



REFERENCE: 14/3/1/A2/30/0378/19

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Dear Mr Loffie-Eaton

APPEAL AGAINST THE REFUSAL TO AMEND THE ENVIRONMENTAL AUTHORISATION FOR THE PROPOSED ESTABLISHMENT OF AN INDUSTRIAL/RETAIL PARK AND ASSOCIATED INFRASTRUCTURE ON PORTION 1, 33 AND 45 OF CAPE FARM 609, PORTION 1 OF CAPE FARM 699 AND PORTION 2 OF CAPE FARM 701, PHILIPPI

1. The appeal lodged in terms of section 43(2) of the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* ("NEMA") against the Refusal of Environmental Authorisation ("EA") issued by the Department of Environmental Affairs and Development Planning's Director: Development Management (Region 1) for the proposed establishment of an industrial/retail park and associated infrastructure on Portion 1, 33 and 45 of Cape Farm 609, Portion 1 of Cape Farm 699 and Portion 2 of Cape Farm 701, Philippi has reference.
2. After careful consideration of the appeal, conciliation report, as well as supporting documentation received, I have decided to dismiss your appeal.
3. **REASONS FOR THE DECISION**
 - 3.1 It is agreed that the EIA Regulations, 2014 makes provision for a party, other than the holder of the EA, to submit an application for the amendment of such EA. The competent authority can however exercise its discretion in determining whether to authorise the amendment applied for, having due consideration for the merits of the matter.
 - 3.2 As indicated by the holder, the EA was obtained subject to considerable cost and time. It is unlikely that the intent of the 2017 NEMA EIA amendments was for a third party to usurp the rights of a holder who had lawfully acquired such EA by virtue of the former owning the land or having purchased the land.
 - 3.3 The *Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000)* ("PAJA") is clear that:

"3. Procedurally fair administrative action affecting any person

(1) *Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*

(2) (a) *A fair administrative procedure depends on the circumstances of each case.*

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

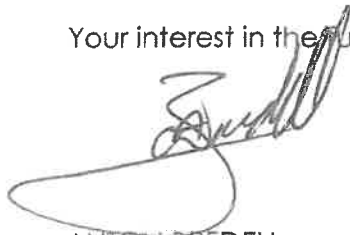
(v) adequate notice of the right to request reasons in terms of section 5."

- 3.4 The competent authority in concluding that the appropriate decision in this matter was to refuse the amendment as requested, was fully compliant with the PAJA stipulations for administrative action that is procedurally fair. The competent authority did not make a mistake in law by misinterpreting the regulations as requiring the consent of the holder of the EA in order to grant the application. Due regard was given to representations made by the holder, as the decision of the competent authority would materially affect its rights and legitimate expectations, having undertaken an EIA process to obtain an EA.
- 3.5 It has been argued that by virtue of your ownership of the property, intent to develop such property and the position that you would not grant the holder authorisation to exercise the rights as contained in the EA, such rights and obligations should be transferred, as to require you to undergo the rigorous EIA process for which the holder had obtained authorisation would be costly, time-consuming and superfluous as the necessary assessment had already been undertaken.
- 3.6 You had expressed the view that the holder is not entitled to any form of compensation for undertaking the costly and time-consuming exercise of applying for and attaining an EA to undertake the proposed activities. Following the conciliation process, you have now indicated a willingness to reimburse the holder for actual expenses incurred toward procuring the EA, rezoning and Water Use Licence, the cost of a Water Use Licence as well as R350 000 representing the saving of not having to apply afresh. This offer was refused by the holder.
- 3.7 The view expressed by the holder that granting this amendment against his objections would be precedent setting was noted. Every matter is however considered on its merits.
- 3.8 With regard to the argument that no reasonable person would come to the same decision as the competent authority, as a landowner cannot be prevented from developing its property by a third party. It can equally be argued that no reasonable person would likely conclude that after spending tens of thousands of rands to obtain an EA, the party be stripped of those rights by way of a two-thousand-rand amendment application process against the objections of the holder and without any prospect of agreed upon compensation.
- 3.9 All relevant factors were considered. One party cannot make a determination as to which factors are relevant and which are not, to the detriment of another.
- 3.10 The right of the owner of the property to develop the land is not disputed, the holder however submitted relevant applications to lawfully develop the property with the intention to purchase the property. The holder's contract was however void due to an administrative process not being completed within an agreed upon timeframe.

- 3.11 The matter at hand involves a request for compensation from the holder of the EA in respect of the EA, Water Use Licence and Land Use Planning authorisation, the latter authorisations being outside the purview of my authority.
- 3.12 NEMA makes provision to "*confirm, set aside or vary the decision, provision, condition or directive or make any other appropriate decision, including a decision that the prescribed fee paid by the appellant, or any part thereof, be refunded*". It does not allow for the determination of the financial value of an EA and hence my referral of this matter for mediation. It would have been best for the parties to agree without recourse to an appeal. The recommendation provided by the mediator therefore cannot be actioned as there is no legislative provision to attach a financial value to an EA, that had been lawfully acquired, to force the holder to transfer such EA to another party and accept an offer already refused, against his wishes.
4. As a consequence, *Forthwith Properties (Pty) Ltd* remains the holder of the EA until such EA lapses. An amendment application for an extension of the timeframe of the EA, by *Forthwith Properties (Pty) Ltd*, will require consent from the property owner, *Gondotrim (Pty) Ltd*.
 5. An application for the amendment of the EA in respect of a change of ownership can be submitted prior to the expiry of the EA if such application is submitted by *Forthwith Properties (Pty) Ltd* or alternatively by *Gondotrim (Pty) Ltd* with the consent of *Forthwith Properties (Pty) Ltd*.
 6. *Gondotrim (Pty) Ltd*, as the property owner can submit an application for environmental authorisation.
 7. Alternatively, the parties may revert to the recommendations put forward by the mediator or come to a mutually beneficially agreement that will enable the EA to be amended.

Since I have discharged my decision-making powers when making the decision I am *functus officio* in this regard. My decision is final and your only recourse, should you still be aggrieved by my decision, is to apply to the Western Cape High Court to review my decision.

Your interest in the future of our environment is appreciated.



ANTON BREDELL
**WESTERN CAPE MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING**

DATE: 2/9/2019

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