THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Cases No: 2046/12 & 22990/11

In the matter between:

Reportable

WILLIAM BOOTH & 2 OTHERS NNO **APPLICANTS**

And

MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING **FIRST RESPONDENT**

CITY OF CAPE TOWN **SECOND RESPONDENT**

And in the matter between

CITY OF CAPE TOWN **APPLICANT**

And

WILLIAM BOOTH ATTORNEYS & 5 OTHERS **RESPONDENTS**

Coram: ROGERS J

Heard: **18 FEBRUARY 2013**

Delivered: **6 MARCH 2013**

JUDGMENT

ROGERS J:

[1] The Booth Family Trust ('BFT') is the owner of Erf 64403 situated at 29 Kenilworth Road, Cape Town ('the property'). William Booth Attorneys ('WBA'), a firm comprising two attorneys (including the eponymous Mr William Booth, a well-known criminal defence lawyer), conducts a law practice at the property.

[2] In terms of the applicable zoning scheme the property is zoned General Residential. This zoning does not permit the use of the property for purposes of a law practice, even though WBA has been conducting its practice there for many years. On 26 August 2008 the BFT submitted to the City of Cape Town ('the City') an application to rezone the property as Special Business. This zoning would have permitted the conduct of a law practice. On 19 August 2009 the City's Protea Sub-Council ('the PSC') refused the rezoning application. BFT filed an internal appeal in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'). On 16 July 2010 the City's Planning & General Appeals Committee ('the PGAC') dismissed the appeal. BFT filed a further appeal to the Minister of Local Government, Environmental Affairs & Development Planning, Western Cape ('the MEC') in terms of s 44 of the Land Use Planning Ordinance 15 of 1985 ('LUPO'). On 13 October 2011 the MEC dismissed the appeal.

[3] Following the MEC's dismissal of the appeal, the City on 14 November 2011 issued an application for a declaratory order that WBA's use of the property as a law practice was unlawful and for an interdict against the unlawful use. The interdict cited as respondents BFT, WBA and the two partners in WBA (Mr Booth and Mr Mia). The respondents opposed the interdict application, relying mainly on the fact

that BFT enjoyed (so they said) strong prospects of having the MEC's decision set aside on review. Following the furnishing of reasons by the MEC on 31 January 2012, BFT issued a review application on 6 February 2012, citing only the MEC as a respondent. Following an earlier postponement of the interdict application on 12 December 2011 to afford the City time to file replying papers in response to belated answering papers from the respondents, the interdict application was on 7 February 2012, and despite opposition from the City, postponed *sine die*. In August 2012, by which time the City had at its own instance been joined as the second respondent in the review, orders were made by agreement for the interdict and review application to be heard together on 18 February 2013. The two applications served before me on that date.

[4] I shall for convenience refer to the BFT, WBA and Mr Booth as 'Booth' except where a distinction is necessary.

[5] Mr Booth bought the property in 1994. He sold it to the BFT during 1997. The precise date on which WBA began to conduct its practice from the property is unclear. On one view it was as early as 1990/1991. It is at any rate common cause that WBA has used the property for its law practice for more than 16 years. The zoning of the property has at no time permitted such use.

[6] There have been various attempts by Booth over the years, mainly unsuccessful, to regularise WBA's use of the property. In 1996 he applied for a temporary departure in terms of s 15 of LUPO, which the local authority refused in 1997. In October 1997 Booth submitted a rezoning application which the local authority refused in July 1998. There was an appeal to the MEC in terms of s 44 of LUPO which the MEC rejected in September 1999. Following this rejection there were several futile and somewhat maladroit efforts by the City to pursue criminal action against Booth.

[7] When the criminal proceedings appeared to the City to be going nowhere, the City decided rather to seek a civil interdict. An application was issued in December 2001. On 18 November 2002 and by agreement an order was made postponing the interdict application to 14 May 2003 to afford Booth time to submit a further

administrative application to regularise WBA's use of the property. This took the form of an application for a departure in terms of s 15 of LUPO, lodged in February 2003. The interdict application was removed from the roll to allow the new departure application to be determined and was not thereafter revived.

[8] The City refused the departure application on 30 October 2003. Booth pursued an internal appeal in terms of s 62 of the Systems Act. The appeal was refused on 6 August 2004, whereupon Booth lodged an appeal to the MEC in terms of s 44 of LUPO. On 8 December 2005 the MEC upheld the appeal and granted the temporary departure. The MEC's decision was that the temporary departure was 'valid for a period of two years only, during which time the premises shall be rehabilitated to make it more suitable for a private residence'. The papers do not reveal precisely what Booth had in mind in seeking the temporary departure. The MEC's decision indicates that the departure was a temporary indulgence after which the premises would have to be returned to residential use - it was not a long-term solution to Booth's problems.

[9] On 8 December 2007 the two-year period of the departure lapsed. Nothing changed – WBA continued to practise from the property. In April 2008 the City served a notice in terms of s 39(2) of LUPO requiring the BFT to cease its unlawful use of the property. This had no effect. Over the period June to November 2008 the City turned again to the criminal courts with no greater success or proficiency than before. While these steps were being pursued, Booth on 26 August 2008 filed the rezoning application which is the subject of the current proceedings. Its fate and the ensuing legal history I have summarized in paragraphs 2 and 3 above.

The legislative framework

[10] An application for rezoning is made in terms of ss 16 and 17 of LUPO, which form part of Chapter II.

[11] Section 36 of LUPO reads thus:

’36 Basis of refusal of applications and particulars applicable at granting thereof

(1) Any application under Chapter II or III shall be refused solely on the basis of a 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, or on the basis of its effect on existing rights concerned (except any alleged right to protection against trade competition).

(2) Where an application under Chapter II or III is not refused by virtue of the matters referred to in subsection (1) of this section, regard shall be had, in considering relevant particulars, to only the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned or the effect of the application on existing rights concerned (with the exception of any alleged right to protection against trade competition).’

[12] Section 39(2)(a)(i) provides that no person shall contravene or fail to comply with provisions incorporated in a zoning scheme except in accordance with the intention of a plan for a building as approved and to the extent that such plan has been implemented. In terms of s 46(1)(a) a contravention is a criminal offence punishable by a fine not exceeding R10 000 or imprisonment not exceeding five years or both.

First ground of review

[13] Despite the numerous review grounds advanced in the papers, Mr WG Burger SC, who appeared with Mr MV Combrink for Booth, focused his oral submissions on two points. He did not abandon the other grounds but made no submissions in support of them. Mr Burger, I should perhaps add, replaced Booth’s former lead counsel at a relatively late stage. He was not a co-author of the heads of argument filed for Booth on 1 February 2013.

[14] The first ground which Mr Burger developed was that the MEC had based his decision on the Land Use Management Policy for Kenilworth Main Road (Between

Claremont & Wynberg) and Kenilworth Road ('the KRP'[1]). Mr Burger submitted that the MEC had viewed the KRP not as a guideline but as a rule to be followed and in so doing had failed to give proper attention to Booth's appeal.

[15] The City adopted the KRP on 5 June 2007. In formulating the KRP the City was assisted by CN de V Africa Urban & Environmental Planners, a firm of town planners. The adoption of the KRP was preceded by a process of public participation.

[16] Kenilworth Road runs at a modest incline from the east (Rosmead Avenue) to the north (Main Road). Roughly halfway up Kenilworth Road one reaches the southern suburbs railway line. The railway crossing is controlled by booms which are closed during peak hours. Kenilworth Station is immediately to the south of the booms (to the left as one travels up Kenilworth Road). Thomas Road (to the south) and Harfield Road (to the north) run parallel with, and just above (ie to the west of), the railway line.

[17] The KRP, in a section on the historical background, stated that Kenilworth Road and the Kenilworth Main Road had faced development pressure for a long period. The local authority had produced policy statements in 1992 and 1993 for these roads. Both roads carried high volumes of traffic, though Kenilworth Road was a narrow street of residential proportions. The essence of the 1992/1993 policies was that no further rezoning, temporary departures or consents would be granted for Kenilworth Road properties. This was so as to 'prevent further intrusions of business and non-residential uses into the residential character of the area; to prevent increased traffic and parking problems; and to prevent the removal of trees and vegetation from the kerbside for the purposes of providing further parking'. Despite these policies, there continued to be pressure for land use changes along Kenilworth Main Road and Kenilworth Road.

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[1] In the papers and in argument the parties used the more cumbersome acronym 'KRLUMP'.

[18] The KRP then reviewed the current land uses in the area. Kenilworth Road was said to operate as two distinct sections, to the east (below the line) and to the west (above the line). Above the line (this is the stretch of Kenilworth Road on which the BFTs property is situated) the land uses abutting the street were 'predominantly residential in historic buildings' (Victorian and Edwardian). The 'Arcadian appearance' of the street had survived to a large extent. There was only one block of flats (in contrast to Kenilworth Road below the line, where blocks of flats were more numerous). The study done in preparing the KRP revealed that since the drafting of the 1992 policy the number of properties used for non-residential purposes had actually declined, suggesting that this part of Kenilworth Road remained highly desirable for residential purposes. Although applications for land use changes had been received (often in an attempt to regularise unlawful use), the local authority had, generally speaking and in line with previous policies, not supported the conversion of properties to non-residential use.

[19] The matters primarily considered in formulating the KRP were identified in section 5.1 as being:

[a] loss of well-located housing stock (demand for residential accommodation was high and the erosion of housing stock should be avoided);

[b] impacts on the residential character of the area (the protection and enhancement of the unique residential character of the residential sections of the roads was of great importance – the illegal use of the BFT's property was cited as one of two specific examples of the adverse effects of unlawful use);

[c] impacts on heritage concerns;

[d] impacts on surrounding properties (for example noise and odours and the absence of people on the property outside of working hours, with resultant security concerns – 'decreased surveillance');

[e] impacts on the existing business areas (the existing business nodes were recognised as being of great importance, and changes to business use outside of

these areas could contribute to decline within the business nodes, resulting in urban blight [for example, because people within the business nodes relocate into residential areas – reference was made to a recent article on this phenomenon which spoke of 'a frenzy of decentralization, aided in part by reckless rezoning']);

[f] impacts relating to increased traffic, parking and noise;

[g] cumulative impact and precedent.

[20] The 'vision' for the area was set out in section 5.2 of the KRP. The first two components of the vision were the following:

'1) Encourage the intensification of residential activities on Main road between the Wynberg CBD, the Kenilworth Village node and the Claremont CBD.

2) Re-affirm Kenilworth Road as an historic mixed use strip restoring its landscape quality, retaining residential uses and considering non residential uses compatible with and appropriate in residential zones. Uses which are not directly supportive of residential activities should move to the proposed Kenilworth Village node, or the Claremont and Wynberg CBDs.'

[21] The policies for the relevant parts of the Main Road, for the Kenilworth Village Node (the precinct around the intersections of Kenilworth Road and Summerley Road with the Main Road) and for Kenilworth Road itself were then set out in sections 5.3 to 5.5. The policy for Kenilworth Road, which is the area relevant in present case, was stated to be the following:

'**KR1** For land use planning purposes Kenilworth Road shall consist of two sections and two nodes between Main Road and Rosmead Avenue. One node is at the intersection of Kenilworth and Main Road. The other is between the railway line and Wessels Road.

KR2 Non residential and residential activities, with residential located above the commercial or retail uses, should be concentrated on these nodes.

KR3 No further applications for non-residential uses should be supported outside the nodes except for the following:

i. Home industries (i.e. work from home in the context described in the Zoning Scheme Regulations);
ii. Guest houses and bed & breakfast establishments;
iii. Places of instruction (from crèches to language schools) and community residential buildings (ie orphanages, home for the aged, vagrants, battered women, or for indigent, handicapped or disabled people, or people otherwise socially or physically disadvantaged) in the Zoning Scheme Regulations.

Note: Many of these activities can operate in terms of existing rights. Where applications are required they will be evaluated in terms of, inter alia, compatibility with the existing residential environment.

KR4 Residential densification – by means of subdivisions, second dwellings ("granny flats"), double dwelling houses and rezonings to General Residential to permit blocks of flats – is supported. Any such application will need to be appropriate and evaluated by Council in terms of the impact and on its own merit.

KR5 No temporary departures are to be permitted, unless in exceptional circumstances and where the proposed activity is genuinely of the temporary nature.'

[22] In advancing his argument, Mr Burger referred to the way in which the KRP had featured in the MEC's reasons for his refusal of the appeal and in the departmental report authored by Mr Andre Lombard, to which report the MEC had paid regard in reaching his decision.

[23] The relevant part of the Departmental report is section 10.2, which contained in summary the following 'planning comments':

[a] The precinct in which the BFTs property was situated was still 'residential in nature', though this character could not be described as rustic or quiet, given the traffic carried by Kenilworth Road.

[b] The difficulty in evaluating land use applications 'on an *ad hoc* basis' was one of the main reasons why the City had adopted the KRP, the purpose of which was to 'give guidance' in regard to future development in the area. Booth was entitled to give his opinion as to what policy should apply. However, the KRP was a 'coherent set of guidelines' for the area and might not align with Booth's views. Booth's argument that his property should be included in an abutting developmental node,

an argument that 'ignored' the principles, concepts and guidelines in the KRP, was 'totally unacceptable': 'Until such time as the need is felt that this policy document should be updated, the policy should be adhered to.'

[c] Section 36 of LUPO utilized the criterion of 'desirability'. Many of Booth's arguments were not based on this criterion (for example, procedural complaints that a particular planning report had not been shown to him or that a particular person should not have been heard in opposition to the rezoning).

[d] Booth's unlawful use had dragged on for 16 years. He should have realized that following the lapse of the two-year departure a fresh application for rezoning would not be entertained – the view of the authorities as to the lack of desirability should have been clear to him from the limited departure granted in December 2005.

[24] In his letter of reasons the MEC stated that the reasons he was giving were 'essentially a summary of' the content of the departmental report. He stated that he accepted and supported the departmental recommendation. He was of the opinion that the 'proposed development' of the property was undesirable. (The quoted phrase was attacked in Booth's founding affidavit as indicating that the MEC had misapprehended the nature of the rezoning application. The MEC explained in answer that this was the standard phrase used in respect of rezoning.[2] In this context, he was simply referring to the use which Booth wished to regularize, namely the use of the property for a law practice.)

[25] The MEC proceeded to state that he had dismissed the appeal for reasons he summarized as follows:

[a] He stated that the precinct was 'predominantly residential' in nature and should be preserved and protected as such. He did not support Booth's contention that the property and the abutting area were 'in a transitional precinct which is reflecting a change in character'.

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[2] The rezoning application form requires the applicant to give a brief description of 'proposed development/intent of application'.

[b] The MEC largely repeated what the departmental report said about the guidance afforded by the KRP, Booth's right to state his view and the unacceptability of Booth's argument that his property should be included in an abutting developmental node. The MEC said: 'Although the applicant's views were considered and evaluated, [the KRP] should be adhered to, until such time as the need is felt that this important policy document should be updated or amended.'

[c] Regarding the desirability criterion in s 36 of LUPO, the MEC said that Booth 'could not sufficiently demonstrate that there is not a lack of desirability', instead relying on unrelated procedural complaints.

[d] The MEC stated, in summary, that he had refused the appeal as it 'contradicted' the City's vision for the area as contained in the KRP, namely a vision of maintaining the residential character of the area. He could not find a convincing motivation in the appeal to support the rezoning.

[26] The MEC did not, in his letter of reasons, repeat what the departmental report had said concerning the long history of unlawful use.

[27] Since the MEC stated that his letter was a summary of the departmental report, I do not think a close comparison of the different formulations in the two documents is warranted. The differences appear to me to be minor in nature. The MEC in essence adopted the reasoning in the departmental report. If there is a reviewable flaw in the departmental report, it would taint the MEC's reasons. If there is no such reviewable flaw in the departmental report, there is nothing in the MEC's summary of his reasons which would justify a conclusion that he, unlike the authors of the departmental report, committed a reviewable error.

[28] Blind or rigid adherence to pre-existing policy was, in our common law of review, viewed as a circumstance showing that the decision-maker had failed properly to exercise the discretion vested in him by the empowering provision. This ground of review is not expressly enumerated in PAJA but could be accommodated, depending on the circumstances, under s 6(2)(e)(iii) (taking into account an irrelevant consideration), s 6(2)(f)(ii) (absence of rational connection between the

decision and the purpose for which it was taken[3]) or s 6(2)(i) (action that is 'otherwise unconstitutional or unlawful').[4]

[29] The formulation and adoption of policy documents, particularly after a process of public participation and with external expert assistance, is a valuable tool of government.[5] This is especially true in the sphere of land use and planning. A properly researched and formulated policy aids rational, coherent and consistent decision-making. It provides a large measure of useful predictability to the public. It avoids the need for time-consuming investigations into the history and character of an area each time a planning application is made – 'reinventing the wheel' as Prof Hoexter puts it.[6] In *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) Nugent JA summarised the position thus (para 1):

'A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy… [G]enerally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding, with the result that no discretion is exercised at all.'

[30] The adoption of the KRP and its use by the City (and on appeal by the MEC) should thus not be viewed with distrust. It was legitimate for the City to adopt the KRP and it was entirely proper for the City (and for the MEC on appeal) in general to apply the KRP. A policy would not be of much use if it was not generally applied. One cannot infer, from the fact that the KRP was applied, that the decision-maker was not aware of his discretion and of his duty to consider the circumstances of the case. Compliance with, rather than departure from, the KRP is what one would generally expect.

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[3] This was the pigeon-hole used in *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism & Others* 2006 (2) SA 191 (SCA) para 10 and in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd & Another* 2006 (5) SA 483 (SCA) para 18.

[4] Hoexter *Administrative Law in South Africa* 2nd Ed at 319.

[5] See, for example, *Britten & Others v Pope* 1916 AD 150 at 158 (*per* Innes CJ) and at 172 (*per* De Villiers AJA) and the *Sasol Oil* case *supra* para 19.

[6] Hoexter *loc cit* at 319-320.

[31] The departmental report, and the MEC in agreement with that report, considered that the precinct in which the property is situated was residential in character and that it was desirable to preserve that character. This was a view in keeping with, and probably inspired by, the KRP. The department and the MEC were evidently satisfied that the policy was appropriate to the circumstances of the case. The department and the MEC criticized Booth's contentions not on the mere basis that Booth was seeking something not exactly in line with the KRP but because Booth's contentions (so they believed) disregarded the KRP and the value of the guidance it afforded.

[32] An applicant seeking a favourable decision which departs from a known policy may, while acknowledging the value of the policy, explain why a departure in his particular case should be allowed and why the overall objectives of the policy will not thereby be impaired. In such a case the decision-maker must consider whether there are any circumstances which render the application of the policy to the applicant's particular case undesirable or improper[7] or, to express the same essential point differently, which makes the applicant's case an exceptional one.[8] In *Britten & Others v Pope supra* Innes CJ put the matter thus in relation to a decision by a statutory committee relating to the acquisition of retail liquor interests by liquor wholesalers (at 158-159, my underlining):

'[T]he Committee adopted the general view that, save under special circumstances, companies of the class referred to, should not be allowed to acquire the ownership of retail businesses because it tended to promote monopolies and other abuses. They did not exclude such companies from the acquisition of retail interests, but they regarded their applications with disfavour, and only consented if, upon investigation, special circumstances in support were found to exist. Such an attitude was not, in my judgment, illegal or improper. It certainly involved the exercise of discretion in each instance; and if it imposed a fetter upon that discretion (whatever that may mean), so in varying degree, would every application of general principles to the facts of a particular case. Yet it could surely not be

[7] *Johannesburg Town Council v Norman Anstey & Co* 1928 AD 335 at 342; *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 759 (N) at 774E-F.
[8] See *Kemp NO v Van Wyk supra* paras 10.

contended that each set of facts should be considered without reference to policy or principle lest the resulting decision should be invalidated.'

[33] It is a very different matter to make an application which disregards the policy or attacks it as a bad policy, which is what Booth did. In the latter situation it is, in my view, a permissible response for the decision-maker to say that since he regards the policy as sound, a proposed use which disregards its values and vision is undesirable. I think it is acceptable for a decision-maker to reason that *prima facie* a land use which is inconsistent with the policy is undesirable, since the policy itself set out to determine, for consistent future land use planning, what is and is not desirable for the area. Of course, if the applicant nevertheless puts up something to show that there are particular reasons why the policy should not be applied to his case, those must still be considered. (In the present case Booth's motivation in support of the rezoning alleged that the whole of Kenilworth Road, from the Main Road down to Rosmead Avenue, was 'literally full of business premises' (which he listed), that Kenilworth Road had 'clearly become business orientated' and that the KRP was 'outdated as it refers to a situation that existed years ago and has not kept abreast of developments in and along Kenilworth Road'. In response to objections Booth then contended that the KRP should be amended by extending the business node which existed immediately below the line down to Wessels Road so as to include the properties above the line up to Greenfield and Richmond Roads, with the new portion of the business node being reserved for 'low impact medical and office uses'. Accordingly, Mr Burger's submission that Booth wanted his rezoning application considered and was not asking for the KRP to be reviewed is not accurate. Booth's motivation involved an attack on the content of the KRP.)

[34] In *Kemp NO supra* Nugent JA (in para 10) cited with approval the following passage from *R v Port of London Authority; Ex parte Kynoch Ltd* [1919] 1 KB 176 (at 184, my underlining):

'There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case…(I)f the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection can be taken to such a

course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction between these two classes.'

[35] The MEC's approach in the present case was, in my view a legitimate one. Although the KRP was a policy which the City as the primary decision-maker in this field had adopted, the MEC regarded the policy as a sound one. It was right, furthermore, that he should display a measure of deference to the City's policy, since municipal planning is a municipal rather than a provincial executive competency (see *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* 2010 (6) SA 182 (CC) paras 49-57). He was satisfied that the stretch of Kenilworth Road in which the BFT's property is located was of a residential character and that this character should be preserved in line with the KRP. Booth had, in the MEC's view, put up nothing convincing to show that the KRP should not be applied to his application. The MEC did not refuse to entertain the appeal, just as the City had not refused to entertain the application; he indeed exercise his discretion, albeit by applying the guidance afforded by a policy he regarded as sound and by finding that there was nothing exceptional in Booth's application to warrant a departure from the policy.

[36] I have thus far confined myself to the facts as they appear from the departmental report and the MEC's statement of reasons. The MEC in his answering affidavit denied that he had applied the KRP as a fixed rule or legal prescript, stating that he had taken it into account as a relevant consideration. He also stated that he considered all the material produced as part of the rule 53 record. While assertions of this kind might in other circumstances be shown to be incompatible with the contemporaneous documents, it will be clear that I do not regard the present matter to be such a case.

[37] In developing this part of the case Mr Burger also submitted that the MEC's reasons did not suggest that WBA's proposed use of the property was visually unacceptable, ie that the property's external appearance would impair the residential atmosphere of the precinct. The MEC, so Mr Burger argued, condemned the

application on the ‘abstract’ or ‘conceptual’ basis that business use should not be allowed because this is what the KRP said. I do not agree with this criticism.

[38] Firstly, the business use of premises inevitably has some visual effect, even if it is not substantial. There would usually be (as there is in WBA’s case) a signboard. The property frontage would be adapted to accommodate parking (for example, there are seven bays on WBA’s premises). It would normally be obvious that the premises are not in fact being used as a residence and that they will thus be unoccupied at night. This inevitably affects the residential character of an area, particularly if it occurs on a large scale. The effect on the area of a change in use of a single property may be minor but it would be impossible to achieve the objective of preserving the residential character of an area if it were not permissible to block each such proposed change in use, since the approval of *ad hoc* separate applications would have a cumulative effect of degrading the residential character of the area. This type of thinking clearly forms part of the KRP and was mentioned in the departmental report as one of the City’s concerns (see paras 6.3 and 6.4). The fact that the MEC followed the guidance of the KRP and thought it desirable to retain the residential character of the area does not mean that his objection to Booth’s application was at a purely abstract or conceptual level.

[39] Second, Booth was seeking to have the property rezoned as Special Business Use, which is a zoning permitting a wide range of activities including retail trade, café, restaurant, bar or laundrette. The rezoning would be permanent. These were points highlighted by the MEC in his answering affidavit. It is true that in terms of s 42 conditions could be imposed by which some uses could perhaps be prevented. However, I doubt whether conditions under s 42 were intended as a means whereby practically everything permitted by the requested zoning would be prohibited. The need to qualify the decision so drastically would tend to confirm that the proposed rezoning is undesirable. Even conditions which restricted the use of the property to use as a law practice would not ensure that the future use of the property had the exact character of WBA’s current practice. The short point is that a rezoning is not a decision which merely permits what an applicant currently wishes to do. The assessment of the rezoning application can thus legitimately take into account the notional impacts of activities which will be permitted by the rezoning,

even though they are not impacts of what the specific applicant for rezoning currently has in mind.

[40] The first ground of attack thus fails.

The second ground: wrong onus placed on Booth

[41] Mr Burger's second contention was that the MEC had misconstrued s 36 of LUPO and thus incorrectly put a wrong onus on Booth. He argued that the MEC had approached the case on the footing that Booth could only succeed by proving that the rezoning would be positively desirable whereas the MEC could only refuse the application if he found it to be positively undesirable. Two questions arise in this regard: [a] In law, what is the test which s 36 imposes in the adjudication of a rezoning application? [b] If the test is as Mr Burger contends, did the MEC in fact apply the wrong test.

[42] Mr Newdigate SC for the MEC submitted that Mr Burger's second ground was not open to him on the papers as the point had not been taken in the founding or even in the replying affidavit. I may add that the point was not even mentioned in the heads of argument filed by Mr Burgers'' predecessor. I think Mr Newdigate's contention is sound: the MEC was simply not called upon to meet a case that he had misconstrued s 36(1) in the way contended for by Mr Burger. Nevertheless, and in case the point is open to him, I shall address it on its merits.

[43] On the first of the questions I have mentioned, Mr Burger recognised that he needed to confront what HJ Erasmus AJ (as he then was) said in *Hayes & Another v Minister of Finance and Development Planning, Western Cape, & Others* 2003 (4) SA 598 (C). At 624J-625A the learned judge said the following with reference to s 36(1) of LUPO:

'The test of desirability is conclusive – in terms of s 36(1) a departure application "shall be refused solely on the basis of a lack of desirability". Though the test is phrased in the negative, it lays down a positive test: the test is a presence of a positive advantage which will be served by granting the application.'

This passage was quoted with apparent approval in *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape & Others* [2011] 4 All SA 270 (WCC) (paras 22-23).

[44] Mr Burger submitted, without elaboration, that the passage I have quoted from *Hayes* was not part of the *ratio*. In the alternative, and more forcefully, he argued that *Hayes* was clearly wrong and that I should not follow it.

[45] Section 36 as a whole, which applies to applications for departures and rezoning (under Chapter II) and applications for subdivision (under Chapter III), is not easy to construe. Among the aspects creating ambiguity are the phrase 'shall be refused solely on the basis of' in s 36(1) and the phrase 'in considering the relevant particulars' in s 36(2). One might read s 36(1) as compelling the decision-maker to refuse the application if there is a lack of desirability or an adverse effect on existing rights, with s 36(2) setting out the further bases on which a discretionary assessment of the refusal or grant of the application must be adjudicated. On this reading, s 36(1) sets out mandatory grounds of refusal while s 36(2) sets out discretionary grounds if the application does not fail at the first hurdle. There are several difficulties with this interpretation. Firstly, such a view would surely require the grounds in s 36(1) and s 36(2) to be different (since otherwise there would always be a refusal under s 36(1)) yet there is an almost complete overlap between the grounds specified in s 36(1) and s 36(2): the safety and welfare of the community and the preservation of the natural and developed environment (the factors mentioned in s 36(2)) are surely at the heart of a desirability assessment (the criterion mentioned in s 36(1)); while effect on existing rights features in both sub-sections. Second, the criteria of desirability and effect on existing rights are too general and varying in their intensity to serve as a sensible basis for mandatory refusal. Third, a reading of s 36(1) as laying down mandatory grounds of refusal is incompatible with the Afrikaans text, which states that applications under Chapters II and III 'mag slegs op grond van…'

[46] The section as a whole thus make more sense if s 36(1) is read as providing that the only grounds on which an application may be refused (though refusal is not mandatory in these circumstances) are lack of desirability and effect of existing

rights, with s 36(2) then meaning that if the application is not refused (but instead granted), the terms of approval (for example, the extent and duration of a permitted departure or the conditions imposed under s 42 in respect of a departure or rezoning or the detailed content of a subdivision decision) must take into account only the matters specified in s 36(2) (which are in essence, once again, matters going to desirability and effect on existing rights). It must be conceded that s 36(2) does not expressly state that it is dealing with the case where an application is approved, and the phrase 'in considering the relevant particulars' is hardly the most natural way to refer to the conditions or terms of an approval. Nevertheless, the overlap between the criteria in s 36(1) and s 36(2) and the other matters I have mentioned make it difficult to avoid the conclusion that in context s 36(2) is dealing with the case where the decision-maker has decided not to refuse the application but to grant it.

[47] Be that as it may, and whatever s 36(2) may mean, I do not think the purpose of s 36(1) is to compel a refusal of the application if certain prescribed circumstances exist. The function of s 36(1), in my view, is to make lack of desirability and effect on existing rights the only bases on which a decision-maker may refuse an application. He is not compelled to refuse an application merely because there is some element of undesirability or some adverse effect on existing rights – whether, with reference to these criteria, the application should be refused or granted is a matter for the decision-maker's judgment and discretion. But what he may not do is refuse the application with reference to any other criteria.

[48] Since the purpose of s 36(1) is to identify the relevant criteria which the decision-maker may take into account in deciding whether to refuse an application, the decision-maker acts lawfully provided his decision to refuse or allow the application is based on desirability and effect on existing rights. I respectfully doubt whether the abstract noun 'desirability' and the phrase 'lack of desirability' are apt concepts to which to apply an onus or a distinction between a positive or negative test. If the decision-maker finds that a rezoning would bring about certain identifiable disadvantages, he could naturally find a lack of desirability. But the same is true if he finds that, while there are no identifiable disadvantages, there are also no identifiable advantages; in that situation the element of desirability (positive advantage) is lacking – a 'lack of desirability'. I think this latter form of 'lack of

desirability' is what the learned judge had in mind in *Hayes*. I would, though, with respect differ from him to the extent that his judgment implies that the decision-maker cannot grant an application unless the applicant establishes a positive advantage. He may refuse it on that basis but whether a lack of desirability in this form (absence of positive advantage) should lead to refusal is a matter for the decision-maker's judgment and discretion on the facts of the particular case.

[49] I thus reject Mr Burger's argument that the MEC could only have dismissed the appeal if he found that the rezoning would bring about identifiable disadvantages. I would agree with him, though, that the MEC would have committed a reviewable error of law if he had interpreted s 36(1) as meaning that he could not uphold the appeal (ie grant the rezoning) unless the applicant could establish positive advantage from the grant of the application. To the extent that *Hayes* held otherwise, I think it was clearly wrong.

[50] The second question is a factual one, namely whether the MEC based his decision on the wrong legal view that he could not uphold the appeal unless Booth had established that the rezoning would bring about positive advantages. I have already mentioned that the MEC was not called upon in his affidavit to answer a contention that he had committed such an error. The question is whether his statement of reasons or his affidavit nevertheless show that he did base his decision on a wrong interpretation of s 36(1).

[51] Mr Burger relied on the statement in para 4.3 of the MEC's reasons that Booth 'could not sufficiently demonstrate that there is not a lack of desirability' and on statements in paras 10 and 53 of the MEC's answering affidavit that the zoning application and appeal did not contain anything which persuaded the MEC that the contemplated utilisation, which was not in keeping with the current residential character of the area, would be desirable. These passages are altogether insufficient to make good Mr Burger's criticism of the MEC. The relevant statements need to be read in the context of the MEC's reasons as a whole and his affidavit as a whole. I have already summarised the letter of reasons. Its tenor is that the MEC found the proposed use to be undesirable since it would involve the business use of property in a precinct where it was desirable to maintain the residential character of

the area in line with the KRP; and that Booth had not put up anything convincing, in relation to the desirability criterion, to show why this conclusion should not stand. Overall, the finding made by the MEC was that the proposed use was positively undesirable, a finding influenced by his acceptance of the KRP as an appropriate guide. The authorities mentioned in paras 32–34 above show that this was a permissible line of reasoning.

[52] The MEC's answering affidavit is similar in its overall tenor. This is clear when one reads para 10 in the context of paras 8 and 9; and para 53 in the context of paras 46-52.

[53] I thus reject Mr Burger's second ground.

Other grounds of review

[54] I do not think it is required of a court to spend much time on contentions which a party declines to press in oral argument. I shall, however, deal briefly with a theme which occurs throughout Booth's papers, namely that the MEC was wrong to consider that the relevant part of Kenilworth was predominantly residential in character and that the MEC in particular had acted irrationally in rejecting Booth's appeal in circumstances where there were a number of business, particularly medical and health care practices, operating in the area whose negative impact on the residential character of the area were no less, and probably more, than the impact of WBA's two-man law firm.

[55] As to the residential character of the area, this was the characterisation contained in the KRP and it was confirmed by the City's PGAC in a site visit conducted on 14 July 2010 and during a site visit by the department's Mr Lombard on 10 June 2011 for purposes of the report to be placed before the MEC (see para 10.2.1 of the report). The departmental report went into this question at some length. Mr Lombard in the current proceedings made an affidavit in which he confirmed his professional opinion as being that the area is predominantly residential character. This is not a question of 'hard fact' which one could impeach (as Booth's affidavits sought to do) as a material mistake of fact in line with *Pepcor Retirement Fund &*

Another v Financial Services Board & Another 2003 (6) SA 38 (SCA). It was a matter of judgment. The view espoused by the KRP, the City and the MEC was one to which they could properly have come.

[56] The medical and health care practices in the area fall into two categories: [a] the residential care facilities at Kenilworth Clinic (a 60-bed facility for persons with psychiatric and psychological disorders) and Kenilworth House (a drug rehabilitation clinic); [b] non-residential medical and dental practices. These facilities are on properties zoned as General Residential. The zoning scheme permits, as a consent use of properties so zoned, their use as 'Institutions'. An 'Institution' is defined as including 'a hospital, nursing home and a Clinic'. A 'Clinic' is defined as meaning 'a building or portion thereof, not being a hospital or nursing home which is used for psychiatric, dental, medical, veterinary or other similar form of consultation, examination or treatment'. The various facilities to which Booth points have obtained the requisite consent uses. The MEC's view as expressed in his answering affidavit is that these do not detract from the residential character of the area and do not require a change in zoning (which is permanent and permits a wide variety of business uses and which would not be confined to a two-man law firm such as WBA).

[57] I am inclined to agree with Booth that the use of a house as a medical practice or dental surgery (where the practitioners do not also use the house as their home) is unlikely to have a lesser impact on the surrounding area than a small law firm in regard to noise, traffic, parking and visual appearance. However, the zoning scheme's thinking, in allowing such practices to function as a consent use of General Residential zoning, is presumably that these practices serve their immediate communities and are not out of place in the heart of residential areas. People, particularly families with children, tend to consult doctors and dentists who are located near where they live. Since consent use is needed before a residential property may be so used, the local authority retains a significant element of control and oversight: the number of such practices may be limited, the extent of the consent may be circumscribed, and the consent is presumably temporary, revocable and personal. Other forms of commercial activity are viewed by the zoning scheme in a different light and can only be conducted if the property is rezoned. This is a

rational distinction which the scheme is entitled to draw. For example, WBA's law practice is most unlikely to draw its clientele from Kenilworth and its immediate environs.

[58] I may add that it is by no means clear to me that there are numerous medical practices in the residential precinct of the area under consideration in this application (ie above the line). The largest practice seems to be Knighton Surgery, which is just below the Main Road on a property zoned Special Business. As far as I can tell from figure 5.2 of the KRP, this property is located in the proposed Kenilworth Village Node, which is one of the two nodes in which certain types of non-residential use were in terms of the KRP to be supported. There is a physiotherapist apparently practising in Murray Road (which runs parallel with Kenilworth Road on the north side) but the evidence does not show that the practitioner does not also reside at the house (work-from-home use is one of the business uses which was, as an exception, to be permitted in terms of the KRP and is in any event also permitted under certain conditions in terms of clause 22 of the zoning scheme). The only relevant practice above the line seems to be the dental practice of Dr Hefer on Erf 64401, which looks onto Harfield Road and the railway line.

[59] Kenilworth Clinic and Kenilworth House are facilities where patients reside temporarily. While Kenilworth Clinic in particular is a substantial operation, the fact is that the property is used for the care of residential patients and this is a use expressly contemplated by the zoning scheme as a consent use for properties zoned General Residential. The MEC stated in his affidavit that he did not regard Kenilworth Clinic as detracting from the residential character of the area. I may add that the extensive building housing Kenilworth Clinic has existed for very many years. Its lawful use as a residential psychiatric facility predated the formulation of the KRP. The KRP was anxious to avoid further degradation of the residential character of the area. One should not assume, from the fact that Kenilworth Clinic exists, that this use would necessarily be approved now (subsequent to the adoption of the KRP) if the property were currently used as a private residence.

[60] Booth gives other examples of non-residential use. Some, like the two properties he mentions in Braeside Road, are too distant to bear on the residential character of Kenilworth Road. Others are below the railway line. The shop Art of Glass is part of Kenilworth Station (it is in a building which used to form part of the station). At least one of Booth's examples above the line (the financial services business just below Knighton Surgery) is an unlawful use. The guest houses he mentions (only one is on Kenilworth Road, the other two on Cumnor Avenue are some distance away) are of a different character, being essentially residential in nature, with the owners in all probability also residing on the properties. It is unsurprising that the KRP permits use as a guest house or bed and breakfast establishment as an exception to the general policy of not supporting further business intrusion into the residential precinct of Kenilworth Road.

[61] I thus do not consider that the MEC committed a reviewable irregularity in his assessment of the character of the area or in declining to treat Booth's rezoning on the same footing as a medical practice.

Conclusion on the review

[62] It follows for all the above reasons that the review application fails.

The interdict application

[63] Mr Burger conceded that if the review failed there was no defence to the interdict application.

[64] I raised with counsel the question whether the operation of the interdict could and should be suspended for a short period to prevent prejudice to WBA's clients. No request for a suspension (if the review were to fail) was made by Booth in his affidavits and no facts to support a suspension were put up. I nevertheless think that common sense dictates that some prejudice to WBA's clients would inevitably be caused if, from the moment my order is made, the property could no longer be used as a law practice except on pain of a finding of contempt. Consultations and other

preparations for pending cases could be seriously jeopardised. Mr Burger suggested a suspension of two to three months.

[65] Mr A Katz SC, who appeared with Ms M O'Sullivan for the City, submitted that because the use of the property contrary to its zoning is a criminal offence in terms of s 39(2) read with s 46(1)(a) of LUPO I did not have the power to suspend the operation of the interdict (even if the review succeeded). He cited as authority for this view the judgment of Fourie J in *Bitou Municipality v Timber Two Processors CC and Another* 2009 (5) SA 618 (C) paras 32-33 but drew my attention to the contrary opinion of Binns-Ward J in *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs* [2010] 4 All SA 414 (WCC) paras 43-49. It so happens that the view expressed in the latter case accords with my own more briefly stated conclusion in *Intercape Ferreira Mainliner (Pty) Ltd & Others v Minister of Home Affairs & Others* 2010 (5) SA 367 (WCC) para 184 (the *Bitou* case had not yet been reported and it was not addressed in my judgment). Fortified by the fuller reasoning in *Voortrekker Road*, I remain of the view that there is the power to suspend an interdict, even where the conduct in question is criminalised. I do not think that the criminalisation of the conduct detracts from the jurisdiction to suspend though it may affect its exercise. Even where the unlawful conduct forming the basis of an interdict has been criminalised, the court granting an interdict in civil proceedings is not determining that the respondent has committed a criminal offence. The court deals with the matter in its civil aspect only. Notionally a respondent might be found to have committed a civil wrong and yet escape a criminal conviction (because of the higher burden of proof, the issue of *mens rea* and so forth). A court which grants a civil interdict but suspends the order no more condones the potentially criminal conduct than it does the civil wrong. The court merely refrains from adding the immediate risk of contempt and judicial execution in recognition of the practical difficulty the respondent may face in effecting immediate compliance or the harm which may be suffered by third parties.

[66] In the present case, and in the absence of evidence on the matter from Booth, I do not believe a suspension of more than one month is needed to prevent serious harm to WBA's clients. Booth has been practising in unlawful breach of the zoning scheme for many years. He should not have put his firm and his clients in the

position they now find themselves. Having done so, he should at least have made some contingency plan in the event of the court finding against him. He will need urgently to find other premises, at least as a temporary arrangement pending permanent relocation to another site.

Conclusion and order

[67] The MEC is entitled to his costs in the review. The City is entitled to its costs in both the review and the interdict. In regard to the review, Booth asked in his application that the MEC's decision be substituted with a decision granting the rezoning. Although the City defended its refusal of the rezoning and the MEC's dismissal of Booth's appeal on the merits, its primary reason for asking to be joined was to oppose the substitution order which it saw as impermissible unless the City's decision to refuse the rezoning was also attacked and set aside. It was only in oral argument before me that Booth through counsel abandoned the request for a substitution order. In the interdict proceedings the City asked for costs on an attorney and client scale. While Booth's conduct in disregarding the zoning restrictions for so long is to be deprecated, his conduct in the current litigation has not been such as to warrant a special costs order.

[68] I thus make the following order

1. In case 2046/12 (the review):

   [a] The application is dismissed.

   [b] The applicant shall pay the costs of the respondents, in each case including the costs of two counsel.

2. In case 22990/11 (the interdict):

   [a] It is declared that the operation of the attorney's practice that trades under the name and title of William Booth Attorneys on Erf 64403 Kenilworth, also known as 29 Kenilworth Road Kenilworth ('the property'), is in contravention

of the Municipality of Cape Town Zoning Scheme Regulations ('the zoning scheme regulations') and s 39(2) of the Land Use Planning Ordinance 15 of 1985 ('LUPO').

[b] It is declared that the use of the property for the operation of the said attorney's practice is in contravention of the zoning scheme regulations and LUPO and is unlawful.

[c] The respondents are interdicted and restrained from using, or permitting the use of the property, or any portion thereof, in a manner which contravenes the General Residential use zone applicable to the property and the provisions of LUPO.

[d] The order in para (c) is suspended for a period of one month from the date of this order.

[e] The respondents shall jointly and severally be responsible for paying the applicant's costs, including the costs of two counsel. This shall include the costs of the appearances on 12 December 2011 and 7 February 2012 which stood over for later determination

ROGERS J

APPEARANCES

For Applicants in Case 2046/12 and for Respondents in Case 22990/11 :	WG BURGER SC (with MV COMBRINK) Instructed by: West & Rossouw Attorneys Cape Town
For First Respondent in Case 2046/12:	J NEWDIGATE SC (with A DU TOIT) Instructed by: The State Attorney Cape Town
For Second Respondent in Case 2046/12 and for Applicant in Case 22990/11:	A KATZ SC (with M O'SULLIVAN) Instructed by: Fairbridges Cape Town