

# Can a municipality "change its mind"?

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What are the legalities around a governmental decision maker's conduct in taking a decision and thereafter revoking or amending that decision - i.e. where the decision maker "changes its mind"?



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## Decisions that affect the public

In this article we are only referring to decisions of a governmental decision maker that have external legal effect on members of the public – i.e. they affect consumers or persons who reside in South Africa. What follows does not apply to internal policy decisions made by such decision makers in relation to their own operations, to the extent that these decisions do not affect the public.

## Functus Officio

It is trite (accepted) law in South Africa that once a decision maker has made a decision, unless it is authorised to revoke or amend that decision in some way or another, that decision is “final” and the decision maker has no further capacity in relation to that decision.

For good governance reasons, a review or appeal of that decision should be referred to another body, in order that an independent party adjudicates any dispute that has arisen in relation to the decision and the matter is not simply referred back to the same decision maker for a second time.

## The general principal

As such, in terms of our law it is not normally lawful for a governmental decision maker to simply “change its mind” in relation to a decision that has external legal effect. Allowing a decision maker to “change its mind” or revoke or amend its original decision and replace it with another would fly in the face of the functus officio principle, create the potential for fraud, and open the door to bias (when the decision maker is required to decide on a dispute raised in relation to its own decision).

## **When and how can a governmental decision be lawfully amended or set aside?**

It would be possible for a governmental decision maker to be authorised in law to “change its mind” and to set aside or amend its own decision provided that it was expressly authorized by some or other law to do this (such as in legislation or case law). For example, the general rule expounded upon above does not apply to situations in terms of which our law gives a governmental decision maker the power to grant approval or consent subject to certain conditions, such that in cases where those conditions are not complied with the decision maker is lawfully authorised to retract or revoke its approval or consent. For example, if a municipality approved a rezoning application on the basis that the property owner consolidates the property with another property, the municipality would be entitled to revoke its approval of the rezoning application in the event that the property owner refused or failed to comply with the consolidation condition.

Alternatively a decision taken by government can be overturned by a different body on appeal/review, if legislation (or case law) provides for this. Note, however, that if a decision maker’s decision is overturned by a different body, then this is not a case of the decision maker “changing its mind” – in cases such as these the decision has been set aside and replaced by a different body with lawful authorisation to do so.

Thirdly, a governmental decision maker that seeks to set aside its own decision and replace it with another, can make application to court in terms of the principle of legality to overturn its own decision, but this can be done only after any prescribed review/appeal processes have taken place (or if there are no prescribed review/appeal processes).

### **Caution regarding “informal advice”**

In the situation where no formal application for a formal response from the municipality has been made by the consumer, when a municipal official is approached by a member of the public and asked whether the municipality would support a particular application, or whether it would be able to assist with the provision of a particular service to a property in certain area, the advice forthcoming from the relevant municipal official may not be binding on the municipality because it may constitute mere informal or “off the cuff” advice.

Accordingly if a municipal official gives a person informal advice, and this flies in the face of a decision which is formally taken by the municipality in relation to the same issue at a later time, this does not constitute the municipality revoking a prior decision or changing its mind and in this context the discrepancy in the advice received will not be actionable as such.

### **Post Script: Withdrawing or revoking decisions of municipal valuers**

City of Johannesburg Metropolitan Municipality (COJ) has on a number of occasions in the recent past, withdrawn or revoked decisions taken by its municipal valuers in relation to objections lodged by consumers, and purported to replace the outcomes of those decisions with different ones. This conduct is unauthorised by law and is accordingly unlawful and invalid, and the legal effect of this conduct is simply that the original decision remains intact and is enforceable whilst the “revised” decision is invalid and cannot be acted upon or enforced at all.

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