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Mr SA Morugiy

Per e-mail: baruch.keren@telkomsa.net

Dear Mr Morugiy

CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE CITY OF CAPE TOWN RELATING TO NON-COMPLIANCE WITH THE CONDITIONS IMPOSED BY A SUB-COUNCIL FOR PERMISSION TO USE A PORTION OF ERF 10129, MILNERTON AS A CHILD AFTERCARE FACILITY

Attached hereto a copy of my final *CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE CITY OF CAPE TOWN RELATING TO NON-COMPLIANCE WITH THE CONDITIONS IMPOSED BY A SUB-COUNCIL FOR PERMISSION TO USE A PORTION OF ERF 10129, MILNERTON AS A CHILD AFTERCARE FACILITY*, for your attention.

Yours faithfully

**ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA**

DATE: 17/12/2019



**PUBLIC PROTECTOR
SOUTH AFRICA**

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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE CITY OF CAPE TOWN RELATING TO NON-COMPLIANCE WITH THE CONDITIONS IMPOSED BY A SUB-COUNCIL FOR PERMISSION TO USE A PORTION OF ERF 10129, MILNERTON AS A CHILD AFTERCARE FACILITY

1. INTRODUCTION

- 1.1 This is a Closing report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report relates to an investigation into allegations of improper conduct and maladministration by the City of Cape Town (City) pertaining to non-compliance with the conditions imposed by a Sub-Council for permission to use a portion of Erf 10129, Milnerton (Erf 10129), as a child aftercare facility.
- 1.3 The report is submitted to the City Manager of the City, Mr L Mbandazayo.
- 1.4 A copy of the report is also provided to Mr B Morugiy, who lodged the complaint (Complainant) on 16 September 2016.

2. THE COMPLAINT

- 2.1 The essence of the complaint and the information obtained from preliminary enquiries made in regard thereto, was that:
 - 2.1.1 The Complainant is the owner of No 22 Watsonia Road, Blouberg, Cape Town, which is situated adjacent to Erf 10129.
 - 2.1.2 The owner of Erf 10129 acquired the property in 2014. The Complainant was informed in July 2014 that the owner would be operating a child aftercare facility at the property. The property was zoned as single residential and for private single dwelling purposes, at the time.
 - 2.1.3 In 2015, a Sub Council of the City approved an application for change of land use by the owner of Erf 10129 to utilise a portion of it as an aftercare facility, subject to certain conditions, including that the areas to be used for instruction

shall be generally in accordance with the sketch plan that was attached to the application.

- 2.1.4 According to the Complainant, the owners of the after care facility allegedly erected a jungle gym against the boundary wall, which was in violation of the conditions imposed by the Sub Council when it approved the land use application. The Site Development Plan (SDP) of the aftercare facility does not reflect the classroom and the building plans of the aftercare facility were not approved.
- 2.1.5 The noise generated from the aftercare facility is a nuisance to the Complainant and has a negative impact on his daily life. Further, that the City failed to ensure that the owner of the aftercare facility complied with applicable legal prescripts regulating noise and nuisance.
- 2.1.6 The City violated the provisions of the Children’s Act, 2005 (the Children’s Act) by permitting the owners of Erf 10129 to use a portion of their property as an aftercare facility, without ensuring that it was registered with the Provincial Department of Social Development (DSD).

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2 Section 182(1) of the Constitution provides that:

“The Public Protector has the power as regulated by national legislation –

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- (b) to report on that conduct; and
- (c) to take appropriate remedial action.”

- 3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.
- 3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies, or any other means that may be expedient under the circumstances.
- 3.5 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect¹. The Constitutional Court further held that: “*When the remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences*”².
- 3.6 The City is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.

¹ [2016]ZACC 11; 2016(3) SA 580(CC) and 2016 (5) BCLR 618 (cc) at para [76].

² *Supra* at para[73].

3.7 The jurisdiction of the Public Protector to investigate the allegations was not disputed by the parties.

4 THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

4.2.1 The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or improper conduct?

4.2.2 In the event of maladministration or improper conduct, what would it take to remedy the wrong where appropriate and to place the Complainant as close as possible to where he/she would have been, but for the maladministration or improper conduct.

4.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence and information provided by the parties and

independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the City failed to ensure compliance with the conditions imposed by the Sub-Council for permitting the use of a portion of Erf 10129 as an aftercare facility on 11 May 2015 and whether the City permitted the owners of Erf 10129 to use a portion thereof for an aftercare facility without ensuring that it was registered with the DSD in terms of the Children's Act.

4.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the City or organ of state to prevent maladministration and prejudice, where applicable.

4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of any maladministration or improper conduct found, where appropriate.

4.3 **On analysis of the complaint, the following issues were considered and investigated:**

4.3.1 Whether the City failed to ensure compliance with the conditions imposed by the Sub-Council for permitting the use of a portion of Erf 10129 as an aftercare facility on 11 May 2015; and

4.3.1.1 Whether the City permitted the owners of Erf 10129 to use a portion thereof for an aftercare facility without ensuring that it was registered with the DSD in terms of the Children's Act.

4.4 **Key sources of Information**

4.4.1 **Documents and information received**

The investigation process included correspondence officials of the City and the DSD, an analysis of documents obtained during the investigation and the application of the relevant laws and other prescripts.

4.4.2 Meetings

4.4.2.1 Meetings were held with the Complainant and officials of the City.

4.4.3 Applicable Legislation

4.4.3.1 The Constitution of the Republic of South Africa, 1996;

4.4.3.2 The Public Protector Act No 23 of 1994;

4.4.3.3 The Children's Act No 38 of 2005;

4.4.3.4 City of Cape Town Zoning Scheme Regulations, 2012. (CTZS Regulations);

4.4.3.5 City of Cape Town Municipal Planning By Law, 2015.(By Law); and

4.4.3.6 The Land Use Planning Ordinance, 1985.

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Whether the City failed to ensure compliance with the conditions imposed by the Sub-Council for permitting the use of a portion of Erf 10129 as an aftercare facility on 11 May 2015

Common cause issues or undisputed facts

5.1.1 It is not in dispute that In July 2014, the owner of Erf 10129 lodged an application with the City in terms of the CTZS Regulations, to permit the use of a portion of the property as an aftercare facility. The Complainant was afforded an opportunity to respond to the application, which he did.

5.1.2 The Complainant lodged a complaint about the nuisance caused by the children attending the aftercare facility with the City on 28 August 2014 and lodged several complaints relating to the aftercare facility thereafter.

The application was approved by a Sub-Council of the City on 11 May 2015, subject to certain conditions, including that:

“1 (a) The areas to be utilised for the place of instruction shall be generally in accordance with the sketch plan attached as annexure E.”

5.1.3 The decision of the Sub-Council was not appealed against or taken on judicial review.

5.1.4 The Complainant also lodged a complaint with the City Ombudsman in connection with the approval of the building plans of the aftercare facility. On 30 July 2016, the Office of the City Ombudsman advised that the owner of Erf 10129 had submitted amended building plans that were approved and that the building was therefore compliant. This was confirmed by the City during the investigation and a copy of the amended SDP, dated 18 August 2016 was submitted.

5.1.5 In 2017, the Complainant lodged an application in the Western Cape Division of the High Court for an interdict against the owner of the aftercare facility and the City, based on the alleged nuisance and infringement of his right to privacy. The High Court dismissed the application on 10 November 2017 and found that the Complainant’s conduct was unreasonable and that he had not established, on a balance of probabilities that the City had failed to execute its mandate of enforcing the relevant laws and regulations.

Issues in dispute

5.1.6 In the main, the Complainant contended that the City failed to ensure that the owner of the aftercare facility complied with condition 1(a) of the Sub-Council

Resolution, in terms of which the areas to be utilised for the place of instruction shall be generally in accordance with the sketch plan that was attached to the application for land use.

- 5.1.7 The records of the City obtained during the investigation, show that a site inspection was conducted at the premises on 4 August 2014 and it was found that an aftercare facility had opened. A notice was issued to the owner of the facility to cease activities within sixty (60) days in terms of the Land Use Planning Ordinance, 1985.
- 5.1.8 A further site inspection was conducted by the City on 8 October 2014 and it was found that the owner of the facility had not complied with the notice. Legal action was taken against the owner and an admission of guilt fine was paid on 14 July 2015.
- 5.1.9 The application of the owner for approval for the use of a portion of Erf 10129 for an aftercare facility was circulated to several of the City's Departments, including Building Development Management, Disaster Risk Management, Environmental Health and Environmental and Heritage Management.
- 5.1.10 The Department of Building Development Management was initially not in favour of the application, but after a meeting with the owner, supported it. None of the other Departments raised any objections to the application, subject to certain conditions being adhered to.
- 5.1.11 The Sub-Council resolved that the application complied with the City's Early Childhood Development Land Use Policy.
- 5.1.12 The records of the City also indicate that subsequent site inspections were conducted on 29 November 2015, 22 April 2016, 11 May 2016, 18 July 2017, 22 July 2017, 12 August 2017, 13 December 2017 and 2 February 2018 and it was found that the conditions of the permission granted by the Sub-Council were adhered to.

- 5.1.13 During a site inspection conducted by the City on 18 June 2018, pictures were taken of a jungle gym found on the premises.
- 5.1.14 The City issued a notice to the owner of the aftercare facility for failing to comply with the conditions of the permission of land use granted by the Sub-Council, on 19 June 2018. After discussions between the owner and the City's Land Use Inspector, the notice was changed to a directive, in terms of which the owner had to submit an application indicating the play equipment on the premises on the sketch plan attached to the Sub-Council Resolution, in order to comply with the conditions.
- 5.1.15 The owner was also advised to apply for an administrative penalty before a further application for consent land use could be considered.
- 5.1.16 The application for an administrative penalty was considered by the Municipal Planning Tribunal on 5 February 2019, which was subsequently approved and imposed.
- 5.1.17 A Directive Notice was served on the owner, in terms of section 128 of the By-Law on 12 April 2019.
- 5.1.18 According to the City Manager, the owner submitted an application to amend the conditions relating to the play area on the sketch plan, on 10 May 2019. The application was advertised and the Complainant provided with a copy to afford him an opportunity to raise any objections. The closing date for objections was 10 October 2019 and it will now be considered by the Sub-Council.

Application of relevant laws and prescripts

- 5.1.19 In terms of Regulation 2.3.1 of the CTZS Regulations "the *Council may approve or refuse an application submitted in terms of this zoning scheme, and may impose conditions on any approval*".

- 5.1.20 Section 46 of the By-Law provides that consent use for land may be granted for a specified time or permanently.
- 5.1.21 In terms of section 126(1) of the By-Law "...the City may serve a notice on an owner or other person if there are reasonable grounds for believing that the owner or other person is in contravention of this By- Law".
- 5.1.22 "*Contravention*" is defined by section 123 as including a failure to comply with a duty or requirement. Not complying with the conditions imposed for land use would accordingly constitute a contravention of the By-Law.
- 5.1.23 A person who is in contravention of the By-Law and who wishes to rectify the contravention may apply to the City for the determination of an administrative penalty, which may be approved and imposed by the Municipal Planning Tribunal, in terms of section 129 of the By-Law.

Conclusion

- 5.1.24 The evidence obtained during the investigation indicates that the City conducted a site inspection at Erf 10129, even before the application for permission to use a portion thereof for an aftercare facility (the application) was lodged. Legal action was taken against the owner for not complying with the Land Use Planning Ordinance at the time and an admission of guilt fine was paid in July 2015.
- 5.1.25 The application was not objected to by the relevant Departments of the City and it was resolved that it complied with the City's Early Childhood Development Land Use Policy.
- 5.1.26 The decision of the Sub-Council was not appealed against or taken on judicial review.

- 5.1.27 The City conducted several subsequent site inspections at the premises from November 2015 to June 2018 and took appropriate action against the owner of the aftercare facility in terms of the By-Law when it was found that condition 1(a) subject to which the permission for land use was granted by the Sub - Council was not complied with.
- 5.1.28 The owner submitted an application for an amendment of the conditions with regard to the play area in terms of the By-Law. The application was advertised to afford anyone the opportunity to lodge an objection. The closing date for objections was 10 October 2019 and the application will be considered by the Sub-Council.
- 5.1.29 The allegation that the City failed to ensure compliance with the conditions imposed by the Sub-Council for permitting the use of a portion of Erf 10129 as an aftercare facility on 11 May 2015 is not supported by the evidence and information obtained during the investigation.
- 5.2 Whether the City permitted the owners of Erf 10129 to use a portion thereof for an aftercare facility without ensuring that it was registered with the Department of Social Development (DSD) in terms of the Children's Act.**

Common cause:

- 5.2.1 It is not in dispute that in July 2014, the owner of Erf 10129 lodged an application with the City in terms of the CTZS Regulations, to permit the use of a portion of the property as an aftercare facility.
- 5.2.2 The application was approved by a Sub-Council of the City on 11 May 2015, subject to certain conditions.

5.2.3 The decision of the Sub-Council was not appealed against or taken on judicial review.

Issues in dispute

5.2.4 The Complainant contended that the City acted in violation of the Children's Act, 2005 (the Children's Act) when it allowed the owner of Erf 10129 to operate an aftercare facility on the premises.

5.2.5 In his response to the complaint, the City Manager stated that the land use application and the approval of an aftercare facility are two separate processes. The land use process is limited to a consideration of the application to grant the permission to use the land for an aftercare facility. It does not grant the owner the right to operate the aftercare facility without adhering to other relevant legislation and prescripts.

5.2.6 He further indicated that the land use application precedes the process of registration with the DSD as Early Childhood Development facilities may only operate from properties where the land has been appropriately zoned and land use permission granted.

5.2.7 The City Manager concluded that as these are distinctly different processes in terms of different legislation, there would be no reason for the City to consider the DSD's requirements for the registration of an Early Childhood Development facility in the assessment of a land use application.

Application of the relevant law and prescripts

5.2.8 Section 76 of the Children's Act provides for partial care of children. It states that partial care (aftercare) is provided when a person, whether for or without reward, takes care of more than six children on behalf of their parents or care-givers during specific hours of the day or night, or for a temporary period, by agreement between the parents or care-givers and the provider of the service.

5.2.9 Section 80(1) of the Children's Act provides that:

“(a) Any person or organisation may establish or operate a partial care facility provided that the facility is registered with the provincial government where the facility is situated”.

5.2.10 In terms of section 81(1), an application for registration of a partial care facility must be lodged with the provincial head of social development, in accordance with the prescribed procedure.

5.2.11 The Children's Act does not provide for any duty or role of a municipality in respect of the registration of a partial care facility.

Conclusion

5.2.12 The application to the City for permission to use a portion of Erf 10129 for an aftercare facility was not subject to the registration of a partial care facility with the DSD, in terms of section 80 of the Children's Act.

5.2.13 The City had no obligation or involvement in the application of the owner of the aftercare facility for registration with the DSD.

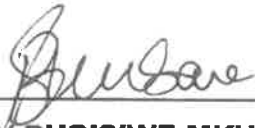
6. RESPONSE TO NOTICE OF INTENTION TO CLOSE THE INVESTIGATION

6.1 The Complainant was informed on 21 October 2019 of my intention to close the investigation of the complaints that he had raised, based on the evidence obtained and the application of the relevant laws and prescripts referred to above, and provided with an opportunity to respond thereto or to submit further or additional information.

6.2 He responded on 5 November 2019, repeating some of his original complaints. However, the Complainant did not submit any further or additional information or evidence that had not been considered during the investigation.

7. REASONS FOR CLOSURE OF THE INVESTIGATION

- 7.1 The allegation that the City failed to ensure compliance with the conditions imposed by the Sub-Council for permitting the use of Erf 10129 as an aftercare facility on 11 May 2015 is not substantiated by the records of the City and information obtained during the investigation.
- 7.2 The allegation that the City permitted the owners of Erf 10129 to use a portion thereof for an aftercare facility without ensuring that it was registered with the Department of Social Development (DSD) in terms of the Children's Act is not substantiated. There was no obligation on the City to ensure registration in terms of the Children's Act in order to consider and grant permission for the use of Erf 10129 for an aftercare facility.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE 17 11/2019