

Failure to advertise a subdivision

Richardson v South Peninsula Municipality

The facts

In terms of section 24(2)(a) of the Land Use Planning Ordinance 15 of 1985 (Cape), a proposed subdivision must be advertised for public comment if 'any person may be adversely affected'. The old Western Cape Regional Services Council received an application for a subdivision of an erf. It decided not to advertise the proposed subdivision due to time constraints and it approved the subdivision without imposing any height restrictions.

The owners of an adjoining erf acquired information about plans to build a two-storey dwelling on the subdivided erf. The planned dwelling would block the panoramic view from their erf and reduce its value. They approached the Court to set aside the resolution to approve the subdivision because it had prejudiced them in not affording them an opportunity to object or make representations.

The judgment

In *Richardson v South Peninsula Municipality 2001 (3) BCLR*

265 (C), the Cape High Court held that the resolution adopted by the Council did not comply with the statute and was therefore invalid. The issue as to whether or not the resolution was an administrative act was not raised. However, the judgment implies that the Court resolved that the resolution constituted administrative action.

The Court said that it has 'a duty to ensure that administrative action by public functionaries not only comply with the constitutional principle of just administrative action, but also (...) with the letter of ordinary piece of legislation as well'.

The consequence of failure to advertise was that the persons who could be adversely affected by the subdivision were not afforded an opportunity to object or make representations, nor could the owner who sought subdivision comment on the objections or representations.

The question arose as to whether the owners of the adjoining erf had the right to institute legal proceedings, since they had not yet acquired any rights to the property at the time of

the council's decision. The Court said that they inherited the right of action at the moment the property was acquired. The transfer of immovable property involves the transfer of any right, title and interest in the property, including a right to institute an action arising from ownership of such property. Whether or not the previous owner was aware of that right is immaterial.

At the time of the decision, the interim Constitution applied. It gave the previous owner the right to procedurally fair administrative action.

The violation of that right entitled the previous owner to approach a court for an appropriate remedy. The Court decided that that right accrued to the new owner on registration of the property.

As to the appropriate remedy, the Court said that the setting aside of the subdivision would cause great harm to the parties involved, considering that a new dwelling had already been erected on the subdivided erf and that more than three years had passed. Instead, the Court referred the matter back to the council, instructing it to consider imposing height restrictions on all present and future building on the subdivided erf.

Persons who could be adversely affected by the subdivision were not afforded an opportunity to object or make representations.

Speed humps, rat runs and administrative action

Steele v South Peninsula Municipal Council

The facts

Dreyersdal and Starke roads in the South Peninsula area in Cape Town are used as 'rat runs': alternatives to a major road that links two main arteries. In response to frequent

speeding on these roads, the former Cape Town Municipality had speed humps built in both roads.

The unintended effect was that motorists resorted to other routes, causing high volumes of traffic on

roads that were intended to carry smaller volumes. This distorted the use of the road system.

South Peninsula Municipality (SPM) had the situation investigated, held a public meeting and did a survey

among residents. A report was made to the executive committee.

The relevant ward councillor, a representative from the ratepayers' association and the attorney for 43 residents addressed the executive committee on the matter.

The committee eventually recommended the removal of half of the speed bumps.

The judgment

In *Steele v South Peninsula Municipal Council 2001 (4) BCLR 418 (C)*, the residents argued that the resolution was an administrative act, subject to review in terms of section 33 of the Constitution ('just administrative action').

The municipality argued that, although the resolution was not legislation, it did not fit into the notion of administrative action either.

The Cape High Court agreed with that view and held that the implementation of a law by a functionary is one of the characteristics of administrative action. This council resolution was passed by a majority of the councillors pursuant to its statutory obligation to see to traffic control and road safety within its jurisdiction.

It was not a decision taken by a functionary to implement a law. The decision maker in this case was a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted.

The Court referred to the Fedsure case (*LGL Bulletin 99(1) at p 6*) where it was decided that the legislative acts of a municipality are not subject to administrative review.

In addition, the Court indicated, that even if the decision could be characterised as administrative action, it was satisfied that it was not unreasonable and that it was taken in a procedurally fair manner.

The Court even went as far as saying that the municipality acted in 'an exemplary manner' in ascertaining the views of the municipality and allowing the residents and their opponents to present their views.

Even though there were deficiencies in the survey, they did not render the process unfair.

COMMENTS

Both cases deal, at least in part, with the question as to whether or not a council resolution constitutes administrative action.

This question is of paramount importance, not only because of the impact of the Promotion of Administrative Justice Act 3 of 2000 but also because it goes to the heart of local government's place in the Constitution.

What makes the qualification of council resolutions difficult is the fact that both the legislative and executive authority of a municipality are vested in the council (s 151(2) of the Constitution).

The executive and legislative authority of a municipality has not been divided by the Constitution, as is the case with national and provincial governments (ss 85(1) and 125(1) of the Constitution). This means that councils not only have legislative and oversight functions, but also executive functions.

Executive functions can be delegated by the council, subject to section 59(1) of the Municipal Systems Act, read with section 160(2) of the Constitution.

On the face of it, the two judgments, both delivered by the Cape High Court, appear to contradict one another. In the *Richardson* case, Judge Yekiso, albeit implicitly, held that the resolution to subdivide an erf is administrative action. In the *Steele* case, Judge Conradie, with reference to Fedsure (see *LGL Bulletin 1999(1) at p 6*), decided that the resolution to remove speed humps is not an administrative act.

The courts will decide whether or not a decision constitutes administrative action on a case-by-case basis.

A distinction has been drawn between administrative acts and executive acts. The first are subject to the principle of procedural fairness

(fair hearing, reasons etc). The latter are not subject to these principles and are subject only to the general principles of legality and rationality.

The Promotion of Administrative Justice Act, which still has to come into operation, follows this distinction and excludes from its ambit the 'executive powers or functions of municipal councils' (s 1(i)(cc)).

The distinguishing element between these two cases seems to be the fact that in *Steele*, the council did not administer or implement any specific legislation: it passed the resolution pursuant to its general statutory obligation to see to traffic control and road safety in the area.

The decision was taken by the council as a 'politically elected deliberative assembly', which renders it an executive act, not subject to the principles of procedural fairness.

In the *Richardson* case, the council resolution seems to have been regarded as administrative action, because of the fact that the council implemented the Land Use Planning Ordinance.

In general, a decision taken by resolution of the council will not easily be qualified as an administrative act, since the council is a political body. It would still be subject to the general principles of legality.

On a positive note, the *Steele* judgement commended the council for its efforts to involve the community and all stakeholders in decision-making and made it clear that minor deficiencies in a public participation process do not necessarily make the process procedurally unfair.

The Promotion of Administrative Justice Act excludes from its ambit the 'executive powers or functions of municipal councils'

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