CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 78/14

In the matter between:

ARUN PROPERTY DEVELOPMENT (PTY) LTD Appellant

and

CITY OF CAPE TOWN Respondent

Neutral citation:	*Arun Property Development (Pty) Ltd v City of Cape Town* [2014] ZACC 37
Coram:	Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J
Judgment:	Moseneke DCJ (unanimous)
Heard on:	9 September 2014
Decided on:	15 December 2014
Summary:	Land Use Planning Ordinance 15 of 1985 — meaning of section 28 — structure plan is not a policy for purposes of the section — alternative remedies to section 28 compensation Section 25 of the Constitution — arbitrary deprivation — expropriation

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Western Cape High Court, Cape Town):

1. The appeal succeeds.
2. The order of the Supreme Court of Appeal is set aside.
3. The order of the High Court is re-instated in the following amended form:
   "(i) The excess land that may be established or agreed upon by the parties has vested in the City of Cape Town in terms of section 28 of the Land Use Planning Ordinance 15 of 1985 (LUPO).
   (ii) Arun Property Development (Pty) Ltd is entitled to compensation in respect of the excess land, in terms of section 28 of LUPO.
   (iii) The compensation must be calculated under the relevant provisions of the Expropriation Act 63 of 1975."
4. The City of Cape Town must pay the appellant's costs including the costs of two counsel in the High Court, Supreme Court of Appeal and in this Court.

JUDGMENT

MOSENEKE DCJ (Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This appeal raises a significant constitutional issue connected to the expropriation of land and compensation. It is whether a local authority that has

acquired land, by operation of legislation, from a private owner in a planning approval process for a residential development, is obliged to pay compensation for the land so acquired. Here, the owner and developer of the land claims compensation from the local authority for the value of the land it has so acquired. It does so on the ground that the land was unrelated to the normal need for the provision of public streets and spaces for the residential development but was required for a future road network planned for the region as a whole.

[2] Since 1986, the Land Use Planning Ordinance[1] (LUPO or Ordinance) requires of a local authority in the Western Cape to undertake land use planning and to adopt a structure plan.[2] It is meant to capture the local authority's vision for the use and development of the land within its jurisdiction. Thus, a structure plan should provide a framework within which land use planning and development by the private sector is to take place. In many instances the requirements set by a local authority in a structure plan are, for a private developer, not easy to bypass or change. A local authority may require that a planned future network of roads be shown on a developer's plan of subdivision. If that were so, section 28 of LUPO would apply.

[3] Section 28 provides, subject to certain qualifications, for the vesting of the ownership of public streets and public places in the local authority, without the payment of compensation.[3] The appeal hinges on the meaning this Court accords to the section. It is thus expedient to rehearse its terms this early:

> "The ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under section 25 shall, after the confirmation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the

[1] 15 of 1985. LUPO was an Ordinance of the former Cape Province and still applies in the Western Cape.

[2] A structure plan is a form of land use plan, along with subdivision plans, site development plans and developmental frameworks.

[3] If new developments were not initiated by developers, the land necessary to enable the structure plan would, in due course, be expropriated *with* compensation to the land owners.

> normal need therefor arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need."

Background

[4] The appellant, Arun Property Development (Pty) Ltd (Arun), is a property developer. The respondent is the City of Cape Town (City), a local authority established in terms of national legislation, the Local Government Municipal Structures Act.[4] In 1997 Arun acquired from the University of Stellenbosch (University) a property located in Durbanville, Western Cape (property),[5] with a view to undertaking a substantial township development.

[5] Before Arun's purchase of the property, the University had instructed a host of expert consultants including city planners, architects and consulting engineers to advise it on the possible future use and development of the property. The consultants advised the University that the property fell within the logical expansion area of the Durbanville district and that the value of the property would be optimised if it were used for a township development. They considered documents regulating municipal planning in the area and found that various planning instruments made provision for a hierarchy of roads that would run over the property.[6]

[6] In the early 1990s, the University lodged its application with the City to obtain the necessary approval for the township development of the property. On 3 September 1992 the University was informed in writing that the ministerial

[4] 117 of 1998.

[5] Portions 57 and 61 of the farm Langeberg No. 311, Durbanville.

[6] These instruments include structure plans adopted in terms of section 4 of LUPO and certain transport plans for the Cape metropolitan area which had been established in terms of the Urban Transport Act 78 of 1977. For example, the Provincial Executive Committee had approved a structure plan for the area north of the N1 in terms of section 4(6) of LUPO on 13 June 1988. The structure plan provided for five categories of roads. Order 1 (freeway), order 2 (primary arterial), order 3 (secondary arterial) and order 4 (local arterial) were essentially for non-residential areas. The fifth category was so-called access routes, serving a residential function.

representative had approved the application for the rezoning of the property from its agricultural zoning to subdivisional area.[7]

[7] After it had acquired the property, Arun, like the University, was told by municipal officials that no application for rezoning and subdivision of the property for a township development would be approved by the competent authorities unless the layout plans of the proposed development made due allowance for the planned future road infrastructure. This meant that the approval for the rezoning and subdivision hinged on whether the development accorded with existing planning protocols. One particularly significant planning instrument was the structure plan. In 1988 the Western Cape provincial authorities approved the structure plan in terms of section 4(6) of LUPO (1988 structure plan). It envisioned primary roads which would run over the property.[8]

[8] Arun too employed a team of consultants whose investigations confirmed the earlier history of the rezoning of the property. Arun's consultants were informed that the requirements of the 1988 structure plan and other planning documents envisaged a specified road infrastructure and the developer was obliged to provide for the planned primary road system over the property.

[9] Arun approached the City for permission to subdivide the property in order to undertake a residential development. The application was drawn up taking into account the local authority's envisaged road infrastructure. The sought subdivisions were granted in terms of section 25 of LUPO.[9] This the City did on three different

[7] The approval of the application for the rezoning to subdivisional area was informed by a traffic impact assessment. This report pointed out that in their planning for an upgrading and extension of the road system in the vicinity of the property, the road authorities had taken account of the increased demand, including traffic to and from this specific development. The conclusion was reached that the development would not have a significant negative impact on the existing road system and its approval was recommended.

[8] This planned primary road system consisted of an order 1 road (trunk roads and main roads) North/South, Kuilsriver highway (previously known as Main Road 81 and currently known as Main Road 81 and the R300 extension); an order 2 road (primary distributors) East/West, De Villiers extension (also known as Golf Course Road) and an order 2 road (primary distributors) North/South, Brackenfell Boulevard in the East.

[9] Section 25 provides:

occasions for the three phases of the residential development. In each case, the approval took effect on the date of transfer to the purchaser of the first erf in a phase. It included confirmation of the rezoning of specified portions of the property to "public streets" as well as conditions for the design of the road infrastructure within a phase.

[10] Although section 42(2) of LUPO allows for the imposition of conditions relating to the cession of land without compensation, the approvals did not set a condition that the portions of the planned primary roads that ran over the property had to be ceded to the City at no cost.[10]

[11] Arun was not happy with every condition of the approvals. It applied for the variation of some of the conditions on a few occasions. It sought the area reserved for public open spaces within the development to be reduced from 16% to 8% of the property. The City approved the variation after the provisional approval of the second phase of the subdivisions. In another instance, the City, acting in terms of section 42 of LUPO,[11] granted a variation of certain second-phase zoning conditions. These included the rezoning of two land units from "single residential" to "general residential" and the layout of an internal public road, with a minimum road reserve 20 metres wide. The variation was approved subject to Arun's complying with the previously imposed second-phase conditions and observing the requirement that—

> "(1) Either the Administrator or, if authorised thereto by scheme regulations, a council may grant or refuse an application for the subdivision of land.
>
> (2) In granting an application under subsection (1) either the Administrator or the council concerned, as the case may be, shall indicate relevant zonings in relation to the subdivision concerned for the purpose of the application of section 22(2)."

[10] This is in contrast to *City of Cape Town v Helderberg Park Development (Pty) Ltd* [2008] ZASCA 79; 2008 (6) SA 12 (SCA) (*Helderberg*) at paras 4 and 7. See also *Arun Property Development (Pty) Ltd v City of Cape Town* [2012] ZAWCHC 399 (High Court judgment) at para 30, distinguishing *Helderberg* from the instant case on this basis.

[11] Section 42(3)(a) provides:

> "Subject to the provisions of the Removal of Restrictions Act, 1967 (Act 84 of 1967), either the Administrator or a council, as the case may be, may, in relation to a condition imposed under subsection (1), after consideration of objections received in consequence of an advertisement in terms of subsection (4) and after consultation with the owner of the land concerned and, in the case of the Administrator, with the local authority concerned . . . waive or amend any condition".

> "all public roads be transferred to Council, prior to the utilisation of the property for General Residential purposes, the transfer of any newly created erven, the redevelopment of the property or the approval of building and sectional title plans, whichever first occurs".[12]

[12] Barring the variations it successfully asked for, Arun did not challenge any of the rezoning and subdivision decisions, or their allied conditions, by way of appeal or review; a matter to which I will revert.

In the High Court

[13] On 10 September 2001, Arun instituted action in the Western Cape High Court, Cape Town (High Court) premised on section 28 of LUPO. It claimed compensation from the City in an amount, as at January 2007, of R13 429 756. We are informed that the figure now stands at a substantially higher amount. Arun pleaded that its approved subdivision plans had to provide for portions of the higher-order roads ("excess land") which were meant to cut across the property. However, the need to provide for the excess land did not arise out of the normal needs of the residential development of the property. The excess land now vests in the City and it is a substantial tract of valuable property. The City must pay compensation for it.

[14] The City raised several exceptions to the summons, some of which were upheld by the High Court. However, it granted Arun leave to remedy the defects by amending its particulars of claim.[13]

[15] When the matter went to trial, the High Court sanctioned an agreement by the parties that the issues for decision be separated in terms of rule 33(1).[14] That decision

[12] Condition (j) reflected in the minutes of a meeting of the Urban Planning Committee that took place on 17 September 1999.

[13] On 23 April 2003, Blignault J upheld an exception to Arun's particulars of claim and granted leave to lodge amended particulars of claim. See *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C). On 15 November 2005, Erasmus J upheld additional exceptions taken by the City against Arun's amended particulars of claim. See *Arun Property Development (Edms) Bpk v Stad Kaapstad* [2005] ZAWCHC 86.

allowed the Court to give meaning to section 28 of LUPO without deciding the extent of the excess land and the value to be placed on it. This, the parties procured by stipulating that it was to be assumed, without the City admitting this to be the case, that the portion of public streets indicated as running over the property at the granting of the specified subdivisions exceeded the normal need therefor arising from the subdivisions.

[16] The separated issues were:

(a) Does the excess land remain vested in Arun or has it vested in the City in terms of section 28 of LUPO? (vesting issue)

(b) If the excess land has vested in the City, is Arun entitled to compensation for the excess land? (compensation issue)

(c) If Arun is entitled to compensation, is it to be calculated in terms of the Expropriation Act,[15] or section 25 of the Constitution? (calculation issue)

[17] The High Court found in favour of Arun. It concluded that the excess land had vested in the City in terms of section 28 of LUPO and that Arun was entitled to compensation for it. Dlodlo J further held that compensation was to be reckoned in terms of the provisions of the Expropriation Act.[16]

[18] In reaching this conclusion, the High Court reasoned that legislation is not presumed to take away existing rights unless it expressly or by necessary implication states so. The object to take away property without compensation should also not be imputed to the Legislature unless it is expressed in clear terms.

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[14] Rule 33(1) of the Uniform Rules of Court provides:

> "The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court."

[15] 63 of 1975 (Expropriation Act).

[16] See High Court judgment above n 10 at para 31.

[19] Section 28 of LUPO was considered by the Supreme Court of Appeal in *Helderberg.*[17] The High Court held that it was not bound by *Helderberg* because it was distinguishable on the facts. In that case, the approval of the subdivision was made conditional upon the developer ceding a portion of the property to the City. The High Court held that the interpretation given to section 28 by the majority in *Helderberg* was premised on the conditions imposed by the local authority. That construction was not binding on it.

[20] The High Court also held that the 1988 structure plan cannot be considered to be a "policy", as contended by the City, because it catered not for the designated area but rather applied generally to the broader community.

In the Supreme Court of Appeal

[21] The appeal before the Supreme Court of Appeal was at the instance of the City.[18] The City sought a reversal of the unfavourable decision of the High Court. The mainstay of Arun's case was that on a proper construction of section 28 of LUPO, all public streets vested in the City and that Arun was entitled to compensation for those that went beyond the normal needs of the development. Arun urged the Court not to follow the majority decision (per Farlam JA) in *Helderberg* on section 28 of LUPO because it was *obiter* in as much as it did not analyse or deal in detail with the meaning of the section. Arun urged that the construction of the section in the minority judgment of Heher JA was correct and ought to be followed.

[22] The Supreme Court of Appeal upheld the appeal and reversed the decision of the High Court. It held that the majority in *Helderberg* had decided the matter before it on the basis of section 28. The Court decided the compensation issue and in so doing in effect also decided the vesting issue on a basis adverse to Arun's case. The Court considered that the *Helderberg* decision was binding and was neither *obiter* nor

[17] See *Helderberg* above n 10 at paras 15-6 and 39-48.

[18] *City of Cape Town v Arun Property Development (Pty) Ltd* [2014] ZASCA 56 (Supreme Court of Appeal judgment).

distinguishable from the present dispute. The Court concluded that the excess land had vested in the City and Arun was not entitled to compensation.

In this Court

[23] The appeal by Arun against the decision of the Supreme Court of Appeal was heard with the prior leave of this Court. Arun sought to move this Court to uphold the appeal with costs and to re-instate the order of the High Court by directing that the excess land had vested in the City and that Arun was entitled to compensation which is to be calculated in terms of the section 26(1) of the Expropriation Act.

[24] Arun submitted that a proper reading of the section compels the City to pay compensation for excess land that has vested in it by operation of section 28 of LUPO. That meaning accords with the plain language of the section and the purpose of LUPO to procure and facilitate the orderly and beneficial use and development of land. Also, that meaning is in harmony with the guarantee against expropriation without compensation afforded by section 25(2) of the Constitution.

[25] The City argued that Arun has no right to compensation. The interpretation of section 28 urged by Arun is incorrect. The provision was properly understood by the majority in *Helderberg*, a case that is indistinguishable from the present. Section 28 only deals with circumstances in which compensation is *not* required. It does not, as a necessary correlative, dictate when compensation must be paid.

[26] In a separate argument, the City submitted that Arun was not entitled to compensation because the 1988 structure plan was a "policy" as envisaged in section 28 and accordingly compensation is excluded. The City added that it has always been its case that the road reserves were provided for in accordance with a section 28 policy. To this Arun said there was no ground for equating the 1988 structure plan with a "normal needs policy" imagined by section 28. Even if the provision of the public streets is "in accordance with a policy", the "normal need"

requirement for vesting must nevertheless be met.[19] The policy may not permit municipalities to acquire land free of the duty to compensate for planned public streets which exceed the normal needs of the subdivision.

[27] On another tag, the City resisted the appeal on the ground that compensation is not the proper relief for Arun's grievance. It should have sought an amendment of the structure plan or the conditions of the planning approvals, set under section 42 of LUPO, which reserved excessive land for public roads. Section 4(7) of LUPO provides a mechanism for any interested party to seek the amendment of a structure plan.[20] Section 44 allows a party to appeal to the provincial authorities against the conditional granting of any application under LUPO.[21] Alternatively, the City contended, Arun could have challenged the lawfulness of the structure plan or approval conditions that it claims operated to its prejudice. It has elected to seek neither municipal nor judicial relief to alter the land-use instruments and decisions that regulated its development. It may not now claim compensation.

[28] Lastly, to Arun's assertion that the vesting of excess land in the City was expropriation that entitled it to compensation, the City has retorted that expropriation is a particularly narrow form of deprivation. The reservation of land for public roads

[19] The relevant part of section 28 reads:

> "The ownership of all public streets and public places . . . shall . . . vest in the local authority . . . without compensation . . . if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision *or is in accordance with a policy determined by the Administrator from time to time*, regard being had to such need." (Emphasis added.)

[20] Section 4(7) reads:

> "A structure plan so approved may at any time, on application to or on the direction of the Administrator, be amended or withdrawn, with the approval of the Administrator, by a local authority or joint committee concerned or the director, in such manner as may be determined by the Administrator and subject to inhabitants of the area of jurisdiction of any local authority concerned and other interested parties being afforded an opportunity of lodging objections or making representations."

[21] Section 44(1)(a) provides:

> "An applicant in respect of an application to a council in terms of this Ordinance, and a person who has objected to the granting of such application in terms of this Ordinance, may appeal to the Administrator, in such manner and within such period as may be prescribed by regulation, against the refusal or granting or conditional granting of such application."

in a commercial development which at least partly serves the development does not amount to an expropriation of property in terms of section 25(2) of the Constitution, but only to a deprivation of property in terms of section 25(1) of the Constitution.[22] Here, the City added, Arun has not shown the deprivation to be arbitrary.

Issues

[29] This appeal poses four questions that track the original issues before the High Court. Some of these issues are marginally qualified by sub-themes:

(a) What is the meaning of section 28 of LUPO?

(i) Does the section vest all public streets and public places shown in an approved subdivision in the local authority with jurisdiction?

(ii) If so, is the property developer entitled to compensation for the land that so vests, if the public streets and places are more than the normal needs of the development?

(b) Is the 1988 structure plan a policy for purposes of section 28?

(c) Does the vesting of land in the local authority amount to expropriation?

[22] Section 25 in relevant part provides:

"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation."

(d) May a property developer sue for compensation before it has exhausted the appeal and review remedies in LUPO?

Meaning of section 28

[30] The meaning of section 28 must be garnered from the plain language of the text, its location in the scheme and the purpose of LUPO.[23] In doing so we must also heed the interpretive injunction that its meaning must promote the objects of the Bill of Rights.[24]

[31] The *text* vests ownership of "all public streets and public places" in the local authority without compensation. But so, only if the provision of the land is within the normal needs of the development or is allowed by a policy determined by the Administrator (now Premier). Thus vesting without compensation is permissible only to cater for normal needs of the subdivision.

[32] A closer look at the provision reveals two distinct components. Its first half vests "ownership of all public streets and public places over or on land indicated as such at the granting" of a subdivision application by a local authority. This occurs without more to *all* land indicated on the subdivision application as public streets – whether based on the normal need or in excess of it. The second part, which is separated from the first by a comma, provides that part of the vesting land that is

[23] See *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at paras 21, 25, 28 and 31; *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 22-3 and *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others* [1999] ZASCA 72; 2000 (1) SA 113 (SCA) at para 21. See also *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and Another* 1962 (1) SA 458 (A) at 476E-F.

[24] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 72, 80 and 90-1 and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 21.

based "on the normal need therefor arising from said subdivision", or is in accordance with a normal need policy, vests without compensation. The excess land, as the minority judgment in *Helderberg* rightly reasoned, attracts a claim for compensation.

[33] To understand section 28 to permit the acquisition of land by the local authority beyond normal needs without compensation is to ignore the syntax of the proviso: "if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision". There is indeed force in the position of the minority in *Helderberg* that the "correlative of the negative postulation" is that an owner is entitled to compensation for over-generously provided streets and public places which vests in the local authority.[25] The meaning preferred by the majority renders the proviso superfluous. That course we are not free to follow.

[34] This is particularly so because the majority did not seem to confront the language, context or purpose of the provision. It seems to have assumed without deciding that the vesting of the excess land had occurred and, without more, that even so, no compensation may ensue. This occurred without reference to the well settled interpretive canon that legislation may not be construed to permit confiscation of land without compensation unless it so provides in clear terms.[26] Nor does the majority judgment reach out to the duty to interpret section 28 in the light of section 25(2) of the Constitution. Instead it sought support in the dicta of two pre-Constitution cases which appeared to countenance "uncompensated expropriation" provided the owner acted with a degree of freedom of choice.[27]

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[25] *Helderberg* above n 10 at para 41.

[26] *Belinco (Pty) Ltd v Bellville Municipality and Another* 1970 (4) SA 589 (A) (*Belinco*) at 597C; *Administrator Cape v Associated Buildings Ltd* 1957 (2) SA 317 (A) at 325B-F and *South Peninsula Municipality and Another v Malherbe NO and Others* 1999 (2) SA 966 (C) at 983A-B.

[27] See *Helderberg* above n 10 at paras 4-5, where Farlam JA relied on *Belinco* id at 597D-G and *Administrator, Cape Province v Ruyteplaats Estates (Pty) Ltd* 1952 (1) SA 541 (A) at 550H-551F, where Greenberg JA said:

> "Before examining the Ordinance [the Townships Ordinance 33 of 1934 – the statutory predecessor to LUPO] in order to ascertain whether, under the powers conferred by it on the Administrator, he is entitled to expropriate without the payment of compensation, the contention of Mr Diemont, on appellant's behalf, that the condition does not amount to such expropriation, must be considered. His first point was that the condition does not compulsorily expropriate the respondent's property inasmuch as he is not compelled to

[35] In addition to being faithful to the text, this is a sensible way to construe the provision. When the public roads in question arise from the normal needs of the subdivision itself, it makes sense to expect the developer to bear the burden of providing the land, free of charge, for the purpose of public roads. There cannot be a township development without public streets and places. The developer has created that need. But where the extent of the roads provided for in the plan is beyond the normal need, the local authority must compensate the developer for the excess that vests in it. This excess is not related to, and the need for it precedes and is not created by, the subdivision. This becomes plain when one considers what the position is on land that is not subject to an application for subdivision that is needed by a local authority for a higher-order road in terms of a structure plan. When the local authority resolves that the time has come to build the road, the land must be expropriated and compensation must be paid to the owner.

[36] At this point, it would be appropriate to deal with the concern raised by the City during oral argument. This was that a developer itself may make provision for overbroad streets and overgenerous public places and then later claim compensation for these "unneeded" portions, should section 28 be interpreted to provide for a claim

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establish a township. Mr Duncan's reply to this was that expropriation without compensation, which I shall describe as confiscation, remains confiscation even if it is applied only when the owner chooses to deal with his property in a certain manner. I am not satisfied that this wholly meets the point. In the absence of any authority that the principle of interpretation applies to cases where it is within the owner's choice whether his property is confiscated or not, and we were not referred to any, it may be open to question whether the principle applies to such cases. But without deciding whether it does or not, it appears to me that it can safely be said that part at any rate, of the reasons why the Court will not construe legislation as empowering confiscation is its injustice and harshness and these are undoubtedly greater when the confiscation is inevitable than when it only takes place where the owner chooses to deal with his property in a particular way. Consequently, assuming that the principle applies to such cases, I think that the Court will be less reluctant to construe legislation as empowering confiscation in this limited way than when the confiscation takes place whether the owner deals with his property or not. Another circumstance which adds to the point raised on behalf of the appellant is that, even when such a condition has already been imposed by the Administrator the appellant can avoid the confiscation by abstaining from availing himself of the permission to establish the township. There is nothing in the Ordinance which prevents him, notwithstanding the permission, from dealing with the ground in the same manner as he was entitled to do before the permission was granted. Indeed the grant of the permission can be treated by him as an offer by the Administrator to grant permission, on the condition stipulated, of which he, the owner, can avail himself or not, according to his own choice."

for compensation in respect of excess land. The Supreme Court of Appeal quotes the majority in *Helderberg* with approval in this regard.[28] In my view there can be no risk of a developer over-providing public roads and spaces and then later enriching itself by claiming compensation. The local authority approves land use and subdivision plans and is thus in a position to ensure that plans do not provide for public roads and spaces which are not needed. It has the power to amend approvals and to impose conditions even after approvals and can thus easily counteract a developer's over-provision and later claim.[29] Furthermore, excess land that may attract compensation is a function of an externally imposed spatial requirement by the local authority itself or a regional plan and cannot be generated by a self-serving developer.

[37] The *purpose* of LUPO is to facilitate planned and orderly land use and development. Its mission is best disclosed by the general purpose of a structure plan. The plan must set guidelines for future spatial development that envisages urban renewal, urban design and development plans that effectively advance the order and welfare of the community concerned.[30] The provision is emphatic that a structure plan "shall not confer or take away any right in respect of land".[31]

[38] Section 28, in particular, aims to vest roads and public spaces based on normal needs of the development in the local authority concerned. What would be normal needs will differ from development to development. The Supreme Court of Appeal reasoned, wrongly in my view, that this provision was not to enable an expropriation

[28] Supreme Court of Appeal judgment above n 18 at para 18.

[29] Section 42(3).

[30] Section 5 of LUPO provides:

> "(1) The general purpose of a structure plan shall be to lay down guidelines for the future spatial development of the area to which it relates (including urban renewal, urban design or the preparation of development plans) in such a way as will most effectively promote the order of the area as well as the general welfare of the community concerned.
>
> (2) A structure plan may authorise rezoning in accordance with such structure plan by a council.
>
> (3) A structure plan shall not confer or take away any right in respect of land."

[31] Section 5(3) of LUPO.

of excess land that was not based on the normal needs. This was so, they said, because there was no procedure for expropriation and that interpretation would offend against section 25(2) of the Constitution.[32] That Court added that this does not amount to expropriation because a developer can opt out of the development if it does not like its excess land vesting in the local authority. The Supreme Court of Appeal concluded that since the vesting under section 28 does not amount to expropriation of excess land, it does not envisage compensation. I respectfully disagree.

[39] The better view is articulated by the *Helderberg* minority in these terms:

> "Counsel for the appellant [the City] submitted that section 28 is a vesting clause and does not contain a power of expropriation. That vesting is its primary object there can be no doubt. However the implications of the phrase 'without compensation' cannot be ignored. In theory the automatic vesting of land occurs in terms of section 28 at the voluntary instance of the landowner who elects to rezone his land, provides for roads and public places in his application for subdivision and causes the subdivision to be confirmed. But that is to ignore the substance. It is not the owner's choice whether or not to give such land to the local authority but the unavoidable result of a statutory provision which applies to all cases. It is sophistry to submit, as the appellant's [City's] counsel has done, that the fact that the owner can refrain from rezoning or subdividing his land confers freedom of choice. That is to place stagnation above development while the Ordinance is intended to regulate development in an orderly fashion not to stultify it. In addition, if the owner has knowledge of the statute, he will be aware that only land that falls within the defined terms of section 28 must be yielded without compensation. Such an owner can hardly be said to part willingly with land which is not vested as a result of normal need for it arising from the subdivision, unless compensation is to be paid, albeit that he has caused it to be shown as a public place or street in his subdivisional diagram. Thus, the provisions of section 28, although primarily concerned with the vesting of land, are founded in a compulsory taking and, when abused in the manner set up by the respondent's case, give rise to a situation so close to confiscation that application of the statutory principle of interpretation is both appropriate and necessary."[33]

[32] See above n 22.

[33] *Helderberg* above n 10 at para 39.

[40] I agree that the section must be understood in a manner that supports and recognises the legislative object of planned, orderly and public-oriented land use and development within a local authority. With the rezoning of land use and subdivision of land in order to develop it into a township come public streets and places, new homes, new communities and their general welfare. The public streets and places properly vest in the public authority without compensation because they are integral to the development. They are the developer's "give" for the value-add a subdivision approval brings. But the section does more. It vests also the ownership of a developer's excess land, if any, in a local authority. That vesting of ownership beyond the reasonable, normal needs of a subdivisional development must rank as a legislative acquisition of the developer's land without compensation. It occurs by operation of law after confirmation of the subdivision or a part thereof. The compulsory taking away of the excess land without compensation is not properly related to the purpose of developing a township with adequate public roads and spaces.

[41] The vesting of excess land in the local authority in the course of a township development may be beneficial to regional roads and other public needs. But that is not an adequate or compelling public consideration why the City may acquire the excess land from the developer for no compensation. I would rather save the provision by giving it a meaning that is at peace with section 25(2) of the Constitution. Excess land, properly so established, must attract compensation, a remedy which section 28 itself uses and the Ordinance provides for in a few other instances.[34] It will always be open to a municipality to adjust its structure plan and other land use planning devices in order to avoid this consequence.

[34] See, for example, section 19 of the Ordinance which provides that an owner may claim compensation from the local authority if his land sustains a fall in value consequent to the rezoning thereof which took place contrary to his wishes. The owner will also have a claim for compensation if the fall in the value of his land is sustained consequent to the rejection of a plan for a building which is in accordance with the use right of the land. The local authority will pay the owner the amount of compensation to which the owner and the local authority agree.

Is the 1988 structure plan a policy for purposes of section 28?

[42] The City contended that, even if a proper reading of section 28 permits compensation for excess land, Arun is not entitled to compensation because the structure plan is a "policy" for purposes of the section. Its provisions do not oblige a municipality to recompense the landowner if land has vested "in accordance with a policy determined by the Administrator from time to time, regard being had to such need". Plainly, "such need" refers back to the normal need for public streets and public places arising from the subdivision. The City's contention begs the question whether a structure plan is a "policy" for the purposes of section 28. Even if it were, does it set guidelines on how to reckon normal need for public roads and places in a township development?

[43] The City made this contention despite its concession at a 2012 pre-trial conference that—

> "17.3 daar te alle tersaaklike tye geen beleidsbepaling deur die Administrateur gemaak is ingevolge Artikel 28 van die Ordonnansie, waarvolgens padbreedtes soos deur die owerhede benodig vir doeleindes van die hoër orde paaie, deur 'n grondeienaar kosteloos aan daardie owerhede afgestaan moet word nie".[35]

[44] The City now explains that it intended to admit only that there was no policy which had as its express purpose the designation of portions of land in relation to which owners would receive no compensation. It says it did not intend to admit that there was no policy applicable to the circumstances of the case. It contends, correctly in my view, that the question whether a structure plan is a *policy* is a matter, not of

[35] My translation: "17.3 at all relevant times, no policy was made by the Administrator in terms of section 28 of the Ordinance according to which land as required by the authorities for higher order roads were to be ceded by the owner thereof without compensation".

fact but of law, that may be raised even on appeal.[36] It follows that we need not resolve the factual dispute around the pre-trial concession.

[45] It is so that neither section 28 nor any other provision of LUPO provides a definition of the word "policy". We must resort to its ordinary meaning. Harms JA's remarks in *Akani* on "policy determinations" appearing in a provincial gambling statute, are not inapposite:

> "The word 'policy' is inherently vague and may bear different meanings. . . . I do not consider it prudent to define the word either in general or in the context of the Act. 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, policy 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."[37]

[46] This Court has not only endorsed these remarks of Harms JA but also emphasised that a policy must be consistent with the operative legislative framework.[38] It serves as a guide to decision-making and may not bind the decision-maker inflexibly.[39] In *Lagoonbay*,[40] this Court found guidance in the following remarks on policy documents in the *Booth* case:

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[36] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68 and *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135; 2003 (2) SA 460 (SCA) at para 23.

[37] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* [2001] ZASCA 59; 2001 (4) SA 501 (SCA) (*Akani*) at para 7.

[38] In *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) at paras 9-10, this Court supported the approach to policy set out in *Akani*, noting that the legislative scheme under consideration served to emphasise the distinction between the determination of guiding policy, on the one hand, and its translation into legally binding enactments, on the other.

[39] *MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others* [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) at paras 54-6.

[40] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) at para 69 fn 86.

> "The formulation and adoption of policy documents, particularly after a process of public participation and with external expert assistance, is a valuable tool of government. This is especially true in the sphere of land use and planning. A properly researched and formulated policy aids rational, coherent and consistent decision-making. It provides a large measure of useful predictability to the public. It avoids the need for time-consuming investigations into the history and character of an area each time a planning application is made – 'reinventing the wheel' as Prof Hoexter puts it."[41] (Footnotes omitted.)

[47] Policy is not legislation but a general and future guideline for the exercise of public power by executive government. Often, but not always, its formulation is required by legislation. The primary objects of a policy are to achieve reasonable and consistent decision-making; to provide a guide and a measure of certainty to the public and to avoid case by case and fresh enquiry into every identical request or need for the exercise of public power.

[48] The City submitted that section 5 requires a structure plan to "lay down guidelines for future spatial development" and to be adopted in a public process. It is thus a policy to calculate the normal need for public roads under section 28. It cannot be so. A structure plan is not a section 28 policy. Chapter I of the Ordinance regulates structure plans. Nothing in it provides expressly or implicitly for a guideline on how to reckon "normal needs arising from [a particular] subdivision". Moreover, if a structure plan were that decision-making tool provided for in section 28, one would have expected the Ordinance to have made reference to it explicitly as a number of its other provisions do cross-reference.[42]

[49] To my mind, the meaning of section 28 is clear: the policy concerned must be a dedicated instrument, published "from time to time" under section 28. This is unlike a structure plan, which must be reviewed once in a ten-year cycle.[43] The policy would

[41] *Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning and Another* [2013] ZAWCHC 47; 2013 (4) SA 519 (C) at para 29.

[42] See, for example, sections 4-6, 14(4)(a), 16(1), 18(1), 34(1)(b) and 36(1) of LUPO.

[43] Section 4(8) of LUPO.

be a guideline to assess what constitutes the "normal need" for public streets and places arising from a subdivision of land. In turn, a structure plan focuses on the general purpose to lay down guidelines for future spatial development of the area it relates to. Its focus is the high-level regulation of urban renewal, design and spatial development planning and not the discrete and varied township developments within a municipality.

[50] Ordinarily, "normal need" would be assessed in light of the facts and features of a given township development. The normal needs policy is meant to provide the local authority with a short-cut. This is sensible: the provision gives the authority a mechanism with which to make a normal-need assessment quickly by application of a pre-ordained and formulaic assessment. It would be aimed at providing criteria and standards which may be applied to a subdivision in order to determine a division of responsibility between developer and local authority in relation to services.

[51] This interpretation of what "policy" means under section 28 is not predicated on the expert evidence of Mr Underwood. His evidence is nonetheless useful because it tells us that, contrary to the City's contention that a structure plan also provides for policy, the Premier or her predecessor has formulated and published a discrete policy under section 28 for the provision of public spaces, but not one for public streets. The evidence also informs us of the relevant contents of the 1988 structure plan. His testimony is undisputed.

[52] He testified that the 1988 structure plan does not purport to provide any criteria or guidelines for establishing normal need in any particular subdivision, as far as public streets are concerned. It confines itself to the location of certain planned higher-order roads. Furthermore, he testified that in his experience, provincial policy was generally made available in the form of provincial circulars and designated policy documents. There was a provincial policy in place providing guidelines and criteria for determining the amount of open public space required in a typical township subdivision. There was no corresponding policy emanating from the competent

authority that purported to deal with the question of public streets. Mr Underwood testified that he would expect and anticipate any such policy, if it had been determined, to have been published. He would not expect the policy to be contained within a particular structure plan for a designated area.

[53] The contention that the structure plan doubles as a policy on determining normal needs for public streets of a township development has no merit and should be dismissed. The City rightly conceded that if we were to hold against it on its policy argument that would be the end of its case on the entitlement of the appellant to compensation under section 28. That is plainly so. Despite the concession, the City persisted with two contentions: that Arun may not claim compensation because the vesting of ownership did not amount to expropriation and in any event, Arun had not first exhausted the remedies of appeal and review under the Ordinance.

Is vesting under section 28 an expropriation?

[54] The core of the City's attitude is that the reservation of land for public roads in a commercial development that partly serves the development does not amount to an expropriation of property in terms of section 25(2) of the Constitution.[44] The mere fact that some of these roads and places may be greater than is strictly required for the isolated needs of the development does not elevate the deprivation into an expropriation in all or most cases. Although the land will vest in the City in those cases, it will involve a deprivation and not an expropriation. Here, the City added, Arun has not shown that the deprivation was arbitrary and thus has no right to compensation. The City concludes that it does not follow, as a "negative correlative" of the proviso in section 28 that, in all cases in which public roads and public places are wider than required for that development, compensation is required.

[55] The City advanced two grounds to support its contention. It says the foremost general characteristic of expropriation is that it "is brought about *unilaterally by state*

[44] See above n 22.

action, without the cooperation and often against the will of the affected owner".[45] This contention relies on the reasoning of the majority in *Helderberg*. Its essence is that if an affected owner had a "degree of freedom of choice" in the "lawful ordering of its affairs" and the consequence is an "uncompensated expropriation", it has no claim to compensation.[46] In that case the majority found that the affected owner could not complain that the City had been "holding [it] to ransom in its lawful ordering of its affairs" because it was free not to continue with the development.[47]

[56] The support the City relies on in *Helderberg*, that vesting under section 28 does not amount to expropriation, is misplaced. The majority remarked:

> "I agree with the submission of counsel for the appellant that the imposition of condition 'u' in the purported exercise of the powers vested in the local authority by section 42 of LUPO did not constitute expropriation because the owner was not obliged to submit to the vesting of his land subject to the condition. This is because the owner could have avoided the vesting of these portions of its land by not proceeding with the proposed subdivision".[48]

[57] The reasoning was directed at the effect of the purported imposition of condition "u" in terms of section 42 and not at section 28 of the Ordinance. There, when the City granted authorisation, it imposed condition "u" to the effect that the owner must cede specified land for no compensation. No condition of that sort was imposed on Arun's authorisation and the operative provision under which the vesting occurred was section 28.

[58] The City pressed on that, in any event, the vesting of land under section 28 is deprivation and not expropriation. We have not had a full argument on the distinction between expropriation and deprivation of property. None of the preceding courts has

[45] Van der Walt *Constitutional Property Law* 3 ed (Juta & Co Ltd, Cape Town 2011) at 344 (emphasis added).

[46] *Helderberg* above n 10 at paras 4-5.

[47] Id at paras 4-6.

[48] Id at para 4.

expressed itself on this distinction which gained prominence only in this Court. I am prepared to accept, without deciding, that an expropriation occurs by state coercion and without the consent of the affected owner.[49] The minority in *Helderberg* defined expropriation, in a similar vein, as "the compulsory deprivation of ownership or rights usually by a public authority for a public purpose".[50]

[59] This however does not advance the cause of the City. Section 28 compulsorily requires the giving-up of ownership of land to a local authority upon the granting of a subdivision. The loss of ownership is compelled by law, and not by the decision of the local authority. It occurs instantly upon confirmation of the subdivision. A land developer would know at the start of the process for rezoning and subdivision that it has to give up the public streets and spaces that make up the normal needs but not those that are not reasonably required for the normal needs of a development. The City has advanced no cogent reason or compelling public interest why the coercive acquisition is with the consent of the affected owner. Nor has it stated why the provision should not be interpreted in accordance with the settled rule of interpretation that a legislative intention to authorise expropriation without compensation will not be imputed in the absence of express words or plain implication or in line with section 25(2) of the Constitution. I am persuaded that to the extent that section 28 vests public places and streets beyond the normal need arising from a particular subdivision, the owner of the land may claim for compensation.

[60] The second ground the City has advanced, relying on *Reflect-All*,[51] is that legislative provisions allowing for the establishment of a future road network which restrained planning and development activities amount to "deprivation" within the meaning of section 25(1) of the Constitution, but not to "expropriation" requiring

[49] See Van der Walt above n 45.

[50] See *Helderberg* above n 10 at para 40, which refers to the definition in *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) at 515A-C.

[51] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) (*Reflect-All*).

compensation.[52] Reliance on this case does not assist the City. In *Reflect-All*, the constitutional validity of sections 10(1) and 10(3) of the Gauteng Transport Infrastructure Act[53] was upheld as the deprivation that occurred under that legislation was not arbitrary.[54] In this case section 28, whose constitutional validity is accepted by all, does not authorise any deprivation beyond normal needs. It follows that any deprivation beyond the normal need would take place outside of legislative authority and would thus be arbitrary. Furthermore, *Reflect-All* is distinguishable. On its facts no confiscation of land occurred. The land of the owners over which planned future roads might be developed did not vest in any state entity.[55] The land in question was not acquired by the state. It remained the property of the landowners. If the land had vested in the state a different question, akin to the one in the present case, would have arisen. It did not.

[61] In *Reflect-All*, another important consideration why the restraint on planning and development, in the mere approval of a road scheme, did not amount to a "taking" was that it was not known whether the state would ever construct the reserved or planned future roads over the affected land.[56] It was not known at which point, if at all, the land would be acquired by the state for constructing roads. Section 28 is vastly different. The ownership of all public roads and public places must vest in the local authority "after confirmation of such subdivision or part thereof". The confiscation of excess land occurs at a fixed and pre-determined moment. The change of ownership of the excess land is a direct sequel to the granting of and confirmation of the subdivision.

[62] The contention advanced here too is no bar to the appellant claiming compensation for the expropriation of its land.

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[52] Id at paras 38-9.

[53] 8 of 2001.

[54] *Reflect-All* above n 51 at paras 38-9.

[55] Id at para 64.

[56] Id at para 67.

Did the applicant exhaust its remedies?

[63] The City assumed the stance that, prior to instituting a claim for compensation, Arun ought to have sought an amendment to the provisions of the structure plan that provided for public roads which were in excess of the normal needs of its own development. Alternatively, Arun ought to have approached a court to review and set aside the decision which reserved land for public roads in excess of normal needs of the development. Was Arun obliged to make use of an appeal or review process before instituting a claim for compensation?

[64] In *Helderberg*, we have seen, the local authority imposed condition "u" in terms of section 42(2) of LUPO that the developer had to give the local authority, free of charge, a 32-metre wide road reserve as condition before approving the subdivisional plan.[57] The majority judgment held that the developer could have lodged an appeal to the Premier under section 44 against the imposition of the condition.[58] The Court held that it was also open to the developer to take the decision to impose the condition on review.[59] The majority held that a party that has at its disposal the remedy of appeal or review and does not make use of it, will not be allowed to claim compensation for what in effect are "constitutional damages".[60]

[65] Section 44 permits an applicant in an application under the Ordinance to appeal to the Premier "against the refusal or granting or conditional granting of such application".[61] Thereafter the section specifies other decisions that are susceptible to appeal to the Premier. Here, in the approval of the subdivision, the City did not put up a similar section 42 condition which was susceptible to an appeal in terms of the section. And unsurprisingly, the vesting of land under section 28 is not listed as

[57] *Helderberg* above n 10 at para 20.

[58] Id at para 7.

[59] Id.

[60] Id at para 8.

[61] See above n 21.

susceptible to an appeal. Vesting of ownership occurs forcibly and by operation of law and not by a decision that is open to appellate scrutiny. Put simply, Arun had no review or appellate remedy to exhaust, unlike the owner in *Helderberg*.

[66] Second, it is by no means clear that Arun or a developer in its position would be able to seek judicial review of the structure plan only for the reason that it makes provision for higher-order roads which must be provided for in its subdivision application. If the review were to occur under PAJA,[62] as it must, the developer will have to confront a legion of obstacles. It will have to find a decision to impugn. As we have seen vesting occurs *ex lege*. It will have to seek condonation to overcome the 180-day time bar given that structure plans have long life cycles. It will have to conjure up discrete PAJA review grounds connected to the reasonableness and rationality of the structure plan, its failure to account for a relevant consideration, or a mistake of fact or law and so forth.

[67] Third, I can find no valid reason why a developer could not when applying for subdivision, make provision in its application for land necessary for higher-order roads and simply claim compensation once the application is approved. The developer is entitled to assume the posture: "I acknowledge the broader public need for these higher-order roads provided for in the structure plan. I don't intend to thwart this eminently legitimate request from the local authority. But I do nevertheless require compensation for the excess land vested in the local authority."

[68] Fourth, the cases the majority in *Helderberg* relied on to support his contention that a developer must first seek to review the decision in question are not applicable here.[63] They involved the question of whether certain conduct should be deemed wrongful for the purpose of the law of delict. This wrongfulness enquiry entails a

[62] Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[63] Above n 10 at para 8. These cases are *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2005] ZASCA 120; 2006 (3) SA 151 (SCA); *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* [2003] ZASCA 42; 2003 (6) SA 13 (SCA); *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA).

policy decision on whether it would be reasonable to impose liability in the circumstances. One recognised reason for refusing to extend the reach of the law of delict to grant the plaintiff a claim is the availability of an alternative remedy.[64]

[69] Fifth, a party that has a statutory right to compensation is in a very different position to a plaintiff trying to establish a novel delictual claim. That party is entitled to rely on this right, which is statutorily entrenched, regardless of any alternative remedies available. The right to compensation is given by section 28 and does not flow from a delictual claim for damages. Section 28 contains no qualification with regard to the right provided by the section or an obligation to exhaust alternative remedies.

[70] Sixth, the claim for compensation for expropriation is premised on an acceptance of the validity of the administrative action, namely the approval of the development. A review or appeal would be directed at the opposite, namely to have the administrative decision to approve the township development set aside. I do not see why Arun should be obliged to follow a process to set aside an administrative decision, whose lawfulness it has accepted and implemented.

[71] Lastly, I also think that a very different case presented itself in *Helderberg* because of the condition to which the developer agreed. This provided for vesting of certain public roads without compensation. It was this condition that the majority thought should be appealed or reviewed.[65] Moreover, because of the condition the majority saw the developer's claim not as one for compensation but as one for "constitutional damages" arising from the local authority's imposition of the condition. The call for appeal or review – and the proposition that alternative remedies must be exhausted – was expressly linked to the condition, not to section 28. Whether or not the majority in *Helderberg* was right, this case is far simpler. There is

[64] See *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28 at paras 62-6 and *Lillicrap, Wassenaar and Partners v Pilkington Brothers (S.A) (Pty) Ltd* [1984] ZASCA 132; 1985 (1) SA 475 (A) at paras 500H-I.

[65] *Helderberg* above n 10 at para 7.

no condition preventing Arun from claiming compensation that must be reviewed and set aside before it can. It is entitled to rely directly on its right to compensation flowing from section 28.

The basis for determining compensation

[72] Arun contends that the compensation to which it is entitled must be determined in accordance with the provisions of the Expropriation Act. Section 26(1) of the Act provides:

> "Subject to the provisions of section 5, the provisions of this Act shall not derogate from any power conferred by any other law to expropriate or take any property or to take the right to use property temporarily, but shall not preclude the expropriation or the taking of property or the taking of any such right being effected either under the said provisions or under the said power: Provided that if any such power is exercised after the commencement of this Act, the compensation owing in respect thereof shall *mutatis mutandis* be calculated, determined and paid in accordance with the provisions of this Act."

[73] We have already held that under section 28 an *ex lege* transfer of ownership occurs and has the same effect as an expropriation. The parties in this appeal were agreed, correctly so, that if section 28 commands an obligatory passing of ownership to the local authority against compensation, section 26(1) of the Expropriation Act would be applicable. It follows that the assessment of any compensation due falls to be reckoned and paid in accordance with the provisions of the Expropriation Act.

Order

[74] The following order is made:

1. The appeal succeeds.
2. The order of the Supreme Court of Appeal is set aside.
3. The order of the High Court is re-instated in the following amended form:

"(i) Excess land that may be established or agreed upon by the parties has vested in the City of Cape Town in terms of section 28 of the Land Use Planning Ordinance 15 of 1985 (LUPO).

(ii) Arun Property Development (Pty) Ltd is entitled to compensation in respect of the excess land.

(iii) The compensation must be calculated under the relevant provisions of the Expropriation Act 63 of 1975."

4. The City of Cape Town must pay the appellants' costs including costs of two counsel in the High Court, Supreme Court of Appeal and in this Court.

For the Appellant:	S P Rosenberg SC and K Reynolds instructed by Du Plessis Hofmeyr Malan Attorneys.
For the Respondent:	G Budlender SC and D Borgström instructed by Cliffe Dekker Hofmeyr Inc.