



REPORT TO: MUNICIPAL PLANNING TRIBUNAL

ITEM NO MPTSW45/05/2022

Case ID	70591928
Case Officer	M Solomons
Case Officer phone number	021 444 9542
District	Southern
Report date	27/04/2022

WARD 71: APPLICATION FOR AN ADMINISTRATIVE PENALTY IN TERMS OF THE CAPE TOWN MUNICIPAL PLANNING BY-LAW, 2015 (MPBL): ERF 108376 CAPE TOWN AT RETREAT, 42 ABERFELDY ROAD, STEENBERG

1 EXECUTIVE SUMMARY

Property description	Erf 108376 Cape Town at Retreat
Property address	42 Aberfeldy Road, Steenberg
Site extent	713m ²
Current zoning	Single Residential Zone 1
Current land use	A place of instruction in the form of an Early Childhood Development (ECD) Centre (currently with 19 or 23 children – the applicant's motivation refers to both figures) and a swimming school.
Overlay zone applicable	None
Submission date	21/02/2022
Subject to PHRA / SAHRA	No
Any unauthorised land use / building work?	Unauthorised land use relating to the operation of an ECD centre (currently with 19 or 23 children – the applicant's motivation refers to both figures) and a swimming school on the subject property.
Has owner applied for the determination of an administrative penalty	Yes
Has the City Manager applied to the MPT for an order that a person who is contravening the MPBL must pay an administrative penalty in an amount determined by the MPT	No
Has the City issued a demolition directive i.t.o section 128 of the MPBL? If yes, an administrative penalty may not be applied for.	No
Has the City served a notice on the owner or other person in respect of the unlawful land use or building work which required the owner or other person to apply for the determination of an administrative penalty?	No

2 DECISION AUTHORITY

For decision by the Municipal Planning Tribunal (MPT).

3 BACKGROUND / SITE HISTORY

- 3.1 The main land use application that is required to legalise the ECD centre and the swimming school has not yet been submitted.

4 **SUMMARY OF APPLICANT'S MOTIVATION**

The applicant's motivation is attached as Annexure B and is summarized as follows:

- The current owners bought the property in 2007 with the swimming school already in operation.
- The swimming pool has an approved building plan. This approved building plan led the owners to believe that the swimming school was authorised.
- The current owners were unaware that the swimming school had no approval in place.
- The swimming school offers vital skills to local communities.
- The swimming school operates from Monday to Saturday.
- Most lessons are individual lessons with a maximum of 3 children and 3 teachers.
- The pre-school groups vary between 3 and 5 children.
- Squad swimming can have up to 8 members with usually half in the water at any point.
- The owner bought the property with the intention of operating a swimming school and did not intend of residing on the property.
- The ECD centre has been in operation since 2014 and is run from the other portion of the property; there is currently 23 children enrolled at the school.
- The ECD centre is open Monday to Fridays.
- When trying to register the school, the owners were made aware of the fact that the ECD centre was operating illegally. The owners proceeded to regularize the activities as soon as they became aware that the land use was not authorised.
- The activity does not pose a safety, fire or any other hazard as the structures were built according to approved building plans and there is no unauthorised building work.
- All the staff employed at both the swimming school and the ECD centre are fully qualified.
- No complaints have been received from any of the neighbours and no notice was has been served.
- Effectively the entire property is been used for the unauthorised land use.
- The owner of the property has not previously contravened the By-Law or other planning law.

5 ASSESSMENT OF APPLICATION

- 5.1 The swimming school and ECD Centre on the subject property are in contravention of Item 21 of the Development Management Scheme (DMS). Places of instruction are only permitted in Single Residential Zone 1 with consent (which has not been applied for or approved in this instance).
- 5.2 In terms of section 129(7)(b) of the MPBL, an administrative penalty for a land use contravention may not be more than 100% of the municipal valuation of the area that is used unlawfully.

- 5.3 The municipal value of the property is R1 385 000.00 as per GV2018 (see Annexure D).
- 5.4 Effectively the entire property is been used for the unauthorised land use, and thus an amount, which is not more than 100% of R1 385 000.00, may be imposed as an administrative penalty.
- 5.5 The following factors need to be considered when determining an appropriate administrative penalty, as contemplated by section 129(8) of the By-Law:

a) The nature, duration, gravity and extent of the contravention

Nature – The contravention relates to the operation of a swimming school and an ECD centre (currently with 19 or 23 children – **the applicant's motivation** refers to both figures) on the subject property.

Duration – According to the applicant, the swimming school has been in operation since before the current owner purchased the property in 2007, and the ECD centre has been in operation since 2014. The duration of the contravention is thus long.

Gravity – The gravity of the contravention is serious given that it relates to the care of children at both a swimming school and an ECD centre. Inter alia, this means that a proper assessment in terms of fire and environmental health are unlikely to have taken place. Furthermore, there is the potential that these sorts of facilities can create negative impacts on the amenity of the surrounding residential properties.

Extent – Effectively the entire property is being used for the swimming school and ECD Centre. The extent of the contravention is thus large.

b) The conduct of the person involved in the contravention

The applicant has stated that the current owners bought the property with the swimming school already in operation and assumed that the necessary approval were already in place. It is difficult to accept that someone who purchased a property with the express intent to continue with a swimming school **did not ask for a copy of the approval. But even if the applicant's** explanation is correct, it suggests negligence on the part of the owners.

The ECD centre on the property was started by the current owners. Given the numerous attempts by various authorities over many years to get ECD centres to register and raise awareness of the need to register, it is difficult to accept that the owners were not aware of the need for a land use approval. It thus appears that the contravention was willful. Even if it was ignorance, it must be pointed out that ignorance of the law is not a valid excuse.

The conduct of the owners cannot be condoned.

c) Whether the unlawful conduct was stopped

The unlawful activity has not ceased.

d) Whether a person involved in the contravention has previously contravened this By-Law or any other planning law

As far as can be ascertained, the current owners have not previously contravened this By-Law or any other planning law.

5.6 In view of the abovementioned considerations, and in particular the conduct of the owners, the extent of the contravention, the gravity of the contravention, and the long duration of the contravention, this Department recommends that an administrative penalty of R10 000.00 be imposed.

6 REASONS FOR DECISION

Reasons for the recommended decision may be summarised as follows:

- 6.1 The swimming school and the early childhood development centre contravenes Item 21 of the Development Management Scheme.
- 6.2 The duration of the contravention is long.
- 6.3 The gravity of the contravention is serious given that it relates to the care of children at both a swimming school and an ECD centre. Inter alia, this means that a proper assessment in terms of fire and environmental health are unlikely to have taken place. Furthermore, there is the potential that these sorts of facilities can create negative impacts on the amenity of the surrounding residential properties.
- 6.4 The extent of the contravention is large.
- 6.5 The applicant has stated that the current owners bought the property with the swimming school already in operation and assumed that the necessary approval were already in place. It is difficult to accept that someone who purchased a property with the express intent to continue with a swimming school did not ask for a copy of the approval. But even if the applicant's explanation is correct, it suggests negligence on the part of the owners.
- 6.6 The ECD centre on the property was started by the current owners. Given the numerous attempts by various authorities over many years to get ECD centres to register and raise awareness of the need to register, it is difficult to accept that the owners were not aware of the need for a land use approval. It thus appears that the contravention was willful. Even if it was ignorance, it must be pointed out that ignorance of the law is not a valid excuse.
- 6.7 The conduct of the owner cannot be condoned.
- 6.8 The unlawful conduct has not ceased.
- 6.9 As far as can be ascertained, the owners have not previously contravened this By-Law or any other planning law.

7. RECOMMENDATION

In view of the above, it is recommended that:

- a) An administrative penalty in the amount of R10 000.00 be determined in terms of Section 129 of the City of Cape Town Municipal Planning By-Law, 2015 in respect of Erf 108376 Cape Town at Retreat with regard to the unauthorised swimming school and early childhood development centre.

ANNEXURES

Annexure A	Locality plan
Annexure B	Applicant's motivation
Annexure C	Site development plan
Annexure D	Municipal valuation
Annexure E	Affidavit



Section Head: Land Use Management

Name P Hoffa

Tel no 021 444 7724

Date 2022-04-27

Comment



District Manager

Name U Gonsalves

Tel no 021 444 7720

Date 2022-04-28

Comment

LOCALITY MAP 0797
DEVELOPMENT MANAGEMENT

ANNEXURE : A



Overview

Erf: 108376

District: SOUTHERN

Allotment: CAPE TOWN

Suburb: STEENBERG

Ward: 71

Sub Council: 20



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Notices Served	●	Support Received	✓
Petition Signatory	■	Objections Received	✗

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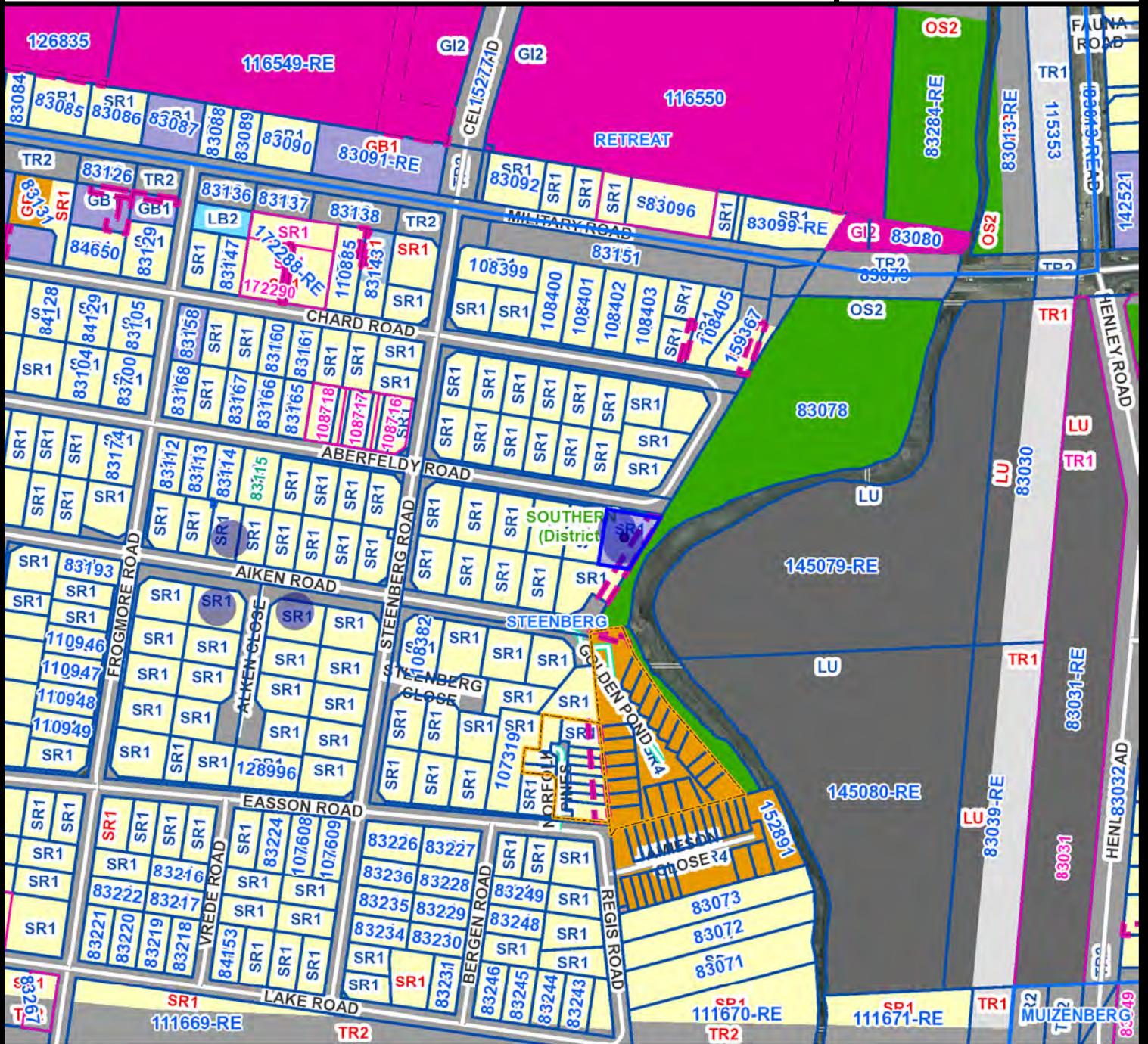


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Making progress possible. Together.

LOCALITY MAP 0798
DEVELOPMENT MANAGEMENT

ANNEXURE :



Overview

Erf: 108376

District: SOUTHERN

Allotment: CAPE TOWN

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Notices Served	●	Support Received	✓
Petition Signatory	■	Objections Received	✗

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01/07/2021

APPLICATION FOR THE DETERMINATION OF AN ADMINISTRATIVE PENALTY: ERF108376, 42 ABERFELDY ROAD, RETREAT,

1. Introduction

This application serves to motivate the administrative penalty relating to the unauthorised use of the property as a swim school and early education centre. The application is submitted in terms of Section 42(r) of the City of Cape Town Municipal Planning Amendment By-Law ('MPBL'), and must be considered together with the application for a departure in terms of the By-Law. The application form is attached as Annexure A.

The Power of Attorney is attached as Annexure B.

Section 129 of the MPBL deals with an "Administrative Penalty" and reads as follows:

A person who is in contravention of this By-Law, and who wishes to rectify the contravention in terms of Section 130, may apply to the City for the determination of an administrative penalty if the City has not issued a demolition directive (in terms of subsection 128) in respect of the land or building or part thereof concerned.

129(2) A person making an application contemplated in subsection (1) must-

- (a) submit an application;*
- (b) pay the prescribed fee;*
- (c) provide the information contemplated in subsections (7) and (8); and*
- (d) comply with the duties of an applicant in section 78.*

129(8) When determining an appropriate administrative penalty, the Municipal Planning Tribunal must consider at least the following factors –

- (a) The nature, duration, gravity and extent of the contravention;*
- (b) the conduct of the person involved in the contravention;*
- (c) Whether the unlawful conduct was stopped, and*
- (d) Whether a person involved in the contravention has previously contravened the By-Law or a previous planning law.*



2. Description and extent of unauthorised land uses

2.1 Swim School



Figure 1 - Interior of the swimming school

The current owners D Rigotti & H Slack, bought the property in 2007. They purchased the swim school as a going concern and took on all 6-8 staff obligations.

The Swimlab swimming pool is enclosed in a very large building. The building plan for the swimming pool structure was approved by council in 2005 and is nearly twice the size of the dwelling house indicated on the plans.

The new owners were completely unaware that there was no approval for a Place of Instruction, or that one was needed. They were under the impression that the building plan approval for such a large indoor swimming pool indicated the approval of the swimming school.

It is considered reasonable that the new owners expected that the approved swimming pool was intended not only for the use of the resident of the house.

Apart from providing "normal" swimming lessons the school is the only swim school in the southern suburbs (the only other one is in Pinelands) that provides a fetching and teaching service from pre-schools and creches. This service is offered as part of their social commitments to improve vital life skills to some the local communities around them who would otherwise struggle to afford the lessons.

The swim school operates from Monday to Saturday midday. The school does not operated on a Saturday afternoon or on a Sunday.

Mondays 09:00 AM to 11:00 - small groups of pre-primary children which are fetched from their schools, taught and returned. The school services the Steenberg/Retreat, Costa da Gama and Kirstenhof community pre-schools with the group lessons on this day - from 1st Feb to end of school term in December. These lessons stop during all school holidays.

Monday	13:00 to 18:00 - individual learn to swim lessons
Tuesday	09:15 to 11:00 - pre-school groups from Elfindale;
Tuesday	13:00 to 18:30 - individual lessons
Wednesday	09:00 to 12:30 - Norfolk Park, Muizenberg & Retreat pre-schools
Wednesday	13:00 to 18:00 - individual lessons
Thursday	13:00 to 18:00 - individual and squad lessons
Friday	13:00 to 17:30 - individual and squad lessons
Saturday	08:00 to 13:00 - individual and squad lessons

Most lessons are individual lessons with a maximum of 3 learners in the pool - the average is two. There are never more than 3 teachers in the pool at any one time.

The Pre-school groups vary between 3 and 5 learners. The school does sometimes accommodate two groups at the same time and in those cases there are a maximum of 8 children in the pool.

Squad swimming can have up to 8 members with usually half in the water at any point



Figure 2 - Interior of the swimming school