

Paul.Heydenrych@capetown.gov.za

gregory.september@capetown.gov.za

appeals@capetown.gov.za

Dear Sir

PROPOSED APPLICATION FOR CITY APPROVALS IN TERMS OF THE DEVELOPMENT MANAGEMENT SCHEME AND CONSOLIDATION OF LAND IN TERMS OF CAPE TOWN MUNICIPAL PLANNING BY-LAW: ERVEN 8210 AND 144698 CAPE TOWN, 102 BUITENGRACHT STREET, CAPE TOWN CITY CENTRE.

REQUEST FOR PROPER NOTIFICATION OF AND ADEQUATE REASONS FOR THE DECISION.

APPLICATION REFERENCE: 70268599

1. BACKGROUND

We refer to the abovementioned application to which we objected.

On 2 August 2016 we received a letter of notification of approval of the application. The letter was dated 21 June 2016 and from the contents thereof it was clear that the letter was intended for the applicant.

The letter informed the applicant that the application had been granted subject to certain conditions and that the applicant had the right to appeal against the decision or against a condition of approval.

From the contents of the letter it was unclear whether objectors were entitled to deliver an appeal.

We obtained legal advice and were informed that we were entitled to deliver an appeal within 21 days of notification of the decision.

We have established from Mr. Heydenrych that the appeal period is calculated from 26 July 2016 and that the last day for the delivery of the appeal is 15 August 2016.

Prior to receiving the notification in the mail, we were provided with a scanned copy of the letter of notification. The letter was forwarded to our legal advisor.

The reasons for the decision were on page 18 and this page was omitted from the scanned copy and the notification.

Our legal advisor, Ms Campbell obtained a copy of the reasons on 10 August 2016.

2. DEFECTIVE NOTIFICATION

We have been advised that the notification is defective and that reasons are inadequate on the grounds set out hereunder:

In terms of section 104 of the City Of Cape Town Municipal Planning By-Law, 2015 “By-Law” an objector has to be notified of a decision within 21 days of the decision. The notification had to include the following information:

- The decision.
- Where the decision may be inspected.
- If applicable, the right of appeal and right to request reasons.
- The effective date of decision.

The letter received by us did not comply with section 104 in the following respects:

- The notification was directed at the applicant and not aimed at objectors.
- The notification did not inform us where the decision may be inspected, but there was substantial compliance in that a copy of the decision and the minutes were attached.
- The notification informed the applicant of the right to appeal, but the objectors were not informed that they had a right of appeal.
- Neither the applicant nor the objectors were informed of the right to request reasons. The reasons were annexed to the notification, but we have been advised that the reasons are not adequate and that we should therefore have been informed of the right to request reasons.

3. INADEQUATE NOTICE

In the event that it is found that the notification was intended for objectors and or that the notification substantially complied with the abovementioned requirements, we contend that the notification does not comply with the section 3(4) of the Promotion of Administrative Justice Act, no 3 of 2000 “PAJA”. The relevant provisions are set out hereunder:

3. Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator subject to subsection (4), must give a person referred to in subsection (1) –

(a)

(b)

(c)

(d) **adequate notice of any right of review or internal appeal**, where applicable; and

(e) **adequate notice of the right to request reasons** in terms of section 5.

The letter of notification was delivered by registered mail. We received the notification letter, which included the reasons, on 2 August 2016. That allowed 13 days for us to deliver a notice of appeal. We contend that in a matter of this complexity, 13 days does not afford us adequate notice of the right of appeal.

The City of Cape Town “COC” did have our email address and we could have been informed by email. Had we been informed by email we could have had 21 days to obtain legal advice and to deliver an appeal.

The postal service is extremely unreliable and the COC could have provided us with adequate notice by informing us by email. Section 111(1)(vi) of the By-Law empowers the COC to notify objectors by email.

4. INADEQUATE REASONS

We further contend that the reasons provided were not adequate. The requirements for reasons are set out in section 5 of PAJA.

5. Reasons for administrative action

(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person **adequate reasons** in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

The Supreme Court of Appeal in the case of *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another ZASCA 46;[2003]*, SCHUTZ JA dealt with the requirements for adequate reasons:

[40] What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* [\[1983\] FCA 179](#); [\(1983\) 48 ALR 500](#) at 507 (23-41), as follows:

‘The passages from judgments which are conveniently brought together in *Re Palmer and Minister for the Capital Territory* [\(1978\) 23 ALR 196](#) at 206-7; [1 ALD 183](#) at 193-4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: “Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.”

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.'

To the same effect, but more brief, is Hoexter *The New Constitutional and Administrative Law Vol 2* 244:

'[I]t is apparent that reasons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information.'

The requirements for adequate reasons are therefore as follows:

- The decision maker should set out its understanding of the **relevant law**:
- Any **findings of fact** on which the conclusions of the decision maker depends (especially if the facts have been in dispute);
- The **reasoning process** that led to the conclusions;

It is not sufficient to set out findings, but a decision maker must be informative and explain how the decision was arrived at.

4.1 THE REASONS

The reasons included in the notification letter are set out hereunder:

- The proposal complies with the City of Cape Town Planning Policies (e.g. Table Bay District Plan Densification Policy, Urban Design policy and Tall Building Policy)
- The proposal takes cognizance of the heritage resources within the area and has potential to exhibit good urban design when the relevant conditions have been complied with, while sacrificing primary development rights.

- The proposal will provide an adequate transition between the City and Bo-Kaap at street level, while reinforcing and defining Riebeeck Square, provided appropriate urban design and landscaping is implemented.
- The massing and height of the building is located away from the Bo-Kaap.
- The interface and facades are considered to be acceptable and positive, especially when relevant conditions are complied with.
- The proposal will activate and improve the surrounding streetscapes.
- The proposal is considered desirable in terms of Section 99(3) of the City of Cape Town Municipal Planning By-Law.

Each of the reasons will be evaluated for compliance with the requirements for adequate reasons.

4.1.1 THE PROPOSAL COMPLIES WITH THE CITY OF CAPE TOWN PLANNING POLICIES (E.G. TABLE BAY DISTRICT PLAN DENSIFICATION POLICY, URBAN DESIGN POLICY AND TALL BUILDING POLICY)

The above statement amounts to a conclusion, does not provide reasons for the decision and is therefore inadequate in the following respects:

- The relevant provisions in the applicable policies should have been set out.
- As there is a dispute as to whether the proposal complies with applicable policies, the facts upon which the Tribunal found that there is compliance with the policies should have been stated.
- The reasoning process that led to the conclusion that there is compliance with policies should have been included.

4.1.2 THE PROPOSAL TAKES COGNIZANCE OF THE HERITAGE RESOURCES WITHIN THE AREA AND HAS POTENTIAL TO EXHIBIT GOOD URBAN DESIGN WHEN THE RELEVANT CONDITIONS HAVE BEEN COMPLIED WITH, WHILE SACRIFICING PRIMARY DEVELOPMENT RIGHTS.

The above statement amounts to a finding or a conclusion, does not provide reasons for the decision and is therefore inadequate in the following respects:

- As there is a dispute as to whether the proposal takes cognisance of the heritage resources within the area and has potential to exhibit good urban design, the facts upon which the Tribunal arrived at the finding should have been stated.
- The reasoning process that led to the finding should have been included.

4.1.3 THE PROPOSAL WILL PROVIDE AN ADEQUATE TRANSITION BETWEEN THE CITY AND BO-KAAP AT STREET LEVEL, WHILE REINFORCING AND DEFINING RIEBEECK SQUARE, PROVIDED APPROPRIATE URBAN DESIGN AND LANDSCAPING IS IMPLEMENTED.

The above statement amounts to a finding or a conclusion, does not provide reasons for the decision and is therefore inadequate in the following respects:

- As there is a dispute as to whether the proposal will provide an adequate transition between the city and Bo-Kaap at street level, while reinforcing and defining Riebeeck Square, the facts upon which the Tribunal arrived at the finding should have been stated.
- The reasoning process that led to the finding should have been included.

4.1.4 THE MASSING AND HEIGHT OF THE BUILDING IS LOCATED AWAY FROM THE BO-KAAP.

The above statement amounts to a finding or a conclusion, does not provide reasons for the decision and is therefore inadequate in the following respects:

- As there is a dispute as to whether the massing and height of the building is located away from the Bo-Kaap, the facts upon which the Tribunal arrived at the finding should have been stated.
- The reasoning process that led to the finding should have been included.

4.1.5 THE INTERFACE AND FACADES ARE CONSIDERED TO BE ACCEPTABLE AND POSITIVE, ESPECIALLY WHEN RELEVANT CONDITIONS ARE COMPLIED WITH.

The above statement amounts to a finding or a conclusion, does not provide reasons for the decision and is therefore inadequate in the following respects:

- As there is a dispute as to whether the interface and facades are considered to be acceptable and positive, the facts upon which the Tribunal arrived at the finding should have been stated.
- The reasoning process that led to the finding should have been included.

4.1.6 THE PROPOSAL WILL ACTIVATE AND IMPROVE THE SURROUNDING STREETSAPES.

The above statement amounts to a finding or a conclusion, does not provide reasons for the decision and is therefore inadequate in the following respects:

- As there is a dispute as to whether the proposal will activate and improve the surrounding streetscapes, the facts upon which the Tribunal arrived at the finding should have been stated.
- The reasoning process that led to the finding should have been included.

4.1.7 THE PROPOSAL IS CONSIDERED DESIRABLE IN TERMS OF SECTION 99(3) OF THE CITY OF CAPE TOWN MUNICIPAL PLANNING BY-LAW.

The above statement amounts to a conclusion, does not provide reasons for the finding that the proposal is desirable. The following considerations are relevant to the assessment of the extent to which, the proposed land use would be desirable –

- (a) economic impact;
- (b) social impact;
- (c) scale of the capital investment;
- (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;

- As there is a dispute as to whether the proposal is desirable, the reasons should have included the facts upon which the Tribunal evaluated each of the considerations in section 99(3).
- The reasoning process that led to the conclusion that the proposal was desirable should have been included.

The reasons provided by the Tribunal are therefore inadequate and non-compliant with the provisions of section 3(2)(d) of PAJA.

A request for adequate reasons will be submitted herewith.

5. CONCLUSION

As the notification and the reasons are inadequate, we are unable to deliver comprehensive grounds of the appeal.

We have been advised that failure to provide us with proper notification and reasons for the decision, amounts to a material procedural irregularity and may constitute grounds for having the decision set aside on review.

The procedural irregularity could however be rectified by providing all objectors with proper notification and reasons.

We are therefore requesting the COC to deliver legally compliant notification of the decision together with adequate reasons for the decision to all objectors. We furthermore request the COC to deliver the notification to our email address, as well as the email addresses of all other objectors, as soon as full reasons are available. The notification should afford all objectors 21 days to deliver a notice of appeal and grounds of appeal.

We will deliver a notice of appeal together with grounds of appeal on 15 August 2016, entirely without prejudice and as a precautionary measure, together with a request to supplement the grounds of appeal within 21 days of receiving adequate reasons for the decision.