she applied for, i.e. two dwellings and the domestic staff quarters.

[50] In this regard, Mr Naude stated:

"They are allowed to have staff quarters, obviously, the plans are approved or will be approved with naming it as a servant's quarters or domestic quarters. So therefore, whatever happens in the future, that room cannot be used as a dwelling unit to rent out to anybody, it needs to be a servant's or domestic room. That is what the building plan that will be approved will indicate, it will show as a servant's quarter or domestic room, so they cannot use it for something else like a dwelling unit to rent out to anybody."

[51] The Chairperson stated:

"So, what I am looking at is, if we were to put additional conditions to the approval about the usage that, for example, the conditions are that the main house must ... the owner must live in the main house and that the domestic quarters cannot be used for any other purpose etcetera, it is something along those lines that we could add to this. Japie?"

[52] As suggested by the Chairperson of the PAAP, the obvious response to the point raised by Folkes Holding before the PAAP was to reformulate the protective

condition so as to ensure that the future use of the subject property would be in line with the application before it. This was already an issue before the MPT. I can think of no reason why the protective condition could not be tightened up on appeal to ensure that it fulfils its purpose. The adjustment of the protective condition was indeed the fall-back position of Folkes Holdings in the internal appeal.

[53] Reverting to what was stated at the outset, the PAAP lacked the kind of problem-solving approach which is required. For instance: why could Mr Brümmer not simply have been asked to clarify, in terms, whether the Applicant intends to use the property as applied for and how a condition could be formulated so as to ensure that this happens. There would have been no unfairness to anyone if that obvious and common sense approach was followed. Instead, the process was ultimately aborted and rebooted for no good reason.

[54] Based on the above, I find that:

54.1. Accurate information regarding the existing use of the subject property was before the MPT and the PAAP.

54.2. To the extent that future use was relevant, there was no information before the PAAP or the Appeal Authority which suggested that the Applicant intended to use the subject property differently to the stated intention in her application.

54.3. In any event, the danger of the subject property being used differently to what was applied for could be addressed through an effective protective condition.

54.4. Certainly it could not be found that the Applicant sought to mislead the City by applying for two dwellings with a domestic staff quarters whereas in fact the Applicant's subjective intent was to operate three dwellings as Airbnb units on the subject property. If that was the case, she would have objected to the principle of imposing a protective condition. Bear in mind, also, that she could not meet the parking requirements which existed at the time and accordingly had no use for a right to operate three dwellings.

[55] Nevertheless, the PAAP recommended to the Appeal Authority that the appeal be upheld in so far as the removal of title deed conditions are concerned. The PAAP's reasons are summarised as follows in by the Appeal Authority:

“13.1 The current use is in contravention with the Municipal Planning By-law, as all three units are rented out as Airbnb accommodation.

13.2 The third unit is clearly not used as domestic staff quarters.

13.3 The proposal does not comply with the parking requirements.”

[56] The basis for the negative recommendation in the last subparagraph is that the Applicant does not meet the parking requirements for operating three Airbnb units, which is something she never applied for.

[57] On 21 April 2022 the Appeal Authority followed the recommendation and partially upheld the appeal. The Appeal Authority substituted the decision of the MPT with the following:

57.1. The application for the removal of the restrictive conditions, i.e. the single dwelling restriction (conditions E(2) and E(3)) was refused.

57.2. The application for the removal of the restrictive conditions, i.e. the consent restriction (F.(2) and F.(3)) was granted.

[58] The relevant parts of the Appeal Authority's reasons are the following:

"14.11 The applicant's formal response to the objection, dated 12 April 2021, and the facts do not correlate. Clearly there were, and still are, three dwelling units on the property. It is cynical and misleading to label the third as "*domestic quarters*". It is obviously not compliant with the DMS definition of "*domestic staff quarters*" as it is not used for the accommodation of domestic staff employed at the dwelling house.

14.12 In addition, the original application is based on patently wrong, if not misleading, information in respect of motivating the removal of the "*one dwelling*" title restriction. The motivation is based on the pretext that a second dwelling unit "*for a family to reside in the area*" is being provided. The appellant deliberately chose not to motivate the alternative use of three dwelling units exclusively for transient guests which has been, and still is, the case. By intentionally omitting to present the true facts of the status quo and the future intentions, the following consequences arise:

- Potential objectors were denied the opportunity to respond to this aspect.
- The MPT decision was based on a motivation that did not truthfully reflect the use of the property.
- No motivation was presented by the applicant for removing the title deed conditions in order to make the DMS's flexibility permitting three dwelling units to be used exclusively as temporary accommodation for transient guests. This is the context which the decision-maker should have

considered in applying its mind to section 39(5) of LUPA and section 47 of SPLUMA.

- The applicant is in breach of the By-law.

14.13 The above comments are not an assessment of the merits of using the property as rented accommodation for short-stay guests. However, it underscores the point that the applicant's town planning consultant failed to demonstrate the merits of approving the application for the purposes of having three dwelling units to be used exclusively for transient guests. As a result, the "one dwelling" title deed restrictions cannot be removed as the case has not been made, and considered, as required in terms of SPLUMA and LUPA.

...

14.16 . . . The application does not provide the required four parking bays given that the so-called "domestic staff quarters" is indeed a third dwelling unit. No parking departure was applied for and therefore cannot be granted. As a result, the current use of three dwelling units is a contravention of the DMS and will continue to be so unless a parking departure is applied for and granted.

...

14.20 The appellant did request that if the appeal is not upheld, and the title deed conditions remain removed, that condition 2.1 be reworded that the existing building "*shall be entirely in accordance with*" the plan submitted as opposed to being "*generally in accordance*" with. I note that the applicant has no objection to such rewording. However, this will result in an unnecessary administrative burden, given that the departures are already specified to the nearest millimetre.

...

14.22 The Condition of title, F.(3) also states “That not more than one dwelling be erected on any one lot without the written consent of the Council of the City of Cape Town.” The City, through a series of amendments to the By-law, adopted the position that erven zoned Single Residential SR1 may contain three dwelling units as of right and that each family or a by maximum of 5 transient guests. In this context, it would be inconsistent not to grant the City’s consent, had it been applied for, even if the units are to be used expressly for short-stay holiday accommodation. I am, therefore, of the view that Condition F.(3) may be deleted in its entirety.”

[59] My difficulty with the above is that it again assumes that the Applicant applied for three dwelling to be used as Airbnb units. This is not the case. She applied for two dwellings and domestic staff quarters and to the extent that there was a danger that the subject property was to be used in a different way, the obvious solution was to tighten the protective condition.

The legal framework

[60] Restrictive conditions are conditions registered against the title deeds of property restricting, in the main, its potential uses. They cannot be overruled by a town planning scheme.

[61] The City has explained, and it is common cause that:

61.1. In the present instance, the single dwelling restrictive condition are of a type that were imposed at the time that the township where the property is located was created and are “*developer’s restrictive conditions*”. The restrictive

conditions F.(2) and F.(3) are of a type that were imposed by a government body in terms of laws that predate the Townships Ordinance 33 of 1934 and are “*pre-1935 government-imposed conditions*”.

61.2. Unlike conditions imposed by a government body in terms of the now-repealed Townships Ordinance 33 of 1934 and the Land Use Planning Ordinance 15 of 1934, developer’s restrictive conditions and pre-1935 government-imposed conditions, do not involve a condition or approval granted or deemed to have been granted in terms of the MPBL. The City is therefore not required to enforce compliance with such conditions.

61.3. Surrounding property owners and others in the area may however seek to enforce such restrictive title deed conditions.

61.4. For this reason, an owner will often apply in terms of s42(g) of the MPBL for the amendment or removal of a title deed restriction which stands in the way of an intended development. The City has the power in terms of the MPBL to grant such an application.

[62] Because the LUMS application was accepted by the City on 23 January 2020, it fell to be determined in accordance with the MPBL as it read prior to amendment by the City of Cape Town: Municipal Planning Amendment By-law, 2019 which came into effect on 3 February 2020. This follows from s142(9) of the MPBL, as amended in 2019, which provides as follows:

“24. Section 142 of the principal By-Law is hereby amended by the insertion after subsection (8) of the following subsection:

“(9) Notwithstanding any amendment to this By-Law which may come into effect, an application that has already been accepted by the City in terms of section 74(a) before the date that the amendments become effective, will be processed and considered in terms of the legislation as it existed at the time of acceptance.”

[63] The MPBL contains a section which specifically deals with the removal of title deed restrictions. Section 42 of the MPBL specifically provides for applications for the *“amendment, suspension or deletion of a restrictive condition or consent or approval in terms of, or the relaxation of, a restrictive condition in a title deed where the restriction relates to use, subdivision, development rules or design criteria...”*.

[64] Section 99(1)(a) of the MPBL provides that an application must be refused if the decision-maker is satisfied that it fails to comply with certain minimum threshold requirements, one of which is that the application must comply with the requirements of the MPBL.⁶ One of the requirements that the application must comply with is s78 of the MPBL, which provides as follows:

“78 Duties of an applicant

- (1) An applicant must ensure that –
 - (a) no misrepresentation is made to the City;
 - (b) the City is not misled;
 - (c) all information furnished to the City is accurate; and
 - (d) the application does not omit any relevant information.
- (2) A person who contravenes subsections (1)(a) or (1)(b) is guilty an offence and upon conviction is liable to the penalties contemplated in sections 133(2) and 133(3).”

⁶ Section 99(1)(a) of the MPBL was however deleted with effect from 3 February 2020.

[65] If the application is not refused under s99(1) of the MPBL, the decision-maker must consider all relevant considerations including those aspects set out in ss99(2) and (3) of the MPBL.

[66] Section 99(2) lists as relevant considerations: criteria contemplated in the DMS; any applicable policy or strategy approved by the City to guide decision making; the extent of desirability of the proposed land use; impact on existing rights; and other considerations prescribed in relevant national or provincial legislation including the development principles contained in s7 of the Spatial Planning and Land Use Management Act 16 of 2013 ('SPLUMA').

[67] Section 99(3) then sets out the considerations which are relevant to an assessment of whether the proposed land use would be desirable:

“(3) The following considerations are relevant to the assessment under subsection (1)(c) of whether, and under subsection (2)(d) of the extent to which, the proposed land use would be desirable –

- (a) socio-economic impact;
- (b) ...
- (c) ...
- (d) compatibility with surrounding uses;
- (e) impact on the external engineering services;
- (f) impact on safety, health and wellbeing of the surrounding community;
- (g) impact on heritage;
- (h) impact on the biophysical environment;

- (i) traffic impacts, parking, access and other transport related considerations; and
- (j) whether the imposition of conditions can mitigate an adverse impact of the proposed land use.”

[68] In addition to these considerations, and assuming that the application is not refused under s99(1) of the MPBL, s48(4) of the MPBL read with s99(2)(g) requires the City to have regard to s39(5) of the Western Cape Land Use Planning Act 3 of 2014 (‘LUPA’) and s47 of SPLUMA when considering whether to remove, suspend or amend a restrictive condition. Thus, the City must take into account:

68.1. the public interest and the rights of those affected (ss47 and 42(1)(c) of SPLUMA); and

68.2. the criteria listed in s39(5) of LUPA which are:

- “(a) the financial or other value of the rights in terms of the restrictive condition enjoyed by a person or entity, irrespective of whether these rights are personal or vest in the person as the owner of a dominant tenement;
- (b) the personal benefits which accrue to the holder of rights in terms of the restrictive condition;
- (c) the personal benefits which will accrue to the person seeking the removal, suspension or amendment of the restrictive condition if it is removed, suspended or amended;
- (d) the social benefit of the restrictive condition remaining in place in its existing form;
- (e) the social benefit of the removal, suspension or amendment of the restrictive condition; and

- (f) whether the removal, suspension or amendment of the restrictive condition will completely remove all rights enjoyed by the beneficiary or only some of those rights.”

[69] It is clear that there is a wide set of considerations which the City must take into account in determining an application in terms of the MPBL generally, and in determining an application for the removal of restrictive conditions in particular.

[70] Lastly as regards the MPBL, s108 confers the following powers to the Appeal Authority:

70.1. The Appeal Authority may receive relevant information and reconsider the matter afresh (s108(5)); and

70.2. The Appeal Authority may “*uphold part or all of the appeal and vary the decision appealed against*” (s108(7)(b)(i)).

[71] To the extent that there was any doubt, the Appeal Authority had the power to seek clarification from the Applicant regarding what her intentions were regarding future use and, if considered necessary, to impose further protective conditions to ensure that she did not actually use the structures on the property in contravention of what she was allowed to do.

The review grounds

[72] In this part I briefly summarise the Applicant’s review grounds, it being common cause that the impugned decision is administrative action within the meaning of the term in PAJA.

[73] Firstly, regarding the alleged lack of information and more particularly, the omission to describe (a) the then current use of the property and (b) the implications of the 2019 amendment), the Applicant contends that these were not relevant considerations and the Appeal Authority's decision is accordingly contrary to s6(2)(e)(iii) of PAJA. In this regard, the Applicant contends that:

73.1. How the property was used prior to the LUMS application and even at the time of the application is simply not relevant to the determining the merits of the removal application because the application is concerned with the desirability of how the property will be used in future, not how it has been used in the past.

73.2. The implications of the amendment of the MPBL could also not serve as a ground for refusal of the removal application. This is because, in terms of s142(9) of the MPBL, the application was to be processed and considered under the law as it stood prior to the amendment.

73.3. The Applicant can hardly be faulted for failing to address something that the MPBL did not require her to address. Had the Appeal Authority nevertheless wanted that information to decide the matter afresh in accordance with its wide appeal powers, it ought to have called for it.

[74] Secondly, the Appeal Authority committed a material error of law and fact by relying on what the Appeal Authority believed (or perhaps inferred) to be the subjective intention of the Applicant. It was assured that she would use her property other than as set out in her LUMS application. The Appeal Authority inferred that the Applicant stated in the LUMS application that she will use the subject property for two family

homes whereas in fact, she was going to use it as it was used when the application was submitted, namely as three Airbnb units. The Applicant contends that there was no basis for drawing the inference.

- [75] Thirdly, the Appeal Authority's decision was irrational as it removed the title deed restriction which favoured the Applicant, i.e. the one which granted a right to the City to consent that the subject property may be used for more than a single dwelling. This left the Applicant in a worse position than she would be had the entire application been dismissed at the outset or had the full appeal been upheld.

The Respondents' submissions

(i) The City's submissions

- [76] The City contends that because of the complexity of the task imposed by the MPBL on the City, in terms of which it must consider and weigh up a wide range of factors in order to determine the merits of an application, the MPBL empowers the City to refuse a planning application where it is not possible for it to assess an application on all the relevant facts. It is in this context that s99(1) of the MPBL requires that the decision- must refuse an application if he or she is satisfied that it does not comply with the requirements of the By-Law. Section 78(1) of the MPBL imposes a duty upon an applicant to ensure that the City is not misled; that all information furnished to the City is accurate; and that the application does not omit any relevant information. It stands to reason that an application must necessarily be refused if the requirement in s78(1) of the MPBL is not met, because in the absence of accurate and full information, the enquiry, for example as regards desirability, cannot be undertaken.

[77] Furthermore, according to the City, the Appeal Authority's decision to refuse to grant the removal of title deed restrictive conditions E(2) and E(3) was not based on the merits but on the basis that the LUMS application had been materially incomplete in the following respects:

77.1. Firstly, the LUMS application had omitted to describe what the current use of the property was, which was regarded to be a relevant consideration regardless of what the intended use of the property was. Furthermore, the LUMS application had omitted to assess what the factual implications were of the 2019 amendment to the MPBL. This, it was believed, had significant consequences for both the proper assessment of the removal application by the various City officials and for a fair public participation process.

77.2. Secondly, the officials who had been tasked with assessing or commenting on the LUMS application had not been aware of the current use of the property and had not focused on the true implications of the 2019 amendment for the removal application. The implications for parking and traffic in D[...] W[...] Road, for example, had not been assessed based on all the relevant information. The Appeal Authority determined that although the Applicant denies the assertions regarding traffic and parking, she did not provide any facts in support of this denial. While the MPT must be taken to have known about the 2019 amendment, it was for the Applicant to have motivated why the restrictive conditions should be removed, and what the implications of that would be.

77.3. Thirdly, the public, having read the motivation, would not have been alerted to the fact that if the restrictive title deed conditions were to be removed,

the subject property would be capable of being used for three Airbnbs accommodating up to 5 transient guests each. Nor were they alerted to the fact that the actual use of the property was already for such purposes.

[78] The City further contends that the application for the removal of the restrictive title deed conditions could not be determined by the Appeal Authority in the absence of a full and complete application; proper assessment by the various officials; and a proper public participation process.

[79] In this regard, reliance is placed on s99(1) of the MPBL which requires that an application be refused if the decision-maker “*is satisfied*” that it does not “*comply with the requirements*” of the MPBL. The City contends that the Appeal Authority was satisfied that the removal application had been misleading (whether intentionally or not); that the information had not in all respects been accurate; and that materially relevant information for purposes of the removal application had been omitted.

[80] For these reasons, the City contends that the LUMS application for removal of the single dwelling restriction did not comply with s 78 of the MPBL.

[81] As regards the restrictive conditions F(2) and F(3), the City contends that:

81.1. Condition F(2) could be removed because it related only to the street setback and its removal had been properly motivated by the case officer who had assessed the departures.

81.2. The part of condition F(3) which limited the area that could be built upon to 30%, was linked to the setback departures which had been assessed by the

case officer and the MPT to have a minimal negative impact, and could therefore be removed.

81.3. The other part of condition F(3), namely that not more than one dwelling could be erected on any one lot without the written consent of the City could also be removed. The reason for the decision as regards condition F(3) was that the City had, through a series of amendments to the MPBL, adopted the position that erven zoned SR1 may contain three dwelling units as of right and that each of these dwelling units may be used as accommodation by either one family or a by maximum of 5 transient guests. It would be inconsistent not to grant the City's consent were it to be applied for.

[82] The effect of the decision of the Appeal Authority is that the Applicant is not entitled to more than one dwelling on the subject property and that house shall only be used as a "*dwelling house*". The Applicant is also no longer entitled to apply for the consent of the City for increased or different use of the subject property.

(ii) Folkes Holdings' submissions

[83] Section 48(4) of the MPBL provides that:

"The City must have regard to section 39(5) of the Land Use Planning Act and section 47 of SPLUMA when considering whether to remove, suspend or amend a restrictive condition."

[84] Folkes Holdings contends that the factors set out in s39 of LUPA are pivotal to the determination of an application for the removal of restrictive conditions made under the MPBL.

[85] Folkes Holdings contends that, contrary to what is argued by the Applicant, the potential (future) use of the property in the event that the application is granted must be considered as it bears on these factors, and in particular the effect of such removal on the holder of rights in terms of the restrictive condition. The Applicant's motivation for the removal of the remaining conditions failed to adequately address the SPLUMA and LUPA criteria for the determination of such an application, as required in terms of s78(1.

[86] Folkes Holdings contends that before an applicant can seek a revision or deletion of title deed conditions which regulate land use, the decision-maker and those advising it must be in a position to assess the contemplated land use and to make recommendations. It does not help if the functionaries are considering a land use which is in fact not the actual or contemplated land use, as recommendations will be made on the basis of the land use requirements and consequences, for example, in relation to parking, traffic density in the road and related issues, which are inappropriate or in fact, of no application.

[87] Folkes Holdings contends that if a land use restriction is to be altered in furtherance of a different land use, which is stated to be acceptable, the correct land use must be presented for the decision-maker's evaluation.

Analysis of review grounds

[88] I deal with the review grounds in the following order:

88.1. Non-compliance with s78 of the MPBL;

88.2. Existing use and intention to use in future; and

88.3. Rationality and the removal of the consent restriction.

(i) Non-compliance with s78 of the MPBL

[89] It will be re-called that s78 of the MPBL imposes duties on an applicant not to make misrepresentations to the City; not to mislead the City; to ensure that all information furnished to the City is accurate; and that the application does not omit any relevant information.

[90] If the applicant fails to ensure that no misrepresentation is made or fails to ensure that the City is not misled, a criminal offence is committed. This does not apply to a failure to ensure that all information furnished to the City is accurate and that no relevant information is omitted. The City argues that if one or both of the latter applies, a requirement of the MPBL is not complied with and the application can be refused on this basis alone under s99(1)(a) of the MPBL (which was in force when the Applicant made her application but was subsequently repealed).

[91] Section 78 is problematic if read as a standalone. How would an applicant, especially one not able to afford expert assistance, know what is relevant for purposes of a LUMS application? Take the present matter as an example: there is no provision of the MPBL or the application form which requires an applicant for a removal of a title deed restriction, or for that matter any other LUMS application under the MPBL, to provide information regarding the existing use of the property. How should an applicant know that this must be provided and that the failure to do so would be fatal? It is not obvious.

[92] Reading s78 of the MPBL as a standalone would also be inconsistent with the detailed provisions regarding the procedure to be followed when making a LUMS application, set out in ss70 to 76 of the MPBL. Those provisions:

92.1. Provide that the City may require an applicant to consult with an authorised official regarding the information which must be submitted with the application (s78(10)(a);

92.2. Provide that the City Manager may prescribe requirements to determine the nature of the information that is required (s78(2);

92.3. Set out in great detail what information is required and provide that the City Manager may call for additional information before acceptance (s71(3)(l);

92.4. Provide that the City must refuse to accept (not refuse) an application which does not comply with an information specification; lacks necessary information required in terms of s71; or contains manifestly incorrect information (s73(1)(c);

92.5. Provide for the calling of further information after acceptance (s75); and

92.6. Provide that an application is complete if the City has received the application fee, and all information necessary for the City to assess the application and the information submitted is compliant with all information specifications (s76).

[93] An interactive process is envisaged by the above. In terms of the approach, the City works together with the applicant to ensure that all relevant information is obtained

before the public participation commences. It is not a competitive process and hence there is no difficulty with the City's planning officials providing assistance or even guidance to an applicant as to what is required. Ultimately the MPT, staffed at least partially with members independent from the City, makes the decision.

[94] Given the above provisions, s78 cannot be interpreted to allow the City at the end of the process and at the appeal stage, to turn around and refuse an application because of a view formed at that stage that there was failure to provide relevant information. Read in context, s78 allows a refusal only when the information is required by the MPBL or called for by the City and then not provided in the sense that relevant information is withheld. This fits in with the remainder of the section, which relates to attempts to misrepresent, mislead and so on. Section 78 relates to a wilful failure to provide relevant information required by the MPBL or the City. That was not the case in the present matter.

[95] In any event, the information relating to the existing use was not relevant in the present matter. Whilst there may be cases where intended use can be inferred from existing use, this is not the position in the present matter. Here the Applicant spelled out her intentions regarding future use (two dwellings and the domestic staff quarters) and did not object to conditions which would have ensured that the subject property is used in accordance with her intent.

[96] Finally, even assuming that it is relevant, the information regarding existing use was before the MPT and the Appeal Authority. It was provided by Folkes Holdings. It is so that the information was provided in response to the call for public comment on the application. It is also so that the public was not alerted to the existing use by the Applicant herself. But the public participation process cannot be rebooted on every

occasion when new and relevant information is provided by an objector so that others can comment on the new aspect. If this were to be the case the process would be circular and never ending. It is also difficult to understand what the purpose of public consultation would be if the Applicant has to provide all relevant information, whether favourable or unfavourable. This would mean that the only new issues which the public can raise would be irrelevant ones, which could never be right. The question is whether all the relevant facts were before the decision-maker and not about who placed those facts before the decision-maker.

(ii) The relevance of subjective intent

[97] Counsel for the Applicant referred me to cases which indicate that the subjective intent of an applicant is not relevant.

[98] In **Longkloof Residents' Association and Others v Future Found Properties (Pty) Ltd and Another** (unreported judgment in the Western Cape High Court, case number 21290/2021, delivered on 25 May 2022), the Court held that:

“The subjective intention of the person who submits the plans is irrelevant. The assumption that in future the residence on Erf 1[...] will be used contrary to the approved building plan and contrary to the zoning rights attached to the first respondent’s property has been denied by the first respondent but is, in any event, a consideration which cannot be taken into account by the City when presented by a compliant application for building plan approval.”

[99] The Court in **Longkloof** endorsed the following passage from **Sinclair-Smith and Another v Saphrey Trust and the City of Cape Town** (unreported judgment in the Western Cape High Court, case number 9987/2009, delivered on 24 June 2009), where the Court held that:

“it is incumbent on the City of Cape Town to consider whether plans objectively comply with the zoning and building regulations and that the subjective intention of the person who submits the plans is irrelevant.”

[100] Counsel for the City and Folkes Holdings sought to distinguish the above authorities on the basis they were concerned with building plans and not land use planning applications.

[101] I do not agree. Generally speaking, it seems to me that the subjective intention of an applicant in a land use application would also be irrelevant. I see no reason why a decision-maker should concern itself with allegations of subjective intent. For instance, why should there be a concern that an applicant for a rezoning from “residential” to “*place of instruction*” actually subjectively intend to run an “*abattoir*” on the property? Surely, in such a case, the City must rely on the enforcement rights it has in law to stop actual breaches of permitted land use when they occur. See, for instance, the extensive powers granted to the City under Chapter 9 “*Enforcement*” of the MPBL (ss123 to 135).

[102] Even in the peculiar circumstance of the present matter subjective intent may not have been relevant. What I mean is that the mere fact that the Applicant may have subjectively intended to use the subject property different to what she applied for is not in itself a reason for refusing the application. Her intent was irrelevant provided that there was a proper formulation of the extent to which the restrictive conditions was relaxed or amended or, if scrapped, a proper formulation of a protective condition to ensure that the Applicant’s use of the subject property remains what was granted.

[103] Since the City does not enforce the particular title deed restrictions which are the subject of the present application, it may have been better to consider imposing a

condition (as was suggested by Folkes Holding) rather than reformulating the title deed restriction. Once a condition is imposed, s133 of the MPBL comes into play, which provides that a person is guilty of an offence if the person contravenes a decision taken or a condition imposed or deemed to have been taken or imposed in terms of the MPBL. In short, any attempt to contravene the condition could be addressed by invoking this section.

(iii) Rationality and the removal of the consent restriction

[104] The Appeal Authority's reason for removing the consent use application is as follows:

“The Condition of title, F.(3) also states “That not more than one dwelling be erected on any one lot without the written consent of the Council of the City of Cape-Town.” The City, through a series of amendments to the By-Law, adopted the position that erven zoned Single Residential SR1 may contain three dwelling units as of right and that each of these dwelling units may be used as accommodation by either one family or a by maximum of 5 transient guests. In this context, it would be inconsistent not to grant the City's consent, had it been applied for, even if the units are to be used expressly for short-stay holiday accommodation. I am, therefore, of the view that Condition F.(3) may be deleted in its entirety.”

[105] The Applicant's contention is that it makes no sense and it is irrational to remove Condition F.(3) if the single dwelling restriction is to remain as it would result in the Applicant being worse off than before she applied for the removal of the single dwelling restriction.

[106] I agree with the Applicant on this issue as well. If the single dwelling restriction is to be removed and if replaced with a condition under the MPBL that the Applicant may only use the subject property for two dwellings and domestic staff quarters, then

Condition F.(3) should also be removed. If not in this scenario, it would leave the Applicant with another option to seek consent for use other than that applied for in the LUMS application. But if the single dwelling restriction is to remain, there is no rational basis for removing the option of obtaining consent. Neither the Applicant nor Folkes Holding asked for the removal of Condition F.(3) in those circumstances. If anything, if this part of the Appeal Authority's decision is left intact it would prejudice the merits of the removal application. I say this because if the consent application must succeed because of the underlying floor of rights for an SR1 zoning then the same should apply to the removal application.

Costs

[107] **Biowatch Trust v Registrar Genetic Resources and Others** 2009 (6) SA 232 (CC) applies and costs must follow the result as far as the dispute between the City and the Applicant is concerned. As far as Folkes Holdings is concerned, the following passage in **Biowatch** is relevant:

“[56] I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door – at the end of the day, it was the state that had control over its conduct.”

[108] There are however reasons to deviate from this general point of departure in the present matter. Although not articulated in this way, the core category of private litigants sought to be protected by **Biowatch** are the ones who participated in order to

improve governmental decision-making processes and then seeks to defend the outcome in subsequent legal proceedings. A situation such as the present one, where a law point was taken by a private party's representatives, which point had little to do with the merits and was ultimately not a good one, falls at the periphery of **Biowatch**. To this I must add that the problem raised by Folkes Holdings could have been addressed easily through a properly formulated protective condition (as was suggested in the written representations and appeal). Folkes Holdings was however content to allow the point to derail the entire appeal. I cannot see how it should be granted immunity from costs in these circumstances.

Order

[109] In the result, I propose to make the following order:

- 109.1. Second Respondent's decision to uphold the Third Respondent's appeal is reviewed and set aside in its entirety.
- 109.2. The matter is remitted to Second Respondent for reconsideration.
- 109.3. The First and Third Respondents shall pay the Applicant's costs on the party and party scale and they shall be liable to do so jointly and severally, the one paying the other to be absolved.

H J DE WAAL AJ
Acting Judge of the High Court
Cape Town
19 February 2024

I agree and it is so ordered.

Samela J

APPEARANCES

Applicant's counsel: Donovan Baguley

Cei Fehr

Applicant's attorneys: Erleigh & Associates Inc.

First and Second Respondents' counsel: Michelle O'Sullivan and Aymone du Toit

First and Second Respondents' attorneys: Fairbridges Wertheim Becker Inc.

Third Respondent's counsel: Sean Rosenberg SC and Trisha Sarkas

Third Respondent's attorneys: Edward Nathan Sonnenberg Inc.