

## REGIONAL SPATIAL DEVELOPMENT FRAMEWORK VS MUNICIPAL ZONING SCHEME

# Which trumps the other?

*Parkhurst Village Association (aka Parkhurst Village Residents Association) v Capela & Others [2010] JOL 25759 (GS)*

For a considerable time, many municipalities, or their officials, have considered themselves bound by the provisions of the spatial development framework (SDF) or the regional spatial development framework (RSDF) or development strategies in the approval of land development applications.

A recent decision of the Gauteng High Court provided a rare opportunity to bring clarity to the legal status of these policies.

### Facts

Hollyberry Props 3 (Pty) Limited applied to the City of Johannesburg for the permission required in terms of the Businesses Act (Act 71 of 1991) to conduct a business as a restaurant on its property. The property in question was zoned as 'Business 1' in terms of the Johannesburg Town-planning Scheme of 1979, meaning it could be used for business purposes as a primary right.

On hearing about the intentions of the company to conduct business on the property, the Parkhurst Village Association applied to the Southern Gauteng High Court for an order preventing Hollyberry Props from operating the business of a restaurant or coffee shop on the property, and preventing the City from granting the consent required to conduct such a business. The association claimed to have a special interest in the Parkhurst suburb of Johannesburg. Hollyberry Props, its director and the City of Johannesburg opposed the application.

The Parkhurst Village Association's case hinged on the phrase 'no more coffee shops or restaurants to be supported along Fourth Avenue' in the RSDF adopted by the City of Johannesburg. They argued that the RSDF formed part of the City's integrated development plan (IDP), which guided and informed all planning and development in the municipality, and the City was therefore compelled to give effect to it and to conduct its affairs in a manner consistent with it. Furthermore, the prohibition of coffee shops or restaurants along Fourth Avenue was couched in imperative language which admitted no discretion on the part of the City. Accordingly, the RSDF had binding effect.

Moreover, argued the association, section 35(1), read with section 36, of the Municipal Systems Act enjoined the municipality to give effect to its IDP and conduct its affairs in a manner consistent with the provisions of section 36. The IDP was binding except to the extent that it contradicted national or provincial legislation. The municipal zoning scheme was neither national nor provincial legislation as it had been initiated by a local authority. No inconsistency between the scheme and the RSDF could interfere with the binding nature of the RSDF. Only conflicting national or provincial legislation could override it, not the town-planning scheme, which was neither.

In response, the respondents contended that the RSDF constituted no more than a policy document guiding and informing town planning decisions on applications made to the City after it had been adopted. The starting point was the Johannesburg Town-planning Scheme adopted pursuant to the Town-planning and Townships Ordinance of 1965 (the Ordinance). Section 40 of the Ordinance compelled the City to observe and enforce the provisions of the scheme, on threat

of criminal sanction. As such, the City was compelled to treat the application to conduct the business of a restaurant like any other application of a property zoned in terms of the scheme as Business 1, whether situated in Parkhurst or not.

Furthermore, noted the respondents, the owner of the property was entitled to exercise the rights afforded to it by the scheme, and the RSDF did not affect or reduce such owner's rights. The IDP constituted the principal strategic planning instrument which guided and informed planning decisions taken by the City in respect of applications lodged after its adoption, of which the RSDF formed part. The IDP was not aimed at addressing rights which had already been granted in terms of the Ordinance, but rather at applications made after the adoption of the RSDF. The paragraph of the RSDF headed 'Interpretation and application of the RSDF' stated that the RSDF provided a tool for evaluating any potential application. It had always been intended as a guide for the assessment of applications, never as an instrument to give or remove town planning rights. As such, the City was obliged to consider the application made to it by the applicant for the intended use of its property.

## The decision

The South Gauteng High Court had to answer a number of issues. The first related to the binding nature of the IDP. In this regard the Court had to decide whether the IDP, and by extension the RSDF, was binding on other persons. The Court held that it was not.

Firstly, the Court stated that the IDP was limited in its operation in that it was not binding on other persons except when it had been passed as a by-law. It was also limited by the fact that it had to be compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation, such as the town-planning scheme.

Secondly, the IDP and the RSDF were too general and sweeping in nature to be regarded as legal prescriptions on property. They were only required to include the provision of basic guidelines for the land use management system. They could neither confer nor remove rights of property owners. Nor could they impact on the manner in which town-planning applications were to be lodged and adjudicated upon by the City. They were simply meant to guide and inform town-planning decisions of the City in respect of applications made to it.

Thirdly, observed the Court, the fact that the RSDF was revisited annually and that it might consequently be amended in the process, militated against the submission that it was to be regarded as having the force of law. If it had ever been intended to override existing town-planning schemes and the rights already accorded to property owners, the law would have stated so explicitly. In the absence of such an express indication, the IDP and that portion of the RSDF relied upon by the applicants did not have the force of law. Consequently, the RSDF could not detract from the rights acquired in terms of the scheme.

The second issue the Court had to address related to the question as to whether the scheme constituted national or provincial legislation that trumped the RSDF in the event of conflict. The Court held that as the scheme had been adopted in terms of the Ordinance, it was the principal tool for regulating land use by the municipality. It formed part of the 'national and provincial development plans and planning requirements', the 'national or provincial sectoral plans and planning requirements' and the 'plans and planning requirements' binding on the City in terms of national legislation. As such, when there was a conflict between the scheme and the provisions of the RSDF, the scheme trumped the provisions of the RSDF to the extent of the inconsistency. Any person who contravened or failed to comply with the provisions of an approved scheme would be guilty of an offence. Furthermore, property owners and their neighbours were entitled to insist upon the enforcement of the scheme.

## Comments

This decision addresses the confusion that abounds in the interpretation and application of land use management policies. It allays the misconception that an SDF or, in this case, the RSDF, confers or removes rights of property owners. It makes it clear that these policies simply guide and inform town-planning decisions by municipalities in respect of applications made to them. They are not binding prescriptions for the approval of land use applications. It is the function of the town-planning scheme (and not of the IDP, the RSDF or the SDF) to manage and regulate the land use.

It is interesting to note that the latest draft of the national Spatial Planning and Land Use Management Bill contradicts this with the stipulation that a municipality may not take a decision that is inconsistent with its SDF.



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