



STELLENBOSCH
STELLENBOSCH • PNIEL • FRANSCHHOEK

MUNICIPALITY • UMASIPALA • MUNISIPALITEIT

3/5/4/1

2017-11-24

MINUTES

COUNCIL APPEAL COMMITTEE MEETING ON

2017-09-12

AND CONTINUATION MEETING ON

2017-11-24

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**MINUTES OF THE COUNCIL APPEAL COMMITTEE MEETING HELD ON TUES
2017-09-12 AT 10:30 IN THE COUNCIL CHAMBER, TOWN HOUSE PLEIN STREET,
STELLENBOSCH**

PRESENT	Councillor DD Joubert [Chairperson]
Councillors	MB De Wet MD Oliphant Q Smit
Officials	Manager: Land Use Management (Ms H Dednam) Town Planner (Ms L Ollyn) Committee Clerk (T Samuels (Ms)) Interpreter (J Tyatyeka)

1.	OPENING AND WELCOME
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The Speaker, Councillor DD Joubert, welcomed all present and requested that a moment of silence be observed in honour of those who recently passed away.

2.	APPLICATION FOR LEAVE OF ABSENCE
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The following applications for leave of absence were approved in terms of the Rules of Order By-law of Council:-

Cllr GN Bakubaku-Vos (Ms) - 12 September 2017

3.	DISCLOSURE OF INTERESTS
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(3/6/2/2)

Councillor MB De Wet disclosed an interest in item 4.2. on the Agenda and will recuse himself when this matter is dealt with.

3.	CONFIRMATION OF MINUTES
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3.1	CONFIRMATION OF THE MINUTES OF THE COUNCIL APPEAL COMMITTEE MEETING HELD ON 2017-05-26
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The minutes of the Council Appeal Committee Meeting held on **2017-05-26**, were **confirmed as correct.**

4.	MATTERS TO BE CONSIDERED
4.1	APPEAL (IN TERMS OF THE INTERNAL APPEAL PROCESS AS APPROVED BY COUNCIL) AGAINST COUNCILS DECISION TO APPROVE APPLICATIONS FOR REZONING, SUBDIVISION AND DEPARTURE ON ERF 872 FRANSCHHOEK

1. EXECUTIVE SUMMARY

1.1 Development Proposal

- Application is made in terms of Section 24(1) of the Land Use Planning Ordinance 15 of 1985 for the subdivision of Erf 872, Franschhoek into five portions namely, Portion 1 which is $\pm 1524\text{m}^2$ in extent, Portion 2 which is $\pm 1524\text{m}^2$ in extent, Portion 3 which is $\pm 1524\text{m}^2$ in extent, Portion 4 which is $\pm 1524\text{m}^2$ in extent, and Remainder Erf 872 which is $\pm 1.0850\text{ha}$ in extent.
- Application is made in terms of Section 17(1) of the Land Use Planning Ordinance 15 of 1985 for the rezoning of the subdivided Portions 1 to 4 from Agriculture to Single Residential.
- Application is made in terms of Section 15(1)(a)(i) of the Land Use Planning Ordinance 15 of 1985 for a departure to relax all eight (8) side building lines from 2.3m to 0m in order to construct four (4) swimming pools, bordering Uitkyk Street on Erf 872, Franschhoek. (See **APPENDIX 1**)

1.2 Council Resolution

On 31-05-2016 the Planning and Economic Development Committee in terms of their delegations resolved the following:

- *That **approval be granted** in terms of Section 25(1) of the Land Use Planning Ordinance (Ordinance 15 of 1985) for the subdivision of Erf 872, Franschhoek into five portions namely, Portion 1 ($\pm 1524\text{m}^2$), Portion 2 ($\pm 1524\text{m}^2$), Portion 3 ($\pm 1524\text{m}^2$), Portion 4 ($\pm 1524\text{m}^2$) and Remainder Erf 872 which is $\pm 1.0850\text{ha}$ in extent as indicated on plan No. 3(1)Rev 4, drawn by dh&a professional land surveyors, dated March 2012- July 2014.*
- *That **approval be granted** in terms of Section 16(1) of the Land Use Planning Ordinance (Ordinance 15 of 1985) for the rezoning of the subdivided Portions 1 to 4 from Agriculture to Single Residential.*
- *That **approval be granted** in terms of Section 15(b) of the Land Use Planning Ordinance (Ordinance 15 of 1985) for a departure to relax all eight (8) side building lines from 2.3m to 0m in order to construct four (4) swimming pools on Erf 872, Franschhoek, Uitkyk Street. (See **APPENDIX 2**)*

See **APPENDIX 3** for the report that served before the Planning & Economic Development Committee on the 31-05-2016.

1.3 Decision Criteria

Section 36 of the Land Use Planning Ordinance No 15 of 1985, which states that an application may be refused solely on the basis of lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability, and that in assessing such desirability regard shall be had only to the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned and the effect of the application on existing rights concerned.

1.4 General Information

Applicant	PJ le Roux Town and Regional Planners
Appellants	Smith Ndlovu Summers Environmental Law Specialists & Franschhoek Trust and Rate Payers Association.
Date of submission of original application	09-03-2015
Date of Council's decision	31-05-2016
Date of notification of MSA appeal rights	02-09-2016 (registration slip: 08-09-2016)
Date of submission of appeal	23-09-2016 & 27-09-2016

1.5 Property Information

Owner	Messers Vogues Exclusive
Farm No.	Erf 872 Franschhoek
Extent of property	1,6946ha
Applicable zoning scheme	Franschhoek zoning scheme
Current zoning	Agriculture
Title Deed no	T038263/2011
Current land use	Agriculture
Current unauthorised land use/	None
Previous approvals granted	None
Special/conservation area	No
Controlled by SAHRA/PHRA	No

Appendices

- Appendix 1 : Locality Plan
- Appendix 2 : Notification of Council's decision
- Appendix 3 : The report that served before the Planning and Economic Development Committee
- Appendix 4 : Appeals received
- Appendix 5 : Applicant's response to appeals
- Appendix 6 : Comment from department of Agriculture
- Appendix 7 : Email and proof of payment for departure application
- Appendix 8 : A Visual Impact Report was prepared by Karen Hanse
- Appendix 9 : External legal comment

2. LEGAL REQUIREMENTS

Appeals were received in terms of the appeal process established in terms of The Promotion of Administrative Justice Act, 3 of 2000 and are deemed valid as they were received within the required time frame of

21days from receipt of the letter of notification (see **APPENDIX 4**). The decision to approve the subject application was taken by the Planning and Economic Development Committee and this appeal decision therefore needs to be taken by the next decision making authority, which will be Council's Appeal Committee. This process followed will be in compliance with the internal appeal process as approved by Council at its meeting held on 29 October 2014.

3. LEGAL IMPLICATIONS

No legal implications.

4. FINANCIAL IMPLICATIONS

No financial implications.

5. COMMENT/S ON APPEAL

Previous recommendation and decisions

It was the opinion of the Planning and Economic Development Directorate, that notwithstanding the objections against the application, the proposed rezoning, subdivision and departure in order to construct dwelling units and swimming pools on the four newly created erven would not have a significant negative impact or alter the character of the surrounding area and therefore approved the application.

Summary of appeal from Smith Ndlovu Summers Environmental Law Specialists

- (i) The appellant argues that the applicant failed to properly apply and substantively motivate for departures to relax the building line in order to accommodate the swimming pools. The appellant further submits that the committee should have dismissed the application for departure as such an application was never properly motivated or applied for.
- (ii) According to the appellant, the Municipality failed to comply with the jurisdictional requirements in section 36(1) of the Land Use Planning Ordinance 15 of 1985, which states that an application for rezoning and subdivision "*shall be refused solely on the basis of a lack of desirability of the contemplated utilization of land concerned including the guideline proposals included in the relevant structure plan in so far as it relates to desirability, or on the basis of its effect on existing rights concerned*". It is the appellant contention that no positive advantage has been presented by the applicant and the application should therefore be refused.
- (iii) The appellant submits that necessary consent from the Minister for the subdivision of the subject property has not been obtained and the applicant's obligations under Subdivision of Agricultural Land Act, Act 70 of 1970 (SALA) have not been met. A consideration of the subdivision of the subject property by the Municipality therefore cannot be lawfully undertaken until such a time as the Minister's written consent has first been obtained and provided to the

Municipality. Therefore, the applicant failed to obtain necessary approval under the Subdivision of Agricultural Land Act 70 of 1970.

- (iv) The proposal does not to comply with the Franschhoek Zoning Scheme regulations. One of the portions measures $\pm 1447\text{m}^2$ and shows a dwelling of 442m^2 . This exceeds the applicable maximum coverage of 30%. It is argued by the appellant that the Committee has not considered this non-compliance in coming to its decision.
- (v) The appellant submits that the applicant failed consider the applicable Urban Edge Policy. The subject property falls within non-urban sub-zone D as identified in the Urban Edge Policy. The following important characteristics of non-urban sub-zone D are described in paragraph 4.5.1.4 of that Policy:
- *the very important cultural heritage of La Cotte as one of the two great farms of the 18th and 19th centuries around which the whole structure and history of Franschhoek grew;*
 - *the importance to preserve this sub-zone as an agricultural area, at least visually, so as to not spoil Franschhoek's unique sense of place;*
 - *the importance in preserving the natural sight lines from Akademie Street."*

The appellant argues that the Urban Edge Policy is a fundamentally relevant document which was not considered or discussed by the applicant's planner in the application.

- (vi) The proposal is fundamentally inconsistent with the with the unique rural character of the surrounding area
- (vii) Smith Ndlovu Summers Environmental Law Specialist also requested the right to an interview with (or hearing before) the Municipal's appeal authority when it considers the appeal.

Summary of appeal from the Franschhoek Rate Payers Association

- (i) The proposed development of Erf 872 does not comply with conditions of the Franschhoek Urban Edge: Land Use Management Policy.
- (ii) The proposed development on Erf 872 is inconsistent with the purposes of the Stellenbosch Municipal Spatial Development Framework (MSDF) in extending the urban edge.
- (iii) The proposed developed of Erf 872 lacks desirability in terms of s36(1) of the Land Use Planning ordinance 1985 (LUPO)
- (iv) The proposed development will jeopardise the inclusion of Franschhoek in the cape Winelands Cultural landscape tentatively designated by UNESCO as a world heritage site.
- (v) The application for approvals does not properly motivate for the departure for relaxation of building line.

- (vi) The Trust alleges that misleading representations and statements were made in the Notice of Intention to Develop (NID), that the NID does not even mention the Urban Edge Policy and that there is nothing in the MSDF to justify or provide a basis for the claim that the Property was included in the extended Urban Edge because it is “*too small to function as a viable agricultural land unit*”.

Summary of applicant’s comment on appeal:

The content of the applicant’s response to the appeals attached as **ANNEXURE 5** is self-explanatory, but could be summarised as follows:

Failure to obtain Act 70/1970 approval

The relevant portion of the definition of ‘agricultural land’ in Section 1 of the Subdivision of Agricultural Land Act 70 of 1970 (“SALA”) reads as follows:

“‘agricultural land’ means any land, **except—**

- (a) **land situated in the area of jurisdiction of a municipal council**, city council, town council, village council, village management board, village management council, local board, health board or health committee . . . but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the *Gazette* to be agricultural land for the purposes of this Act”

Therefore, the applicant’s property is not “agricultural” as envisaged by SALA. The Director: Sustainable Resource Management of the Western Cape Provincial Department of Agriculture in a letter dated 9 November 2015 to Stellenbosch Municipality, provided the following comment: “*According to information available to this office the abovementioned property is not subject to the provisions of the Subdivision of Agricultural Land Act No. 70 of 1970*”. (See **APPENDIX 6**)

Non-compliance with Zoning Scheme Regulations

The Applicant must submit a building plan (be it for the erf concerned or any other erf in the development), if it does not comply with the provisions of the Regulations, the Municipality will (in the absence of an application for a departure from the coverage requirement and approval of same) simply be compelled to refuse building plan approval. The Committee only approved the rezoning, subdivision, departure and SDP submitted, nothing more and nothing less. It did not approve coverage exceeding the permissible percentage and SDP approval does not translate into approval of a building exceeding the permissible coverage.

Concerns regarding the “HWC” decision

The applicant submits that the information that served before Heritage Western Cape (HWC) when it considered the Notice of Intent to Develop (NID) was sufficient for the HWC members to form their own opinion and there is no reason to suspect that, at the time, they had to rely on opinions expressed in the NID. The allegation concerning the negative visual impact that the development will have, is not supported by any facts, has no merit and is, at best, highly speculative. The profile

description in a policy document cannot be used to determine the visual impact of a development.

Application not made for departures

The email of 17 June 2015 contained an application in terms of section 15 of the Land Use Planning Ordinance, 15 of 1985 ("LUPO") for a departure from the building lines. The email included proof of payment for the departures referred to (See **APPENDIX 7**). The suggestion that the application for departure was not applied for is incorrect. The applicant submits that the Committee approved the application for departure because they clearly did not see a need for a motivation for a swimming pool. The impact of the relaxation to accommodate a swimming pool will be minimal to the built environment and would mostly affect the owners of the newly created portions.

Non-compliance with Urban Edge Policy & MSDF

The MSDF designation of the area concerned (in which the Property is located) as a "new development area" is in direct conflict with the guideline proposals contained in the Urban Edge Policy (e.g. that no cadastral *subdivision* may be allowed within the NUZ, rezoning approvals are to be considered for *existing* building structures only and so forth). It raises questions concerning the status of the MSDF and the Urban Edge Policy respectively. In terms of Section 25(1) of the Local Government: Municipal Systems Act, 32 of 2000 (the "**MSA**") each municipal council is required to adopt a single, inclusive and strategic plan for the development of the municipality (referred to as an Integrated Development Plan or "IDP"). The IDP is principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality. The MSDF is a core component of the IDP. Therefore, the MSDF has effectively replaced the Urban Edge Policy and that the Urban Edge Policy is no longer a relevant consideration. Erf 872 is located well within the newly adopted urban edge.

Proposed use lacks desirability

The Property is flanked by residential erven 2736, 2737, 45 and 2758 on its south-westerly boundary, by residential erven 3699 and 3710 on its south-easterly boundary and by residential erf 673 and Remainder 3287 on its north-westerly side. A Visual Impact Report was prepared by Karen Hansen (See **APPENDIX 8**), an independent consultant Landscape Architect and visual impact practitioner. The report suggests that the visual impact extended to less than 100m in radius and was on average, low, with a significance rating on the low side of medium. Therefore, the proposal will not negatively affect the character of the area. The Appellants statements concerning the impact that the approved development will have, are not supported by any facts, have no merit and are, at best, highly speculative. It was further suggested that the members of the appeal Authority conduct an inspection to familiarise themselves with the area referred to.

Use will jeopardise inclusion as World Heritage Site

The applicant submits that it is legally irrelevant whether or not the development will contribute or lead to the exclusion of Franschoek from the Cape Winelands Cultural Landscape. It is further conveyed that the

environment is not the only concern when it comes to sustainability. It is necessary to balance the three imperatives of sustainable development. A balanced approach is required in matters of this nature.

Committee's failure to apply mind

The MSDF has replaced the Urban Edge Policy and HWC does not share the Trust's view that the development will have an unacceptable negative impact on Franschhoek's heritage resources. The applicant submits that the suggestion that fundamentally relevant considerations were not addressed or properly considered is not factually based, without merit and therefore, should be rejected.

Request for a hearing

The applicant submit that the issues for determination of the applications can be adequately determined in the absence of the parties by considering the documents provided to it and that such hearing will not assist in the expeditious and fair disposal of the application, but will serve to further delay the matter. In the circumstances we request that the request for a hearing be declined.

Land Use Management comment on appeal

The only new information, which was not previously evaluated in the initial report by Council which could have a significant influence on the decision taken, is a Visual Impact Report was prepared by Karen Hansen. In terms of the report, it is recommended that, the project proceeds, if mitigation measures would be undertaken.

The content of the planning report that served before the Planning and Economic Development Committee and the subsequent decision taken by the committee is therefore still supported by the department and it is recommended that both appeals should be dismissed.

6. INTERVIEW REQUESTED WITH APPEALS AUTHORITY

Smith Ndlovu Summers Environmental Law Specialist also requested the right to an interview with (or hearing before) the Municipal's appeal authority when it considers the appeal.

RECOMMENDED

that the Appeals Committee takes a decision on the appeal submitted against the decision taken by the Planning and Economic Development Committee dated 31 May 2016.

COUNCIL APPEAL COMMITTEE MEETING: 2017-05-26: ITEM 4.4

RESOLVED (nem con)

that this item stands over till the next Appeal Committee meeting.

COUNCIL APPEAL COMMITTEE MEETING: 2017-09-12: ITEM 4.1

A site inspection was conducted by the Committee on 2017-09-12 instant at subject property.

The Committee afforded the Applicant and Appellant an opportunity to make presentations in respect of the Appeal.

RESOLVED (nem con)

- (a) that the internal Legal Services Department provide guidance on the following questions raised by the Appeals Committee:
- (1) Can the Appeal Committee consider a new ground of appeal that was not contained in the Appellant's appeal as lodged;
 - (2) Can Councillors consider new facts or conditions perceived by their natural senses during a site visit and can that be considered as part of their reasoning; and
 - (3) Does the Appeal Committee of Council have the authority to make a factual finding on the conditions or facts perceived at the relevant site on their site visit;
- (b) that this matter be deferred to be considered at a reconvened meeting.

Meeting:	<i>Council Appeal: 2017-09-12</i>	Submitted by Directorate:	<i>Planning and Economic Development</i>
Ref No:	<i>872 FH</i>	Author:	<i>Senior Town Planner (L Ramakuwela)</i>
Collab	<i>509378</i>	Referred from:	<i>2017-05-26</i>

4.2	APPEAL IN TERMS OF SECTION 62 OF THE MUNICIPAL SYSTEMS ACT (ACT 32 OF 2000) AGAINST COUNCILS DECISION TO REFUSE AN APPLICATION FOR TEMPORARY DEPARTURE ON FARM NO. 345/5, STELLENBOSCH DIVISION
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1. EXECUTIVE SUMMARY

1.1 Development Proposal

Application is made in terms of Section 15(1)(a)(ii) of the Land Use Planning Ordinance, 1985 (No 15 of 1985) for a temporary departure in order to use the existing store as a function venue for 150 guests on Farm No. 345/5, Stellenbosch Division.

See **APPENDIX 2**.

1.2 Council Resolution

On 01-09-2015 the Planning and Economic Development Committee in terms of their delegations resolved the following:

*that the application for a temporary departure in order to use the existing store as a function venue for 150 guests on Farm No. 345/5, Stellenbosch Division as indicated on plan nr. 1010, dated January 2014, drawn by Van Biljon Barnardo **be refused**.*

See **APPENDIX 2** for the report that served before the Planning & Economic Development Committee on the 01-09-2015.

1.3 Summary of the Appeal

- The departure will only be valid for a maximum of 3 functions per calendar month;
- The owner will limit the seating capacity (maximum 150 persons);
- The owner will ensure that noise levels conform to the applicable noise control regulations;
- Amplified music will be restricted to the inside of the existing building and no loud music will be allowed outside these designated areas. No amplified music will be allowed after 24h00;
- The owner will restrict the opening and closing hours of the function venue to reasonable times in order to create the least amount of disturbance to the surrounding neighbours;
- The temporary departure will be binding only to the owner of the property and cannot be transferred or ceded by way of agreement or other means. The owner remains responsible to ensure that noise levels be limited as far as possible;
- The facility is located within close proximity of the owner's residence and it is therefore to their best interest to ensure that noise levels are restricted and contained as far as possible;

- The application has been approved by the Provincial Department of Transport and Public Works. It is believed that the access road is a private road and not a servitude road as stated in the planning report and reasons for refusal;
- The owner is willing and committed to provide railings to the bridge as well as any other upgrading/improvements to enhance safety should it be required. No accidents and/or incidents have occurred to date;
- The application has been recommended for approval by the Traffic Engineering Section of the Stellenbosch Municipality;
- The application property is the first property that gains access from the access road and which access point is located in close proximity of the bridge. The additional traffic generated by the limited number of functions will therefore not interfere and impact on the majority of owners located to the south that gains access from the road.
- There are numerous other similar facilities that gains access from as single lane road;
- The owner undertakes to see to the transportation of all employees to and from the function venue;
- Sufficient parking is available on site to accommodate the parking requirements to the facility;
- The function facility is made available, free of charge, to a number of schools and non-profit organizations in order to assist them with fund raisers etc;
- The owner undertakes to implement sufficient landscaping reasonably expected to hedge the existing store and parking bays at the perimeter of the property in order to minimize visual disruption to the surrounding neighbours.

See **APPENDIX 4** for appeals received.

1.4 Decision Criteria

Section 36 of the Land Use Planning Ordinance No 15 of 1985, which states that an application may be refused solely on the basis of lack of desirability, and that in assessing such desirability regard shall be had only to the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned and the effect of the application on existing rights concerned.

1.5 General Information

Applicant	Emile Van Der Merwe Town Planning Consultants (on behalf of Johan Meyer Trust)
Appellant(s)	Emilie Van Der Merwe Town Planning Consultants (on behalf of Johan Meyer Trust)
Date of submission of original application	14-02-2014
Date of Council's decision	01-09-2015

Date of notification of MSA appeal rights	23-09-2015 (registration slip: 30-09-2015)
Date of submission of appeal	21-10-2015

1.6 Property Information

Owner	Johan Meyer Trust
Farm No.	345/5, Stellenbosch Division
Extent of property	3,2386ha
Applicable zoning scheme	Zoning Scheme Regulations promulgated in terms of Section 8 of the Land Use Planning Ordinance (15 of 1985).
Current zoning	Agricultural Zone I
Title Deed no	T24603/2005
Current land use	Residential
Current unauthorised land use/ building works	Complaints have been received from the surrounding property owners claiming that the property is already being used as a function venue.
Previous approvals granted	None
Special/conservation area	No
Controlled by SAHRA/PHRA	No

2. LEGAL REQUIREMENTS

The appeal was received in terms of the Municipal Systems Act No 32 of 2000 and is deemed valid as it was received within the required time frame.

3. COMMENT/S ON APPEAL (Department: Planning & Economic Development)

The appeal was submitted in terms of Section 62 of the Local Government Municipal Systems Act, No. 32 of 2000. The applicant's comments are summarized in this report and the issues raised pertaining to the Land Use application have been previously addressed in the report to the Planning and Economic Development Committee as attached as **APPENDIX 2**.

No new information was submitted by the appellant that could have a significant influence on the decision taken and therefore the decisions of the Planning and Economic Development Committee as taken on 01-09-2015 is supported.

The appeal submitted was forwarded to the objectors for comment. The objector's comment on the appeal is attached as **Appendix 5**.

4. INTERVIEW REQUESTED WITH APPEALS AUTHORITY

No.

5. LEGAL IMPLICATIONS

The Land Use Planning Department has obtained a legal opinion from an external legal firm (Smith Tabata Buchanan Boyes Attorneys), which has indicated that the Appeals Committee, in considering the appeal, must take note that the subject property has a restrictive title deed condition which restricts the use of the property to agriculture and residential uses only and thus the decision taken by the Planning

Committee to refuse the proposed use of the existing store on the property for a function venue for 150 guests as a temporary departure should be upheld. (see **Appendix 6** for legal comment).

6. FINANCIAL IMPLICATIONS

None required.

APPENDICES

- Appendix 1 : Locality Plan
- Appendix 2 : The report that served before the Planning and Economic Development Committee
- Appendix 3 : Notification of Council's decision
- Appendix 4 : Appeals received
- Appendix 5 : Comment on appeal
- Appendix 6 : External legal comment

RECOMMENDED

that the Appeals Committee takes a decision on the appeal submitted against the decision taken by the Planning and Economic Development Committee dated 01-09-2015.

COUNCIL APPEAL COMMITTEE MEETING: 2017-09-12: ITEM 4.2

A site inspection was conducted by the Committee on 2017-09-12 instant at subject property.

Before the matter was put to the vote, Councillor MB De Wet recused himself from the Chamber.

RESOLVED (nem con)

that the appeal be **dismissed**.

REASONS FOR DISMISSAL

The appeal was dismissed based on the legal opinion of STBB relating to the title deed of the property as listed below:

[10] *the relevant provisions of the restrictive title deed condition in question read as follows:*

“The land hereby conveyed shall be used for residential and/or agricultural purposes only and shall not be used for any commercial venture or undertaking of any description whatsoever...”

[11] *In fact, the condition is rather emphatic in that it explicitly states that the Property “shall not be used for any commercial venture or undertaking of any description whatsoever”.*

Meeting:	Council Appeals: 2017-09-12	Submitted by Directorate:	Planning and Economic Development
Ref No:	345/5	Author:	Town Planner (Ms L Olyn)
Collab	450255	Referred from:	

The meeting adjourned at 12:00.

CHAIRPERSON:

DATE:

Confirmed on

MINUTES OF THE CONTINUATION OF THE COUNCIL APPEAL COMMITTEE MEETING HELD ON FRIDAY 2017-11-24 AT 10:00 IN THE COUNCIL CHAMBER, TOWN HOUSE PLEIN STREET, STELLENBOSCH

- PRESENT** Councillor DD Joubert [Chairperson]
- Councillors** Cllr GN Bakubaku-Vos (Ms)
 MB De Wet
 MD Oliphant
 Q Smit
- Officials** Manager: Land Use Management (Ms H Dednam)
 Senior Town Planner (L Ramakuwela)
 Committee Clerk (T Samuels (Ms))
 Interpreter (J Tyatyeka)

1.	OPENING AND WELCOME
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The Speaker, Councillor DD Joubert, welcomed all present and Councillor MD Oliphant offered a prayer.

2.	APPLICATION FOR LEAVE OF ABSENCE
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NONE

3.	DISCLOSURE OF INTERESTS	(3/6/2/2)
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NONE

4.	MATTERS TO BE CONSIDERED
4.1	APPEAL (IN TERMS OF THE INTERNAL APPEAL PROCESS AS APPROVED BY COUNCIL) AGAINST COUNCILS DECISION TO APPROVE APPLICATIONS FOR REZONING, SUBDIVISION AND DEPARTURE ON ERF 872 FRANSCHHOEK

1. EXECUTIVE SUMMARY

1.1 Development Proposal

- Application is made in terms of Section 24(1) of the Land Use Planning Ordinance 15 of 1985 for the subdivision of Erf 872, Franschhoek into five portions namely, Portion 1 which is $\pm 1524\text{m}^2$ in extent, Portion 2 which is $\pm 1524\text{m}^2$ in extent, Portion 3 which is $\pm 1524\text{m}^2$ in extent, Portion 4 which is $\pm 1524\text{m}^2$ in extent, and Remainder Erf 872 which is $\pm 1.0850\text{ha}$ in extent.
- Application is made in terms of Section 17(1) of the Land Use Planning Ordinance 15 of 1985 for the rezoning of the subdivided Portions 1 to 4 from Agriculture to Single Residential.
- Application is made in terms of Section 15(1)(a)(i) of the Land Use Planning Ordinance 15 of 1985 for a departure to relax all eight (8) side building lines from 2.3m to 0m in order to construct four (4) swimming pools, bordering Uitkyk Street on Erf 872, Franschhoek. (See **APPENDIX 1**)

1.2 Council Resolution

On 31-05-2016 the Planning and Economic Development Committee in terms of their delegations resolved the following:

- *That **approval be granted** in terms of Section 25(1) of the Land Use Planning Ordinance (Ordinance 15 of 1985) for the subdivision of Erf 872, Franschhoek into five portions namely, Portion 1 ($\pm 1524\text{m}^2$), Portion 2 ($\pm 1524\text{m}^2$), Portion 3 ($\pm 1524\text{m}^2$), Portion 4 ($\pm 1524\text{m}^2$) and Remainder Erf 872 which is $\pm 1.0850\text{ha}$ in extent as indicated on plan No. 3(1)Rev 4, drawn by dh&a professional land surveyors, dated March 2012- July 2014.*
- *That **approval be granted** in terms of Section 16(1) of the Land Use Planning Ordinance (Ordinance 15 of 1985) for the rezoning of the subdivided Portions 1 to 4 from Agriculture to Single Residential.*
- *That **approval be granted** in terms of Section 15(b) of the Land Use Planning Ordinance (Ordinance 15 of 1985) for a departure to relax all eight (8) side building lines from 2.3m to 0m in order to construct four (4) swimming pools on Erf 872, Franschhoek, Uitkyk Street. (See **APPENDIX 2**)*

See **APPENDIX 3** for the report that served before the Planning & Economic Development Committee on the 31-05-2016.

1.3 Decision Criteria

Section 36 of the Land Use Planning Ordinance No 15 of 1985, which states that an application may be refused solely on the basis of lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability, and that in assessing such desirability regard shall be had only to the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned and the effect of the application on existing rights concerned.

1.4 General Information

Applicant	PJ le Roux Town and Regional Planners
Appellants	Smith Ndlovu Summers Environmental Law Specialists & Franschhoek Trust and Rate Payers Association.
Date of submission of original application	09-03-2015
Date of Council's decision	31-05-2016
Date of notification of MSA appeal rights	02-09-2016 (registration slip: 08-09-2016)
Date of submission of appeal	23-09-2017 & 27-09-2016

1.5 Property Information

Owner	Messers Vogues Exclusive
Farm No.	Erf 872 Franschhoek
Extent of property	1,6946ha
Applicable zoning scheme	Franschhoek zoning scheme
Current zoning	Agriculture
Title Deed no	T038263/2011
Current land use	Agriculture
Current unauthorised land use/	None
Previous approvals granted	None
Special/conservation area	No
Controlled by SAHRA/PHRA	No

Appendices

- Appendix 1 : Locality Plan
- Appendix 2 : Notification of Council's decision
- Appendix 3 : The report that served before the Planning and Economic Development Committee
- Appendix 4 : Appeals received
- Appendix 5 : Applicant's response to appeals
- Appendix 6 : Comment from department of Agriculture
- Appendix 7 : Email and proof of payment for departure application
- Appendix 8 : A Visual Impact Report was prepared by Karen Hanse
- Appendix 9 : External legal comment

3. LEGAL REQUIREMENTS

Appeals were received in terms of the appeal process established in terms of The Promotion of Administrative Justice Act, 3 of 2000 and are deemed valid as they were received within the required time frame of 21 days from receipt of the letter of notification (see **APPENDIX 4**). The decision to approve the subject application was taken by the Planning and Economic Development Committee and this appeal decision therefore needs to be taken by the next decision making authority, which will be Council's Appeal Committee. This process followed will be in compliance with the internal appeal process as approved by Council at its meeting held on 29 October 2014.

3. LEGAL IMPLICATIONS

No legal implications.

4. FINANCIAL IMPLICATIONS

No financial implications.

5. COMMENT/S ON APPEAL

Previous recommendation and decisions

It was the opinion of the Planning and Economic Development Directorate, that notwithstanding the objections against the application, the proposed rezoning, subdivision and departure in order to construct dwelling units and swimming pools on the four newly created erven would not have a significant negative impact or alter the character of the surrounding area and therefore approved the application.

Summary of appeal from Smith Ndlovu Summers Environmental Law Specialists

- (i) The appellant argues that the applicant failed to properly apply and substantively motivate for departures to relax the building line in order to accommodate the swimming pools. The appellant further submits that the committee should have dismissed the application for departure as such an application was never properly motivated or applied for.
- (ii) According to the appellant, the Municipality failed to comply with the jurisdictional requirements in section 36(1) of the Land Use Planning Ordinance 15 of 1985, which states that an application for rezoning and subdivision "*shall be refused solely on the basis of a lack of desirability of the contemplated utilization of land concerned including the guideline proposals included in the relevant structure plan in so far as it relates to desirability, or on the basis of its effect on existing rights concerned*". It is the appellant contention that no positive advantage has been presented by the applicant and the application should therefore be refused.
- (iii) The appellant submits that necessary consent from the Minister for the subdivision of the subject property has not been obtained and the applicant's obligations under Subdivision of Agricultural Land Act, Act 70 of 1970 (SALA) have not been met. A consideration of

the subdivision of the subject property by the Municipality therefore cannot be lawfully undertaken until such a time as the Minister's written consent has first been obtained and provided to the Municipality. Therefore, the applicant failed to obtain necessary approval under the Subdivision of Agricultural Land Act 70 of 1970.

- (iv) The proposal does not to comply with the Franschhoek Zoning Scheme regulations. One of the portions measures $\pm 1447\text{m}^2$ and shows a dwelling of 442m^2 . This exceeds the applicable maximum coverage of 30%. It is argued by the appellant that the Committee has not considered this non-compliance in coming to its decision.
- (v) The appellant submits that the applicant failed consider the applicable Urban Edge Policy. The subject property falls within non-urban sub-zone D as identified in the Urban Edge Policy. The following important characteristics of non-urban sub-zone D are described in paragraph 4.5.1.4 of that Policy:
 - *the very important cultural heritage of La Cotte as one of the two great farms of the 18th and 19th centuries around which the whole structure and history of Franschhoek grew;*
 - *the importance to preserve this sub-zone as an agricultural area, at least visually, so as to not spoil Franschhoek's unique sense of place;*
 - *the importance in preserving the natural sight lines from Akademie Street."*

The appellant argues that the Urban Edge Policy is a fundamentally relevant document which was not considered or discussed by the applicant's planner in the application.

- (v) The proposal is fundamentally inconsistent with the with the unique rural character of the surrounding area.
- (vi) Smith Ndlovu Summers Environmental Law Specialist also requested the right to an interview with (or hearing before) the Municipal's appeal authority when it considers the appeal.

Summary of appeal from the Franschhoek Rate Payers Association

- (i) The proposed development of Erf 872 does not comply with conditions of the Franschhoek Urban Edge: Land Use Management Policy.
- (ii) The proposed development on Erf 872 is inconsistent with the purposes of the Stellenbosch Municipal Spatial Development Framework (MSDF) in extending the urban edge.
- (iii) The proposed developed of Erf 872 lacks desirability in terms of s36(1) of the Land Use Planning ordinance 1985 (LUPO)
- (iv) The proposed development will jeopardise the inclusion of Franschhoek in the cape Winelands Cultural landscape tentatively designated by UNESCO as a world heritage site.

-
- (v) The application for approvals does not properly motivate for the departure for relaxation of building line.
 - (vi) The Trust alleges that misleading representations and statements were made in the Notice of Intention to Develop (NID), that the NID does not even mention the Urban Edge Policy and that there is nothing in the MSDF to justify or provide a basis for the claim that the Property was included in the extended Urban Edge because it is *“too small to function as a viable agricultural land unit”*.

Summary of applicant’s comment on appeal:

The content of the applicant’s response to the appeals attached as **ANNEXURE 5** is self-explanatory, but could be summarised as follows:

Failure to obtain Act 70/1970 approval

The relevant portion of the definition of ‘agricultural land’ in Section 1 of the Subdivision of Agricultural Land Act 70 of 1970 (“SALA”) reads as follows:

“‘agricultural land’ means any land, **except—**

- (a) **land situated in the area of jurisdiction of a municipal council**, city council, town council, village council, village management board, village management council, local board, health board or health committee . . . but excluding any such land declared by the Minister after consultation with the executive committee concerned and by notice in the *Gazette* to be agricultural land for the purposes of this Act”

Therefore, the applicant’s property is not “agricultural” as envisaged by SALA. The Director: Sustainable Resource Management of the Western Cape Provincial Department of Agriculture in a letter dated 9 November 2015 to Stellenbosch Municipality, provided the following comment: *“According to information available to this office the abovementioned property is not subject to the provisions of the Subdivision of Agricultural Land Act No. 70 of 1970”*. (See **APPENDIX 6**)

Non-compliance with Zoning Scheme Regulations

The Applicant must submit a building plan (be it for the erf concerned or any other erf in the development), if it does not comply with the provisions of the Regulations, the Municipality will (in the absence of an application for a departure from the coverage requirement and approval of same) simply be compelled to refuse building plan approval. The Committee only approved the rezoning, subdivision, departure and SDP submitted, nothing more and nothing less. It did not approve coverage exceeding the permissible percentage and SDP approval does not translate into approval of a building exceeding the permissible coverage.

Concerns regarding the “HWC” decision

The applicant submits that the information that served before Heritage Western Cape (HWC) when it considered the Notice of Intent to Develop (NID) was sufficient for the HWC members to form their own opinion and there is no reason to suspect that, at the time, they had to rely on

opinions expressed in the NID. The allegation concerning the negative visual impact that the development will have, is not supported by any facts, has no merit and is, at best, highly speculative. The profile description in a policy document cannot be used to determine the visual impact of a development.

Application not made for departures

The email of 17 June 2015 contained an application in terms of section 15 of the Land Use Planning Ordinance, 15 of 1985 ("LUPO") for a departure from the building lines. The email included proof of payment for the departures referred to (See **APPENDIX 7**). The suggestion that the application for departure was not applied for is incorrect. The applicant submits that the Committee approved the application for departure because they clearly did not see a need for a motivation for a swimming pool. The impact of the relaxation to accommodate a swimming pool will be minimal to the built environment and would mostly affect the owners of the newly created portions.

Non-compliance with Urban Edge Policy & MSDF

The MSDF designation of the area concerned (in which the Property is located) as a "new development area" is in direct conflict with the guideline proposals contained in the Urban Edge Policy (e.g. that no cadastral *subdivision* may be allowed within the NUZ, rezoning approvals are to be considered for *existing* building structures only and so forth). It raises questions concerning the status of the MSDF and the Urban Edge Policy respectively. In terms of Section 25(1) of the Local Government: Municipal Systems Act, 32 of 2000 (the "MSA") each municipal council is required to adopt a single, inclusive and strategic plan for the development of the municipality (referred to as an Integrated Development Plan or "IDP"). The IDP is principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality. The MSDF is a core component of the IDP. Therefore, the MSDF has effectively replaced the Urban Edge Policy and that the Urban Edge Policy is no longer a relevant consideration. Erf 872 is located well within the newly adopted urban edge.

Proposed use lacks desirability

The Property is flanked by residential erven 2736, 2737, 45 and 2758 on its south-westerly boundary, by residential erven 3699 and 3710 on its south-easterly boundary and by residential erf 673 and Remainder 3287 on its north-westerly side. A Visual Impact Report was prepared by Karen Hansen (See **APPENDIX 8**), an independent consultant Landscape Architect and visual impact practitioner. The report suggests that the visual impact extended to less than 100m in radius and was on average, low, with a significance rating on the low side of medium. Therefore, the proposal will not negatively affect the character of the area. The Appellants' statements concerning the impact that the approved development will have, are not supported by any facts, have no merit and are, at best, highly speculative. It was further suggested that the members of the appeal Authority conduct an inspection to familiarise themselves with the area referred to.

Use will jeopardise inclusion as World Heritage Site

The applicant submits that it is legally irrelevant whether or not the development will contribute or lead to the exclusion of Franschoek from the Cape Winelands Cultural Landscape. It is further conveyed that the environment is not the only concern when it comes to sustainability. It is necessary to balance the three imperatives of sustainable development. A balanced approach is required in matters of this nature.

Committee's failure to apply mind

The MSDF has replaced the Urban Edge Policy and HWC does not share the Trust's view that the development will have an unacceptable negative impact on Franschoek's heritage resources. The applicant submits that the suggestion that fundamentally relevant considerations were not addressed or properly considered is not factually based, without merit and therefore, should be rejected.

Request for a hearing

The applicant submit that the issues for determination of the applications can be adequately determined in the absence of the parties by considering the documents provided to it and that such hearing will not assist in the expeditious and fair disposal of the application, but will serve to further delay the matter. In the circumstances we request that the request for a hearing be declined.

Land Use Management comment on appeal

The only new information, which was not previously evaluated in the initial report by Council which could have a significant influence on the decision taken, is a Visual Impact Report was prepared by Karen Hansen. In terms of the report, it is recommended that, the project proceeds, if mitigation measures would be undertaken.

The content of the planning report that served before the Planning and Economic Development Committee and the subsequent decision taken by the committee is therefore still supported by the department and it is recommended that both appeals should be dismissed.

7. INTERVIEW REQUESTED WITH APPEALS AUTHORITY

Smith Ndlovu Summers Environmental Law Specialist also requested the right to an interview with (or hearing before) the Municipal's appeal authority when it considers the appeal.

RECOMMENDED

that the Appeals Committee takes a decision on the appeal submitted against the decision taken by the Planning and Economic Development Committee dated 31 May 2016.

COUNCIL APPEAL COMMITTEE MEETING: 2017-05-26: ITEM 4.4

RESOLVED (nem con)

that this item stands over till the next Appeal Committee meeting.

COUNCIL APPEAL COMMITTEE MEETING: 2017-09-12: ITEM 4.1

A site inspection was conducted by the Committee on 2017-09-12 instant at subject property.

The Committee afforded the Applicant and Appellant an opportunity to make presentations in respect of the Appeal.

RESOLVED (nem con)

- (a) that the internal Legal Services Department provide guidance on the following questions raised by the Appeals Committee:
- (1) Can the Appeal Committee consider a new ground of appeal that was not contained in the Appellant's appeal as lodged;
 - (2) Can Councillors consider new facts or conditions perceived by their natural senses during a site visit and can that be considered as part of their reasoning; and
 - (3) Does the Appeal Committee of Council have the authority to make a factual finding on the conditions or facts perceived at the relevant site on their site visit;
- (b) that this matter be deferred to be considered at a reconvened meeting.

Meeting:	<i>Council Appeal: 2017-09-12</i>	Submitted by Directorate:	<i>Planning and Economic Development</i>
Ref No:	<i>872 FH</i>	Author:	<i>Senior Town Planner (L Ramakuwela)</i>
Collab	<i>509378</i>	Referred from:	<i>2017-05-26</i>

**FURTHER COMMENTS BY THE SENIOR LEGAL ADVISOR:
MR M WILLIAMS: 2017-11-17**

Background:

The issue and/or new ground of appeal which was raised before the Appeal Committee ("the Committee") is that the Committee would be acting unconstitutionally if approval were to be given for a residential development at the time that the land is used, unlawfully as a waste disposal site.

Furthermore Mr Smith for the appellants argued that an appropriate licence need to be obtained from the relevant competent authority to authorise the placement of the materials on the Property.

We were requested to provide an opinion on the following issues:

- (1) Can the Appeal Authority consider a new ground of appeal that was not contained in the Appellant's appeal as lodged;

Section 62 of the Systems Act provides that a person whose rights are affected by a decision taken under delegated authority, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.

All grounds and reasons of appeal must be submitted within 21 days of the notification. If a ground was not listed at the time of the submission of the appeal, same should not be considered by the Appeal Authority. The party against who the appeal is submitted have a right to respond on the merits of such appeal submitted. If a ground of appeal is submitted late or at the time when the matter is heard before the Appeal Committee the person against whom the appeal is lodged will be denied the opportunity to respond thereto. This clearly would be unfair and should not be allowed.

- (2) Can councillors consider new facts or conditions perceived by their natural senses during a site visit and can that be considered as part of their reasoning; and

In *CC Groenewald NO & Others v M5 Developments (Cape) (PTY) Ltd (283/09) [2010] ZASCA 47* the court held that section 62 involved an appeal in the wide sense in the sense of a re-hearing of the issues. It is a re-hearing related to the limited issue of whether the party appealing should have been successful.

In light of the fact that the appeal is a wide appeal and amounts to a re-hearing of the issues on appeal, new facts or conditions perceived by the members of the Appeal Committee can be taken into account by the Appeal Committee, but in my view this should be limited to the grounds/issues listed in the appeal.

- (3) Does the Appeal Committee of Council have the authority to make a factual finding on the conditions or facts perceived at the relevant site on their site visit.

Yes it may, but same in our view should be limited to the grounds/issues listed in the appeal submitted. As far as the alleged unlawful waste disposal site are concern, the Building Control department should investigate the allegations and serve the relevant notice/s and institute criminal proceedings against the property owner, should the need therefor exists. The Appeal Committee will not be acting unconstitutional if it consider the appeal on its merits and approve or refuse same.

COUNCIL APPEAL COMMITTEE: 2017-11-24: ITEM 4.1

RESOLVED (nem con)

that the appeal against Council's decision to approve an application for Subdivision, Rezoning and Departure on Erf 872, Franschoek be **dismissed**.

REASONS FOR DISMISSAL OF THE APPEAL

1. The property is situated within a "new development area" as designated by the MSFD;
2. The subdivision of the property and subsequent sizes of the relevant erven would not be out of character of the surrounds where the property is situated, as the proposed subdivision would divide the property into similar size erven as those surrounding the property;

- 3. Any development (done within the building regulations) would not be out of character for that area, as the houses in the property's street are all already develop, and in fact it is almost only the subject property which seems empty. It would therefore also not be undesirable;
- 4. In line with the legal opinion that this committee received from the legal department, the appeals committee did not consider, what seem to be the appellants main contention during oral arguments, that the property is being used as an illegal dumping site, and therefore only applied themselves to the original grounds of appeal as raised by the appellants in their written notice of appeal; and
- 5. In light of the fact that building plans still need to be submitted to the relevant building authority for any development on the property, the appeal committee feels comfortable with the original approval of the application by the planning department, because the proposed development would still have to be in line with all the current building regulations.

Meeting:	<i>Continuation of Council Appeal: 2017-11-24</i>	Submitted by Directorate:	<i>Planning and Economic Development</i>
Ref No:	<i>872 FH</i>	Author:	<i>Senior Town Planner (L Ramakuwela)</i>
Collab	<i>509378</i>	Referred from:	<i>2017-09-12</i>

The meeting adjourned at 10:05.

CHAIRPERSON:

DATE:

Confirmed on