Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6561/2015

Before: The Hon. Mr Justice Binns-Ward
Hearing: 20 October 2016
Judgment: 13 January 2017

In the matter between:

JOAO JOSÉ RIBEIRA DA CRUZ	First Applicant
THE BODY CORPORATE OF THE FOUR SEASONS SECTIONAL TITLE SCHEME (SS 269/08)	Second Applicant

and

THE CITY OF CAPE TOWN	First Respondent
THE TRUSTEES OF THE SIMCHA TRUST	Second Respondent

JUDGMENT

BINNS-WARD J:

[1] Section 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 ('the Building Act')[1] has been a fecund root of litigation and the subject of strikingly divergent judicial interpretation. This is yet another case arising from the approval of building plans by a local authority in terms of the provision. The applicants, who are the body corporate of a 17-storey mixed use building in central Cape Town called 'Four Seasons' and the owner of one of the residential units in the building, have applied for the judicial review and setting aside of the decision by the

[1] The relevant text is set out in paragraph [21] below.

municipality of the City of Cape Town to approve building plans for the remodelling and upward extension of a building on the immediately adjoining erf (Erf 5284, Cape Town) known as the Oracle building. The City was cited as the first respondent and the owner of the adjoining erf as the second respondent. Both respondents opposed the application.

[2] The City had originally approved building plans for the work on Erf 5284 in 2008. Building operations commenced shortly thereafter, but they were soon discontinued due to the adverse economic conditions prevailing at the time. Construction was resumed only in 2012.

[3] The approved building plans provide for the renovation and extension of the Oracle building to comprise a structure consisting of eight floors above the ground floor, with a roof terrace over part of the new top floor. The newly created sixth floor of the Oracle building will be at a level that more or less corresponds with that of the eighth floor of the Four Seasons building.

[4] Affected owners of units in the Four Seasons building, who had not been given notice of the building plan application, became excited by the building activity only when it became apparent, during 2012, that the levels being added to the Oracle building were being built flush with the common boundary, right up against the balconies of the apartments on the Table Bay facing side of the applicants' building on the eighth storey, and more or less three metres from the windows of the apartments on the ninth and tenth storeys on that side of the Four Seasons building. [2]

[5] The second respondent acquired the Oracle building in 2006. It was reportedly in a derelict condition at that time and stood only four storeys high. The Four Seasons building was erected adjacent to it between 2005 and 2007. The first seven storeys of the Four Seasons building, which provide a parking garage, were built right up to the common boundary line between the two properties so as to directly abut the Oracle building.[3] The residential accommodation in the applicants' building comprises apartments on the eighth and higher storeys. The levels on which

[2] The second respondent's valuer determined the distance as '±2.8' metres. (See para. 2.8 of the report of Mr. Saul Du Toit, dated 8 February 2015.) At the inspection *in loco*, the depth of the balconies was paced out and estimated to be between 3 and 3,5m.

[3] The parking levels in the Four Seasons building reportedly make provision for parking not only for the residential units in the building itself, they also provide 120 bays for The Square sectional title development on the opposite side of Buitenkant Street.

the apartments are situated are set back about three metres from the common boundary with Erf 5284. The roof space above the top floor of the parking garage between the common boundary and the set back façade of the eighth to seventeenth storeys was designed to provide small balconies for the apartments on the eighth floor.

[6] Prior to the upward extension of the Oracle building, the apartments on the Table Bay facing side of the Four Seasons building, being at a higher level, would have looked out over its roof. It is not disputed, however, that purchasers of apartments between the eighth and tenth floors of the Four Seasons might reasonably have expected the views from those apartments to be blocked by future development of Erf 5284 if regard were had to what was permitted in terms of the applicable zoning scheme regulations. This case is therefore *not* about any alleged right to a view. It arises out of allegations concerning what the applicants contend would be the unduly intrusive and objectionable character of an aspect of the building extension on Erf 5284.

[7] Erf 5284 was zoned as General Commercial subzones C4 and C5 (a so-called 'split-zoning') in terms of the erstwhile zoning scheme of the City of Cape Town. By virtue of certain transitional provisions under the current zoning dispensation, the erstwhile scheme continued to be of effect for the purposes of the determination of the building plan application. The zoning permitted 100% building coverage of the property. Accordingly, 0 metre building setbacks were permissible on all its boundaries. As far as may be determined from the photographic evidence, it seems that the pre-existing building on Erf 5284 took full advantage of the permitted coverage provision. Similarly, the Four Seasons building appears to cover the entire property on which it was erected, with setbacks only above the parking levels.

[8] Aerial photographs put in evidence show that it is commonplace in the area, which is in the inner city, for adjoining buildings to be built right up against each other. It is evident that they are usually designed with this in mind. The photographic evidence depicts the walls on the boundaries between adjoining erven as invariably blank, or mainly blank; that is without windows or living spaces such as balconies. The Four Seasons building is a striking exception to the rule. But even the Four Seasons building has a blank wall on its Harrington Street façade, presumably with an

eye to the future development of the adjoining erf on that side which, on the photographic evidence, appears currently to have an old building on it.

[9] The area in issue was categorised as an urban conservation area in terms of the erstwhile zoning scheme. The council's consent in terms of reg. 108 was consequently required for the proposed extension of the Oracle building. As pointed out in the departmental report prepared in respect of the second respondent's application for the required consent, '[t]*he consent relates to heritage/aesthetic aspects and has no bearing on development rights*'.[4] In other words, the determination whether consent should be granted would be governed by the council's perception of the impact of the appearance of the proposed building in its urban environment.[5] The aerial photographs afford a good impression of the general appearance of the building within its urban context. It does not stand out as incongruous. There is no challenge to council's decision to grant the required consent. The case is therefore also not about the general character or outward appearance of the extended Oracle building; it is about an aspect of it that would not be of concern to passers-by on the pavement, or, indeed, to the owners or occupants of any neighbouring buildings other than the Four Seasons building.

[10] Construction of the additions to the Oracle building had reached a relatively advanced stage before it was halted pursuant to an interim prohibitory interdict granted by Dolamo AJ on 12 December 2012, at the instance of a number of unit owners in the Four Seasons building.[6] One is consequently able to obtain a real impression of the effect of the extended building on the affected apartments in the Four Seasons building. That, no doubt, was the reason the court was asked by the applicants to conduct an inspection *in loco* before hearing argument in the

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[4] Annexure PH2 to the City's answering affidavit.

[5] The nature of the assessment required in terms of the application for consent in terms of reg. 108 of the zoning scheme regulations was described in the departmental report as '… to determine the impact of the proposed changes to the building façade on the heritage fabric of the area'. The enquiry, as the report itself points out more than once, was discrete from that which it was appreciated would require to be undertaken in terms of the Building Act before the building plans could be approved. Obtaining the consent required in terms of reg. 108 was one of the steps that the second respondent had to take to qualify their building plans as compliant for the purposes of s 7(1)(a) of the Building Act. The building plan application was resubmitted to the City for approval in terms of the Act in June 2014, approximately four months after consent had been obtained in terms of reg. 108.

[6] See *De Jong and Others v Trustees of the Simcha Trust and Another* [2012] ZAWCHC 387.

application.[7] A graphic depiction of the effect is given in the set of colour photographs attached as annexure JC8 to the first applicant's founding affidavit. The confining effect on some of the apartments in the Four Seasons building of the solid unbroken wall of the Oracle building being built flush against the boundary is amply illustrated by those photographs. The effect is most striking at the eighth floor level, where there were balconies. The effect of the construction on Erf 5284 has been to change the character of the areas that were designed to be balconies into small courtyards confined between towering walls.

[11] The interim interdict was granted pending a judicial review of the City's 2008 decision to approve the plans. The ensuing review application was upheld and the approval of the building plans was set aside in terms of an order taken by agreement before Desai ADJP. Absent any defence predicated on the advanced state of the building work (cf. *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA), especially at paras. 28-29), the challenge to the building plan approval had to succeed in those proceedings because, notwithstanding the judgment in *Walele v City of Cape Town and Others* [2008] ZACC 11, 2008 (6) SA 129 (CC), 2008 (11) BCLR 1067 given four months earlier in litigation to which the City had been actively party, the City's decision had been made without reference to a motivated recommendation by the building control officer in terms of s 6(1)(a) of the Building Act.[8] Although the 2013 review

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[7] The respondents' counsel did not concede that an inspection *in loco* would be relevant to the determination of the case, but they raised no objection to it. At the court's request the parties put in a minute constituting an agreed record of the observations made at the inspection. The most relevant part of it goes as follows:

3 The parties then inspected unit 806 at Four Seasons, on the eighth floor. On the balcony of this unit it could be seen that the second respondent's building ('the Oracle') was built hard up against the balcony of the units on the eighth floor of Four Seasons.

4 It was pointed out that the Oracle had reached its maximum height, at least in respect of the area in the vicinity of where the parties were standing.

5 It could be seen that the façade of the room was glass and it was noted that the distance from the glass façade of the unit and (sic) the balcony parapet wall is between 3 and 3.5 metres. Stated differently, the balcony is 3 to 3.5 metres deep.

6 The parties then inspected unit 903 on the ninth floor of Four Seasons. The unit had no balcony, but also had a glass façade. It was pointed out that, while from that level one could 'see through' the Oracle, this was temporary because that part of the Oracle will be walled in. It was not clear whether this was the case along the entire façade of the Oracle; it was pointed out, for example, that the lift wells would always be set back from the common boundary.

[8] Section 6(1)(a) provides: *'(1) A building control officer shall-*

(a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4 (3)'.

application was not opposed, the second respondent sought a compensatory order against the City, as well as an order that the City should pay both its and the applicants' costs in the interim interdict proceedings. Those issues were determined in proceedings heard separately by Rogers J. The relief sought by the second respondent was refused. [9]

[12] The second respondent thereafter resubmitted the building plans for approval in substantially unaltered form.[10] They were circulated in the ordinary course for consideration and comment by the City's interested technical departments. After certain issues raised (in respect of matters such as certification by a structural engineer that the building would be able to sustain the additional loading to be imposed by the additions and amendments to the plan to address Fire Services' requirements) had been addressed, the application was given a clean bill of health. Comments from the applicants were then invited, and upon their receipt the second respondent was afforded the opportunity to reply to them.

[13] The applicants' comments were set out in a 13-page letter, dated 23 January 2015, from their attorneys of record to Mr Henshall-Howard (Mr Howard), the City's Head of Building Development Management. The letter had attached to it a number of photographs (not identified in the founding papers, but presumably illustrating the position as depicted in annexure JC8 referred to earlier). Much of the letter was given over to a summary of the history of the jurisprudential treatment of s 7(1)(b)(ii) of the Building Act. It was contended that purchasers of units in the part of the Four Seasons building that abutted Erf 5284 could not reasonably have anticipated that the City would allow building development on that property right up against the boundary above the parking levels in the Four Seasons building. This was so (it was argued) because the effect would be so unattractive, intrusive and overbearing that no

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Section 4 of the Act contains the provisions that make it compulsory for any person desiring to erect a building to apply to the local authority for approval of the building plans. The judgment in *Walele* held that the building control officer's recommendation was required to contain a motivated indication concerning the existence or not of disqualifying factors in terms of s 7 of the Building Act.

[9] The second respondent sought the compensatory order purporting to rely on s 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000. See *De Jong and Others v The Trustees of the Simcha Trust and Another* [2013] ZAWCHC 178, 2014 (4) SA 73 (WCC) and, on appeal from the latter judgment, *Trustees of the Simcha Trust v De Jong and Others* [2015] ZASCA 45, 2015 (4) SA 229 (SCA), [2015] 3 All SA 161.

[10] In *De Jong and Others v The Trustees of the Simcha Trust and Another* [2013] ZAWCHC 178, 2014 (4) SA 73 (WCC) supra, at para. 30, the judge noted an undertaking given on behalf of the City from the bar that it would not charge the second respondent a scrutiny fee if the plans were resubmitted in the same form as those approved in 2008.

reasonable decision-maker could allow it in terms of the Building Act. In the result, so it was contended, the erection of the proposed building extension would be unsightly and objectionable and occasion an impermissible derogation from the value of the affected units in the Four Seasons building. The attorneys emphasised that the effect of the proposed building was such as to at least instil doubt in the minds of the decision-maker, which was all that was necessary (so they submitted) to mandate the compulsory refusal of the building plan application. Suggestions were made as to how the second respondent might address the objections to the plan by setting back from the common boundary the part of the Oracle building that was regarded as unduly intrusive on the Four Seasons building.

[14] The applicants' attorneys also recorded a request to meet with Mr Howard and the building control officer on site '*in order that our clients' position may be fully understood*'. The attorneys contended that an on-site meeting would be '*indispensable to a proper appreciation of whether or not the building proposed by* [the second respondent] *will probably or in fact be unsightly or objectionable, derogate from the value of our clients' property or be dangerous to life or property*'. This made it clear, I think, that the applicants were not contending that the additions were objectionable in the sense that they would disfigure the neighbourhood, but rather in the much narrower context of their effect on certain units in the Four Seasons building. (Section 7(5) of the Building Act[11] appears to contemplate cases in which the proposed building might be acceptable in most respects, but objectionable in some or other detail.) Mr Howard and the building control officer did not take up the proposal that they should meet with the applicants' representatives on the site. In response to an averment in the founding papers that as far as the first applicant was aware '*neither the building control officer nor the decision-maker visited the inside of*

[11] Section 7(5) provides in material part:

Any application in respect of which a local authority refused in accordance with subsection (1)(b) to grant its approval, may, notwithstanding the provisions of section 22, at no additional cost and subject to the provisions of subsection (1) be submitted anew to the local authority within a period not exceeding one year from the date of such refusal-

(a) (i) if the plans, specifications and other documents have been amended in respect of any aspect thereof which gave cause for the refusal; and

(ii) if the plans, specifications and other documents in their amended form do not substantially differ from the plans, specifications or other documents which were originally submitted; or

(b) ….

(Underlining provided for emphasis.)

the second applicant's property', Mr Howard stated, somewhat opaquely, '*the City cannot be expected to inspect a site from neighbouring properties*'.[12]

[15] The applicants' attorneys' letter of objection was forwarded to the second respondent for comment. It provided a detailed response, dated 9 February 2015, drafted by counsel and the second respondent's attorney. The gist of it was that existing development on the Four Seasons building could not be permitted to compromise the second respondent's ability to develop its property to the maximum extent permitted in terms of the zoning scheme. The notion that the nature of the development undertaken first by an adjoining property owner might impinge on the ability of the neighbour to subsequently exploit the development potential of its property was untenable, so it was argued. Paragraph 16.2 of the response bears quoting *in extenso*, for it highlights that the current case raised out of the ordinary questions :

> The windows of the Four Seasons apartments face onto the common boundary in a situation in which two adjacent erven are zoned to allow 100% coverage with a zero setback, windows should **never** be designed or constructed on the common boundary between [?such] erven. Facades facing common boundaries are architecturally reserved for store rooms, lifts, services, stairwells, passages (sic). These uses are non-habitable and for this reason do not require windows in terms of the NBR.[13] The problem in this case has arisen because, in order to extract maximum value from the erf, the developers of the Four Seasons **most unusually** designed habitable rooms on the common boundary. To extract further value the rooms were given windows (and, at the lowest level, a veranda) to exploit the views and light then in existence between the buildings. As a result of this, Four Seasons was required to step the residential floors back in order to comply with statutory requirements. SABS 0400-1990 [part

[12] In paras. 78 and 81. In their heads of argument the City's counsel submitted that 'City officials cannot be expected to gain access to all neighbouring properties when considering applications for building plan approval, inspect the subject property from that vantage point, and take that into account. That would place an intolerable and unjustified burden on the City officials, who have limited time and resources and have to deal with many thousands of applications for building plan approval'. This sort of generalisation exaggerates the potential for burdensomeness. Dealing with a similar argument, the Constitutional Court pointed out in *Turnbull-Jackson v Hibiscus Court Municipality and Others* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310, at para. 81, 'the level of scrutiny by the decision-maker will depend on the facts of each case'. Gaining access to neighbouring properties will not be necessary in most cases. As will be described, the facts of the current case were unusual - even the second respondent's representatives had emphasised that aspect in their submissions to the building control officer (quoted in paragraph [15] above) - and it was contended by some of the affected parties that an inspection from their vantage point was required for a proper understanding of their arguments. As it was, the building control officer reported that he had been to the site on several occasions. He did not explain why he could not have accessed any of the affected Four Seasons apartments on any of them. Nor, for that matter, did he explain what it was about the proposed development that had made him sufficiently anxious to undertake so many visits to the site.

[13] National Building Regulations (made in terms of s 17 of the Building Act).

> of the National Building Regulations] stipulates light and vent requirements of a vertical distance of 1/3 of the horizontal distance affected by the absence of light and vent (sic). The Four Seasons building had to be constructed in compliance with these requirements.

(Underlining and bold print reproduced as in the original.)

[16] On 25 February 2015, the building control officer rendered a recommendation in terms of s 6(1)(a) of the Building Act. The recommendation was addressed to Mr Howard, who was responsible under delegated authority for determining the building plan application. It ran to eight closely typed pages containing 42 numbered paragraphs. The recommendation recorded that the building control officer had conducted a number of site inspections and was familiar with the subject property and the neighbouring properties. The building control officer's report noted that '[s]*ince all of the surrounding properties are developed,* [he] *was able to evaluate the probable impact of the proposed building on those properties and on the area*'. (Had he accepted the invitation to visit the Four Seasons building he would have been able to evaluate the *actual* impact on the balconies on the eighth floor.) I shall consider the content of the report in some detail presently. It contains indications that the building control officer failed in material respects to appreciate the scope and purpose of s 7(1)(b)(ii) of the Building Act and the import of the related jurisprudence to which he said he had had regard.

[17] The plans were approved by Mr Howard on the same day that the building control officer's recommendation was produced. Mr Howard composed a memorandum, also dated 25 February 2015, in which he purported to set out his reasons for approving the application. He recorded that he was aware of '*the history of* [the] *project*' and had had regard to the building control officer's recommendation and assessed the plans also taking into account the submissions by the legal representatives of both the applicants and the second respondent. I shall discuss the memorandum in some detail later in this judgment.

[18] Shortly after it had received notification of the approval of the building plan application, the second respondent put the applicants to terms to bring any proceedings they might wish to institute to challenge the approval, failing which building work would resume. The current proceedings were thereafter commenced before the given deadline.

[19] At the heart of this case is the applicants' contention that the further development of the Oracle building site to provide higher levels built flush up against the balconies on the eighth floor of the Four Seasons building is something so exceptionally intrusive and objectionable that it would not reasonably have been foreseen by any notional purchaser of an affected unit in The Four Seasons building. As to the reasonable expectations of purchasers of units in the Four Seasons building prior to the redevelopment of the Oracle building, the first applicant averred in his founding affidavit[14] that '[a]*n important consideration is that the City approved the* [Four Seasons] *building. It approved the balconies on the eighth floor. A reasonable notional purchaser and seller of a unit in the* [Four Seasons] *building would, I say, never expect that the City – having approved those balconies – would then approve a building on the next property which has the effect of rendering those balconies entirely useless*'. I shall revisit this averment, in the context of the City's response to it, later in this judgment.

[20] The application for review is expressly founded on the allegation that the decision to approve the building plans was –

(i) materially influenced by an error of law; (s 6(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'))

(ii) not rationally connected to the information before the decision-maker; (s 6(2)(f)(ii)(cc) of PAJA)

(iii) taken because relevant considerations were not considered; (s 6(2)(e)(iii) of PAJA) and

(iv) so unreasonable that no reasonable decision-maker could have made it (s 6(2)(h) of PAJA).

[21] Section 7(1) of the Building Act provides in relevant part:

> (1) If a local authority, having considered a recommendation referred to in section 6(1)*(a)* -
>
> *(a)* is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;
>
> *(b)* (i) is not so satisfied; or
>
> (ii) is satisfied that the building to which the application in question relates -
>
> *(aa)* is to be erected in such manner or will be of such nature or

[14] At para. 49.

> appearance that -
>
> *(aaa)* the area in which it is to be erected will probably or in fact be disfigured thereby;
>
> *(bbb)* it will probably or in fact be unsightly or objectionable;
>
> *(ccc)* it will probably or in fact derogate from the value of adjoining or neighbouring properties;
>
> *(bb)* will probably or in fact be dangerous to life or property,
>
> such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal:
>
> Provided that …

[22] As mentioned at the outset, the proper construction of the provision, and accordingly how it falls to be applied, has been the subject of divided judicial opinion. The City's functionaries say that they had reference to the jurisprudence in their assessment of the building plan application in this matter. It is therefore useful for present purposes to preface the discussion by examining the relevant case law.

[23] In *Walele* supra, at para. 55 of the majority judgment, the provisions of s 7(1) of the Building Act were construed to have the following effect:

> Accordingly the decision-maker must be satisfied of two things before granting approval. The first is that he or she must be satisfied that there is compliance with the necessary legal requirements. Secondly, he or she must also be satisfied that none of the disqualifying factors in s 7(1)*(b)*(ii) will be triggered by the erection of the building concerned. This is so because any approval of plans facilitating the erection of a building which devalues neighbouring properties, for example, is liable to be set aside on review. An approval can be set aside on this ground irrespective of whether or not the decision-maker was satisfied that none of the disqualifying factors would be triggered. All that is needed for an applicant to succeed is to prove to the satisfaction of the reviewing court that the erection of the building will reduce the value of his or her property. The legislature could not have intended to authorise an invalid exercise of power. In order to avoid this consequence, the decision-maker must at least be satisfied that none of the invalidating factors exist before he or she grants approval. This interpretation is consistent with the obligation to promote the spirit, purport and objects of the Bill of Rights. It demonstrates that it is not only the landowner's right of ownership which must be taken into account, but also the rights of owners of neighbouring properties which may be adversely affected by the erection of a building authorised by the approval of the plans in circumstances where they were not afforded a hearing. The section, if construed in this way, strikes the right balance between the landowner's entitlement to exercise his or her right of ownership over property and the right of owners of neighbouring properties. The interpretation promotes the property rights of the landowner and those of its neighbours.

[24] A finding by the majority in a subsequent judgment of the Supreme Court of Appeal, in *True Motives 84 (Pty) Ltd v Mahdi and Another* [2009] ZASCA 4, 2009 (4) SA 153 (SCA), [2009] 2 All SA 548, 2009 (7) BCLR 712, that para. 55 of the judgment in *Walele* was *obiter* was disapproved by the Constitutional Court in *Turnbull-Jackson v Hibiscus Court Municipality and Others* [2014] ZACC 24, 2014 (6) SA 592 (CC), 2014 (11) BCLR 1310. In *True Motives*, the majority held (at paras. 22 and 23 of the judgment of Heher JA):

> The requirements of s 7(1)*(b)*(ii) are as follows:
>
> *(a)* If the local authority is satisfied (ie, as with ss 7(1)*(a)*, capable of reaching a positive conclusion) that the building will, for instance, disfigure the area, it must refuse to grant its approval. This involves being satisfied that the outcome is certain.
>
> *(b)* If the local authority is satisfied that the building will *probably* have a detrimental effect specified in subparas (aa) or (bb) it must refuse its approval.
>
> (c) If the local authority is not satisfied on either of the aforegoing then the refusal of the building plans is not mandated or indeed allowed by s 7(1)*(b)*(ii). The decision-maker must then act on its positive finding with respect to the requirements of s 7(1)*(a)*.
>
> … on the aforegoing analysis a local authority may entertain some level of concern about whether a proposed building will disfigure the neighbourhood or derogate from the value of neighbouring properties (and so on), but that concern may not be at a high enough level for it to be satisfied that the undesirable outcome is probable. If that is the state of its mind (or that of its authorised decision-maker) with respect to these issues, the local authority must approve the plan.

[25] The difference between the construction of s 7(1)(b)(ii) applied in *Walele* and that in *True Motives* was described in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19, 2011 (2) BCLR 121 (CC), 2011 (4) SA 42, at para. 33, as follows:

> … according to *Walele* the local authority cannot approve plans unless it positively satisfies itself that the proposed building will not trigger any of the disqualifying factors referred to in s 7(1)*(b)*(ii). If in doubt, the local authority must consequently refuse to approve the plans. According to *True Motives*, on the other hand, a local authority is bound to approve plans, unless it is satisfied that the proposed building will probably, or in fact, trigger one of the disqualifying factors referred to in s 7(1)*(b)*(ii). If in doubt, the building authority must consequently approve the plans… Moreover, while *Walele* imposes an obligation on the local authority to ensure the absence of the disqualifying factors, no such duty arises from *True Motives*. [Footnotes omitted.]

Having noted the difference, the court in *Camps Bay Ratepayers'* found it

unnecessary for the purposes of that case to resolve the situation created by the conflicting interpretations of the provision.

[26] The court did, however, highlight that an implication of s 7(1) of the Building Act was that considerations beyond compliance with any statutorily imposed restrictions had to be taken into account by a local authority in deciding a building plan application submitted in terms of s 4 of the Act. So, at para. 40 of the judgment, Brand AJ conceived of a building compliant with all the '*legally imposed restrictions*' that nevertheless might derogate from the value of surrounding properties in a cognisable sense by reason of its being '*for example, so unattractive or intrusive*' as to exceed '*the legitimate expectations*' of the notional purchasers of the surrounding properties when they acquired those properties. The local authority would be obliged in terms of s (7)(1)(b)(ii) to refuse to approve a building plan for the erection of such a structure. (The majority in *True Motives* had also allowed that a plan in respect of a proposed building that would be compliant with the requirements of the Act and any other applicable law might nevertheless trigger a disqualifying factor in terms of s 7(1)(b)(ii).[15])

[27] A definitive and ultimately authoritative construction of s 7(1)(b)(ii) of the Building Act was subsequently given by the Constitutional Court in *Turnbull-Jackson*. The court (once again by a majority) confirmed the interpretation given in the majority judgment in *Walele*. The majority judgment pointed out that the court's decision in *Camps Bay Ratepayers* had been concerned with a matter arising out of alleged non-compliance with s 7(1)(a) of the Building Act, and reiterated that that judgment had not resolved the '*Walele - True Motive* controversy' in respect of the proper construction of s 7(1)(b)(ii).[16] The court nevertheless endorsed the observation in *Camps Bay Ratepayers* that '[i]*f derogation of value is raised in the context of an acceptance that there has been compliance with restrictions imposed by law, there will be derogation of value as envisaged in s 7(1)(b)(ii) only if "the new building . . .*

[15] See *True Motives* at para. 30, where Heher JA illustrated the point as follows: '*Take, for example, the case of a developer who builds to maximum bulk* [in terms of the town planning scheme] *in reckless disregard of market opinion. Such a person might well find that his development, although falling within the strict confines of existing developmental controls, derogates from the value of an adjoining property because the hypothetical purchaser and seller of that property would have regarded the likelihood of such a development as too remote to influence their price*'.

[16] In paras. 46-48.

is, for example, so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale'".[17]

[28] The majority in *Turnbull-Jackson* held that the construction of the provision applied in *Walele* had not been *obiter* and was therefore binding. It in any event preferred it to that adopted by the majority in *True Motives* on the ground that the *Walele* construction was contextually more plausible, regard being had to the objects of the legislation. In this regard Madlanga J observed (at paras. 88-89):

> [88] We will recall that the Building Standards Act aims to prescribe building standards. Prescribing building standards is not an end in itself. As much as it is about the rights of people seeking to develop their properties, it is also about the protection of the rights of owners of neighbouring properties.
>
> [89] The *Walele* approach is less susceptible - if at all - to an overly relaxed level of scrutiny insofar as the rights of owners of neighbouring properties are concerned. It better protects the rights of these owners. It is more consonant with the provisions of s 39(2) of the Constitution. Of course, the rights of prospective property developers are also deserving of protection. …
>
> (Footnotes omitted.)

[29] The learned judge expressly mentioned that the rights of neighbours that might be implicated were the rights to life, security of the person, and property. In this regard he no doubt had in mind the disqualifying factors predicated on buildings that would probably or in fact be dangerous to life or property (s 7(1)(b)(ii)(bb)) and those that would probably derogate from the value of neighbouring properties (s 7(1)(b)(ii)(aa)(ccc)). Neighbours in particular, but also the community in general, also enjoy rights under the Act to be protected against the erection of buildings that would disfigure the area (s 7(1)(b)(ii)(aa)(aaa)) and those that would be unsightly or objectionable (s 7(1)(b)(ii)(aa)(bbb)). Whilst it is readily conceivable that the latter features would often occasion a derogation from the value of neighbouring properties, separate reference to them in the statutory provision suggests an intention that the avoidance of the unacceptably adverse impacts of new buildings on the neighbours' aesthetic sensibilities and the utility of their properties are to be taken into account by local authorities, in the manner indicated in *Camps Bay Ratepayers'* supra, at para. 40, as self-standing disqualifying factors.

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[17] In para. 79

[30] The judgment in *Turnbull-Jackson* expressly left open who bore the onus to satisfy the local authority on the existence or not of disqualifying factors.[18] 'Onus' cannot apply in respect of the determination of a building plan application in the same way as it does in a trial, where it is inextricably bound up with the duty on one or the other side to adduce evidence to prove a pleaded claim or establish a defence. The processing and determination of building plan applications does not involve an adversarial process. In many cases, notice is not even given to potentially affected third parties. [19] The statute places an obligation on *the local authority* to satisfy itself that the plans comply with all the applicable statutory requirements and that none of the disqualifying factors will be triggered. The legislative scheme envisages that the building control officer will undertake the enquiries required to those ends and treat of them in the recommendation. The decision-maker is, of course, required to apply his or her own mind independently.[20] In cases in which the content of the building control officer's recommendation or the additional information otherwise available to the decision-maker raises questions, the decision-maker is required to investigate further.[21]

[31] The only relevance of 'onus' is the standard by which the evidence (including any expert opinion) must be weighed by the decision-maker in determining whether it supports a finding that none of the disqualifying factors will be triggered. The determination falls to be made on a balance of the probabilities. The standard for being satisfied therefore does not demand that the decision-maker be absolutely certain; it requires no more than being able to reach a conclusion based on a proper assessment of the facts with regard to the balance of probabilities. If, however, upon proper investigation, and applying the aforementioned standard, the decision-maker is left unable to decide on the probabilities whether the disqualifying factors will be triggered, it must follow that he or she cannot express him-or herself satisfied that

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[18] In para. 76, holding that the question was not before the court.

[19] It is therefore not altogether clear, with respect, what Brand AJ intended to convey in para. 33 of *Camps Bay Ratepayers* when he stated '*The practical implication of the difference* [between the majority judgment in *Walele* and the majority judgments in *True Motives*] *appears to be this: under Walele it is the applicant for approval of the plans who must satisfy the local authority that the disqualifying factors do not exist. Under True Motives it is the objector to the plans who must satisfy the local authority about the positive existence of the disqualifying factors.*' Indeed, it was for that reason that I omitted the statement when quoting from the paragraph at para. [25], above.

[20] *Walele* at para. 56.

[21] Cf. *Turnbull-Jackson* at para. 82 and also at para. 110 (minority judgment).

they will not be.[22] The 'onus' imposed by the provision *on the local authority* will not have been discharged. A refusal of the application must follow.[23]

[32] A decision made in the manner required in terms of s 7(1) of the Building Act should be amenable to being reasoned by the decision-maker in much the same way that a court is expected to be able to reason its judgments. Properly discharging the duty imposed on the local authority by s 7(1) should result in a decision, whether it be to approve or refuse the application, that is demonstrably rational. If the decision-maker, when it furnishes its reasons, is not able to reason its decision plausibly, the decision is likely not to be rationally connected to the matter in hand and accordingly vulnerable to review in terms of paragraphs (e)(iii), (e)(vi), (f)(ii)(cc) and (f)(ii)(dd) of s 6(2) of PAJA, amongst other possible grounds.

[33] The import of paragraph 55 of the judgment in *Walele*, quoted above, is that the character of the disqualifying factors is factual. The enquiry is into whether the proscribed consequences will actually or probably eventuate if the proposed building is erected. Even if the determination may entail forming an opinion based on the known facts, and therefore judgement, the decision is not discretionary in nature. That much seems to follow necessarily from Jafta AJ's statement that '*An approval can be set aside on this ground* [derogation from value] *irrespective of whether or not the decision-maker was satisfied that none of the disqualifying factors would be triggered. All that is needed for an applicant to succeed is to prove to the satisfaction of the reviewing court that the erection of the building will reduce the value of his or her property*'.[24]

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[22] Compare the reasoning of Heher JA in respect of the effect of s 7(1)(a) in *True Motives* supra, at para. 19 (an aspect unaffected by the subsequent Constitutional Court judgments). As Froneman J implied in para. 110 of his minority judgment in *Turnbull-Jackson*, a situation in which the decision-maker is left uncertain should occur very rarely, if at all. Any initial uncertainty should be almost always be capable of being resolved by further investigation.

[23] Cf. *Mobile Telephone Networks (Pty) Ltd v Beekmans NO and Others* [2016] ZASCA 188, at para. 23, on the relevant import of the judgments in *Walele* and *Turnbull-Jackson*.

[24] Compare the observations by Heher JA in *True Motives* supra, at para. 34, with reference to the passages in para. 55 of *Walele* highlighted by the learned judge in italics, and also the remarks of Cameron JA at para. 94. As Cameron JA acknowledged in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA), at para. 31, the distinction can be '*notoriously difficult to draw*'. The learned judge of appeal identified part of the reason for the difficulty as follows: '*This is partly because process-related scrutiny can never blind itself to the substantive merits of the outcome. Indeed, under PAJA the merits to some extent always intrude since the Court must examine the connection between the decision and the reasons the decision-maker gives for it, and determine whether the connection is rational. That task*

[34] Concern has been expressed that the quoted remarks in para. 55 of *Walele* could conduce to an unwholesome blurring of the distinction between review and appeal.[25] There is no reason, however, to believe that the Constitutional Court could have intended that. Had any such far-reaching departure from established principle been intended it would surely have been spelled out expressly. It might be inferred from Jafta AJ's statement in the same paragraph that '[t]*he legislature could not have intended to authorise an invalid exercise of power*' that the learned judge had the principle of legality in mind.[26] It seems to me that enforcing compliance with the principle of legality in these circumstances can be approached on common law review principles in the manner described by Lord Wilberforce in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] UKHL 6, [1976] 3 All ER 665 (CA and HL), [1977] AC 1014, at pp. 681-2 (All ER), in the context of a comparable statutory formulation:

> This form of section [i.e. framed in a "subjective" form - if the Secretary of State "is satisfied"] is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however *bona fide* it may be, becomes capable of challenge.[27]

These principles have been taken up in s 6(2) of PAJA.

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can never be performed without taking some account of the substantive merits of the decision.' See further Hoexter, *Administrative Law in South Africa* 2ed. (Juta), at pp. 108-111 and 351-352.

[25] See *True Motives* supra, at para. 36

[26] Cf. *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC), 1999 (1) SA 374, at paras. 56-59 and *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241, at para. 17.

[27] Referred to with approval in *Pepcor Retirement Fund and Another v Financial Services Board and Another* [2003] ZASCA 56, [2003] 3 All SA 21 (SCA), 2003 (6) SA 38, at para. 36. Compare also the approach in respect of the review of executive conduct under legislation framed using the phrase 'if it appears to the Minister' in *Minister of Home Affairs and Another v Austin and Another* 1986 (4) SA 281 (ZS), at 293H-294, and in similar vein *Office of Fair Trading and others v IBA Healthcare Ltd* [2004] 4 All ER 1103 (CA), at para. 45.

[35] Section 7(1)(b)(ii) does not give the administrator the power to determine what the relevant facts are, and therefore does not give rise to matters of 'pure judgment'. The local authority is required to have regard to the objectively relevant facts and make a reasonable judgement[28] on the basis of them. If the existence of any of the disqualifying factors is established on that approach, then the principle of legality precludes approval of the building plan. A failure by the decision-maker to have appropriate regard to any relevant fact in forming the required judgement might result in the decision being reviewable in terms of s 6(2)(e)(iii) of PAJA, which provides that administrative action taken because 'irrelevant considerations were taken into account or relevant considerations were not considered' can be set aside on review; cf. *Chairpersons' Association v Minister of Arts & Culture and Others* [2007] ZASCA 44, [2007] 2 All SA 582 (SCA), 2007 (5) SA 236, at para. 48. As postulated in paragraph [32] above, depending on the facts, which might raise other matters – a misdirection on the import of the applicable law, for example - other provisions of s 6(2) of PAJA could also find application.

[36] It has been held that s 7(1) of the Building Act places a local authority seized of deciding an application for the approval of building plans in the position of the 'guardian' of the interests of the owners of the neighbouring properties. In *Odendaal v Eastern Metropolitan Local Council* 1999 CLR 77 (W) at 84-85, Lewis AJ said '[B]*oth the Act and the* [town-planning] *Scheme are legislative instruments for ensuring the harmonious, safe and efficient development of urban areas. . . . Local authorities are given considerable powers under both Act and Scheme. Onerous duties are imposed on them by both instruments. The essential purpose of the powers afforded and the duties imposed is to ensure that the objectives of the legislative instruments are achieved; that there is a balance of interests within a geographical community. <u>The local authorities are in effect the guardians of the community interest.</u> They are entrusted with ensuring that areas are developed in as efficient, safe and aesthetically pleasing a way as possible. They are required to safeguard the interests of property owners in the areas of their jurisdiction. That is why the powers and rights of owners of immovable property are restricted. Power over one's property has never, under our legal system, been unfettered. The rights of an owner of land*

[28] In the sense of 'reasonable' that is well understood in the context of judicial review; cf. e.g. *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [2002] ZACC 2, 2002 (3) SA 265 (CC), 2002 (9) BCLR 891, at para. 87.

have always been limited by the common law in the interests of neighbours. But the rapid urbanization of countries worldwide and the inevitable need for regulation that has accompanied it has had the effect of restricting full dominium even further than the common law ever did'. Those remarks were quoted with approval in O'Regan ADCJ's minority judgment in *Walele.* They were also endorsed in Jafta JA's minority judgment in *True Motives.*[29]

[37] A similar view was expressed by Cleaver J in *Chairperson of the Walmer Estate Residents' Community Forum and Another v City of Cape Town and Others* [2007] ZAWCHC 6, 2009 (2) SA 175 (C)[30]. He said: '*While the local authority is entrusted with the power to approve plans, it must, in a manner of speaking, act on behalf of the neighbours by ensuring that the disqualifying factors mentioned in s 7(1)(b) are not present before approving plans which otherwise comply with all applicable laws*'.[31] The tenor of Cleaver J's remark presaged the construction of s 7(1)(b)(ii), subsequently confirmed in *Turnbull-Jackson*, that imposes a positive duty upon local authorities to satisfy themselves of the absence of the 'disqualifying factors' before they can competently approve building plan applications.

[38] While treating of the pertinent jurisprudence, mention should also be made of the case involving the Mill Row Housing Development because of the reported reliance upon it by the building control officer and the functionary who approved the building plan application. Owing to the significance the City's officials appear to have attached to the judgment, I have thought it appropriate to describe the facts and issues in some detail. The officials must have been referring to the judgment at first instance (per Engers AJ),[32] which has not been reported. The nature of the review challenge and the facts of the case are, however, described in the subsequently given judgment on appeal to the full court, reported *sub nom. Gerstle and Others v City of Cape Town and Others* [2016] ZAWCHC 102, [2016] 4 All SA 533 (WCC), 2017 (1) SA 11.

[39] The Mill Row Housing Development was described as follows in the full court's judgment written by Davis J: '*Mill Row* [is a group housing development]

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[29] At para. 71.

[30] Which was the *Walele* case at first instance.

[31] At para. 26. Cited with approval in *Walele* at para. 56.

[32] Delivered on 20 February 2015 in case no.s 15073 and 15074/2013.

consist[ing] *of 17 properties, eight of which are in the back row (comprising of seven double storeys and one double storey with a basement) and eight of which are in the front row and, at present, constitute single storey residential dwellings*'.[33] The applicants took on judicial review the approval by the City of building plans submitted by owners of two of the dwellings in the front row to convert their buildings into double storey structures. The review was founded primarily on the allegation that the City had failed to comply with s 7(1)(b)(i) of the Building Act by not refusing the application for want of compliance with the requirements of the applicable zoning scheme. As a second string to their bow, the applicants in Mill Row had also contended that the interference with the views from their back row properties that would be occasioned by the addition of second storeys to the front row houses would occasion a derogation from the value of their properties. It would also affect their privacy and the amount of natural light that they had hitherto enjoyed.

[40] The applicants in Mill Row relied on the provisions of the Table View Town Planning Scheme that defined a '*group housing scheme*' as '[a] *group of separate and/or linked and/or individual dwelling units on smaller than conventional erven and which is planned, designed and built as a harmonious architectural entity with a medium density character in which the structures vary between single and double storeys*'. Divergent opinions were given in evidence as to the import of the concept of a '*harmonious architectural entity*'. In this respect the full court held '*... the court a quo was correct that the ordinary meaning of the phrase was that "all the structures within a group housing development, taken together, must form an orderly or pleasing style of building". Further, the court correctly noted that "what constitutes a harmonious architectural entity is a difficult question to answer" and "this appears to me to call for a fair amount of subjectivity"*'.[34] It also held that the applicants' architectural expert had conceded '*... that, viewed externally, Mill Row did not*

[33] At para. 2. It appears from the first instance judgment that there were in fact nine dwellings in the back row and eight in the front row, which solves the arithmetical puzzle of how the full court arrived at the total of 17.

[34] At para. 26. The court did not suggest, however, that it was not bound to determine the meaning of the term, whatever the difficulty that its inherent vagueness might have presented. It adopted the quoted definition given by the court of first instance. The element of subjectivity that necessarily followed from the employment of that definition was what afforded the wide degree of latitude consequently to be given in assessing the reasonableness of any decision applying the concept.

comprise an harmonious architectural entity and that, at best, for appellant, when viewed from inside, it was a "modest attempt" at creating such an entity'.[35]

[41] In the face of conflicting evidence about whether the proposed building additions would upset the (apparently questionable) harmonious architectural character of the development, and being satisfied that the building control officer's recommendation had carefully addressed all the objections advanced against the building plan applications and substantiated his reasons for concluding that they did not fall to be refused by virtue of the existence of any of the disqualifying factors in s 7(1)(b)(ii), the court expressed its consciousness '*of the need for respect for expertise in the making of policy laden or polycentric issues*' (cf. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC), at paras. 44-45 and 48). Davis J proceeded to state in that regard, '*Once a decision maker with the necessary expertise has set out detailed, plausible and justifiable explanations for a decision to which he or she has arrived, the court should be extremely cautious before intervening*'.

[42] Applying that approach to the evidence before it in the particular case, the court held that judicial review had been correctly refused by the court of first instance because it could not be found that the decision to approve the building plans was one that a reasonable decision-maker could not have made.[36] The judgment makes it clear, I think, that the court was conscious that the relevant determination was to a material extent an expression of the decision-maker's value judgement formed on a proper and conscientious assessment of all the real evidence or primary facts. And that in that context it was acutely alive to its duty of adherence to the principle that it should refrain from intervening on review in such a case when the judgement was one that might reasonably be formed in the circumstances, even if the court might itself have had a different view had it been the administrator.

[43] Dealing with the evidence adduced by the appellants that the developer and its architect had expressed an intention that the front row would remain as single storey

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[35] Which, if correct, would suggest that the original building plans for the development perhaps should not have been approved on account of non-compliance with the zoning scheme's requirements concerning the planning, designing and building of a group housing scheme. The first instance judgment in *Gerstle* indicates that the development was put up 'in the 1980's', so the building plans may have been approved before the Building Act came into operation in 1985.

[36] At para.s 35-36.

dwellings, no doubt to enable both rows to benefit from the views, both the court of first instance and the full court pointed out, however, that, in the absence of a servitutal restriction or a home owners' constitution with pertinent provisions regulating height limits, no enforceable rights had been vested in the purchasers of erven in the back row by the developer's expressions of intent to restrict the further development of houses in the front row within limits narrower than those imposed in terms of the zoning scheme (i.e. three storeys). The development was, moreover, in any event incomplete, as provision had been made for the future development of a third row of houses in front of the then existing front row dwellings. Significantly, the court of first instance had held in this regard (at para. 56) '*There is no suggestion that the proposed second storeys are being built in such a way as to be exceptionally unsightly or more intrusive than might otherwise be the case. In other words, the second storey is exactly what any notional buyer would envisage if he or she knew that the single storey house could be made double storey*'.

[44] The Mill Row case was of an entirely different character to the current case. There has been no suggestion in the current matter that the building to be erected in accordance with the approved building plans would not be compliant with the zoning scheme and the building regulations, and thus compliant with the technical requirements of the Building Act and any other applicable law. The applicants in the current matter have, however, suggested very vehemently that the effect of the construction of a solid wall on the common boundary would be so exceptionally intrusive to the extent that the prospect of it being permitted by the local authority would not have been factored in by the notional parties to any hypothetical sale of the affected units in the Four Seasons building.

[45] The adjudication of the applicants' claim that the first respondent failed to take relevant considerations into account must proceed on the basis of a conceptual understanding of what a local authority is required by the provision to consider. Having regard to the recognised objects of town-planning and zoning schemes[37] and s 7(1) of the Building Act, it follows, I think, that the respective statutory instruments

[37] The 'co-ordinated and harmonious development' of land; cf. e.g. *Broadway Mansions (Pty) Ltd v Pretoria City Council* 1955 (1) SA 517 (A) at 523B; *Esterhuyse v Jan Jooste Family Trust and Another* 1998 (4) SA 241 (C) at pp. 253H-254B; *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* 2010 (5) SA 367 (WCC) at para. 104, and *JDJ Properties CC and Another v Umngeni Local Municipality and Another* 2013 (2) SA 395 (SCA), [2013] 1 All SA 306 at para.s 28-29.

fall to be applied integrally in the consideration of building plan applications. The object of harmonious and co-ordinated building development is common to the planning and the building legislation. This highlights the responsibility resting on a local authority, when it considers a building plan application, to have regard not only to the compliance of the proposed building with the technical restrictions and regulatory prescriptions in respect of building development on the building plan applicant's property, but also to the contextual effect of the contemplated finished product. The obligation to consider the contextual effect of the proposed building implies that the local authority must take account of how the proposed structure would fit in with the existing development of neighbouring properties, and, of course, what might reasonably be anticipated to be the possible future use of such properties.

[46] The effect is that in discharging the function of building plan approval a local authority is required in a sense to act as a moderator in respect of the potentially conflicting rights and obligations of neighbouring property owners. It is inevitable that in fulfilling that function the local authority will on an incremental basis play a material role in determining the character of a neighbourhood. Its decisions concerning the sort of building development it is willing to approve on property B, will inevitably have some influence on what might be acceptable for the purposes of s 7(1)(b)(ii) of the Building Act in respect of what it might subsequently allow on the neighbouring properties A and C. This is so because it must take account of what it has permitted on B when it considers, in the context of subsequent applications, what might acceptably be built on A and C. If it does not, realisation of the object of co-ordinated and harmonious development will be subverted. It is not surprising therefore that the decision-making power in terms of s 7 was described by the Constitutional Court in *Camps Bay Ratepayers*[38] and *Turnbull-Jackson*[39] as 'an important public power'. Therein lies what Lewis AJ described as the 'onerous duty' on the local authority to ensure a balancing of interests.[40]

[47] The statement by Mr Howard in his answering affidavit on behalf of the City that '[t]*he City cannot be expected to tailor its approach to the second building in*

[38] In para. 27.

[39] In para. 18.

[40] See the quotation from *Odendaal v Eastern Metropolitan Local Council* in para. [36] above.

accordance with the approval of the first building'[41] is not correct as a statement of principle if it implies, as it appears to, that the City does not have to take into account the effect of its approval of the first building when it considers the application for the second building. The Building Act unambiguously imposes a duty of contextual assessment on local authorities whenever they consider a building plan application. The actual or probable effect of what is proposed on what is already there (or which a neighbour foreseeably might reasonably wish to put up in the future) is central.

[48] That does not mean that prior development of one property dictates how the neighbour may develop its land; it means that the local authority must take the existing (and foreseeably future) development appropriately into account in deciding whether the proposed new development would trigger any of the disqualifying factors. Accordingly, when deciding whether or not to approve the first development, the local authority must apply its mind to the effect of the proposed building on the neighbouring properties, including their potential for future or further development. The contextual assessment occurs in the second stage of what the City's counsel correctly described as 'a two-part enquiry'.[42] The second part is undertaken only after the local authority has satisfied itself that the proposal is compliant with the zoning scheme restrictions, the National Building Regulations and any other law that might be applicable to the proposed development. If the building plan does not comply with the applicable laws, the building plan application must be refused and second part of the enquiry is not reached.

[49] A positive determination of the building plan application in the first part of the enquiry should not be treated as a prognosticator of the determination of the second part; certainly not in a manner that would deprive the second part of the enquiry of its discrete and substantive import. (What might be taken as an opposite view stated in *True Motives* at para. 46, where Heher JA referred with apparent (albeit qualified) approval to the statement by a building control officer in the employ of the City of Johannesburg that '[a]*s a general policy, once a building plan demonstrates compliance with the Act, regulations and the scheme there arises a strong prima facie indication that approval should be granted*', falls to be understood in the context of the learned judge's (subsequently disapproved) appreciation of the character of the

[41] In para. 80.

[42] First respondent's heads of argument, at para. 12.

second part enquiry. The notion that a 'general policy' could apply in respect of how what is plainly intended to be a peculiarly facts-sensitive second stage enquiry is determined is inconsistent with the scheme of the provision.) Whilst the applicable provisions of the zoning scheme are undoubtedly an important consideration as the indicator of the maximum extent of development permitted on any property, the notional properly informed purchaser or seller considering what might be put up on neighbouring properties would also be cognisant of the broader regulatory framework concerning building development, including s 7(1)(b)(ii) of the Building Act. He or she would appreciate that the zoning scheme is not, of itself, dispositive of what may be built on a land unit, and that a statutorily prescribed contextual assessment of the effect of any building development on the neighbouring properties should prevent a building that was unreasonably intrusive, overbearing or otherwise unsightly or objectionable from being erected.

[50] The notion that a property owner may develop its property to the maximum extent permitted by a zoning scheme regardless of the nature of the adverse effect on the utility of its neighbour's property is not only inconsistent with the provisions of s 7(1), it also runs counter to the precepts of the common law. As Steyn CJ noted in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A), at 106 *fin* – 107A, '*As algemene beginsel kan iedereen met sy eiendom doen wat hy wil, al strek dit tot nadeel of misnoeë van 'n ander, maar by aangrensende vasgoed spreek dit haas vanself dat daar minder ruimte is vir onbeperkte regsuitoefening. Die reg moet 'n reëling voorsien vir die botsende eiendoms - en genotsbelange van bure, en hy doen dit deur eiendomsregte te beperk en aan die eienaars teenoor mekaar verpligtings op te lê*'.[43] The moderating principle in the regulation of neighbour relations in the common law is reasonableness (*Afr.* 'billikheid'). One of the examples from the common law cited by the learned chief justice illustrates that it was considered unreasonable to put up a structure on one's property in a position that would have the effect of diverting the wind from the neighbour's threshing floor.[44] It serves as a real

[43] As a general rule anyone may do with his property what he wishes, even if it is to the disadvantage or displeasure of another, but when it comes to adjoining fixed property it is readily apparent that there is less scope for the unrestricted exercise of rights. The law has to make provision for the clashing proprietary and utility interests of neighbours – and it does so by restricting property rights and imposing mutual obligations on the owners. (My translation.)

[44] *Regal v African Superslate* supra, at 107C, citing *Cod.* 3.34.14(1), which reads '*As that is a perfectly plain rule of law which forbids a neighbour to erect a building opposite the threshing floor of another, where, by trampling the dry grain, its benefit and utility may be secured, but, by the construction of*

example of how account was required to be taken when erecting a building of its effect on an existing utility on neighbouring property.

[51] It was, no doubt, with these considerations in mind that the Constitutional Court observed in *Walele* that notwithstanding its finding, based on the import of s 3 of PAJA, that a local authority was not required to cause notice of building applications to be given to owners of neighbouring property, it would nonetheless '*be helpful and enhancing to the process if the Building Control Officer, at the stage of compiling the recommendation invites, from owners of neighbouring properties, representations about the impact the proposed building might have on their properties. Such approach would help in dealing with issues relating to disqualifying factors. This would significantly reduce chances of approval of plans in cases where some of the disqualifying factors exist but were not discovered by a local authority*'.[45]

[52] Earlier in this judgment (at paragraph [19]) I quoted an averment from the applicants' founding affidavit concerning the reasonable expectations of purchasers of units in the Four Seasons building prior to the redevelopment of the Oracle building. The City's response to that averment (at para. 80 of Mr Howard's affidavit) was '*The City approved the balconies on the Four Seasons* [building] *because it was asked to, and they were lawful. That cannot now bind the City to protecting the amenities provided by those balconies to the detriment of neighbouring property owners*'. In my judgment Mr Howard's response betrays a fundamentally misguided belief that s 7(1) allows an uncoordinated and potentially disharmonious approach by local authorities to the consideration of building plan applications. It runs directly counter to the contextual approach demanded by the provision.

[53] If it were foreseeable, regard being had to the object of achieving harmonious and co-ordinated development, that the design of the Four Seasons building would unreasonably compromise the ability of the owner of the neighbouring properties, like Erf 5284, to develop their properties to full potential – thereby no doubt derogating

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such a building, the wind will be obstructed, and, in consequence, the straw cannot be separated from the grain, the wind being prevented by the building aforesaid from exerting its force everywhere, and, because of its position, the wind will be of no advantage to the threshing floor, We hereby decree that no one shall be permitted either to build any house, or do anything else to prevent the wind from being made use of in a proper and sufficient manner for the above-mentioned purpose, and thereby render the threshing floor useless to its owner, and unavailable for the separation of grain' (Scott's translation.)

[45] *Walele* supra, at para. 71.

from the value of such properties – the City should have refused to approve the plans for its construction, irrespective of their being zoning scheme and building regulation compliant.[46] Furthermore, the remedy for the consequences of having possibly wrongly approved the plans for building A, does not lie in the local authority ignoring the characteristics of building A after it has been erected, especially those that contribute to its utility and market value, when subsequently considering plans for the erection of building B on the plot next door. On the contrary, it must accept that the parties to the so-called hypothetical sale of units in building A would reasonably take into account for the purpose of determining the market value of such units the character and utility of what the local authority has permitted to be built when they apply their minds to what it might reasonably allow to be put up on the adjoining property.

[54] Turning now to consider how the City came to approve the building plans.

[55] It was recognised in *Walele* (at para. 70) that the building control officer's report required in terms of the building plan application process under the Building Act was intended by the legislature to be the decision-maker's primary source of information on the questions on which the local authority must be satisfied in terms of s 7(1) before it may competently approve a building plan. It follows that its content and the decision-maker's treatment of it are foundational to the determination of any building plan application.

[56] There was nothing contentious about the application insofar as s 7(1)(a) and (b)(i) were concerned. As to the existence of any disqualifying factors in terms of s 7(1)(b)(ii) of the Building Act, the essence of building control officer's approach was reflected in a number of passages in the recommendation report. I shall identify and comment on the salient ones in turn.

1. Having referred to a discernible trend in the central parts of the City for buildings to be erected up to the common boundaries, he proceeded (at para. 26.1 of the report) to say '*It is clearly the trend to develop each property to its full potential and I am of the opinion that this is fully acceptable as long as the set development parameters are adhered to.*' It would seem that by '*set*

[46] The possible liability that the local authority might have to the owner of the neighbouring plot in such a case in respect of the knock-on consequences for having wrongly approved plans for building A to be erected is not a question for decision in the current case.

development parameters', the building control officer meant the applicable land use development restrictions in terms of the zoning scheme.

2. At para. 27 of the report the building control officer stated:

'*... most new buildings do have an impact on their surroundings. However, an application would be disqualified under the Building Act only if the building to which it relates would disfigure the area. The right to build on the common boundary existed all along. While some may regard the proposed building work as intrusive, unattractive and unreasonable, development progress makes such changes inevitable when such changes are within the permitted parameters.*'

3. Paragraph 29 of the report went as follows:

'*I cannot agree with the statement that it was expected that* [the second respondent's] *building would be stepped back once it reached the residential part of the Four Season* (sic) *Building. This expectation is nowhere established in law and upholding such an expectation would undermine the development rights of erf 5284, Cape Town. The design of the building is compliant with architectural trends. The building is designed by a competent professional person in a contemporary way and the proposal is sensible. The construction methods and materials proposed for the building are conventional and are in keeping with the acceptable norms in the industry. The proposed building would be an improvement on the subject property in the circumstances. I advise that the proposed building will not probably or in fact be unsightly or objectionable*'.

4. At paragraph 35, the building control officer stated:

'*In summary an informed buyer and an informed seller of a surrounding property would have been aware of the long-standing right of the subject property to develop a higher building on the common boundary. The proposal in my opinion is close to common practice in the City Centre. The development of a site to its full legal potential is especially likely in and sought after (sic). This kind of development is consistent with a trend towards densification, which is generally promoted by the City. In the circumstances, I am of the view that a developer could reasonably be expected to erect a*

building of the maximum size permitted by the Scheme Regulations on the subject property'.

[57] I shall treat of each of these passages from the report in turn. They provide the foundation for my observation earlier that the building control officer's appreciation of the import of the relevant statutory provisions was materially flawed.

1. Re para. 26.1 of the BCO recommendation

   It shows a lack of appreciation that an enquiry into the existence of any disqualifying factors arises as a second stage enquiry, and only in the event of the proposed building being found in the first stage enquiry to actually be compliant with the '*set development parameters*'. That much was clearly spelled out in the Constitutional Court jurisprudence in the majority judgment in *Walele*, and reiterated in *Camps Bay Ratepayers* and *Turnbull-Jackson*. Being satisfied that the proposed building falls within the '*set development parameters*' did not afford an answer to the second part of the enquiry, particularly in the confessedly unusual context presented by the case in point. The remark calls into question whether the building control officer properly appreciated the content of the statutory enquiry enjoined by the provisions of s 7(1)(b)(ii) of the Building Act**.**

2. Re para. 27 of the BCO recommendation:

   The remarks in this paragraph underscore the impression that the building control officer's approach proceeded from an understanding that any building erected '*within in the permitted parameters*' was one that neighbours were obliged to tolerate. His understanding is at odds with the provisions of s 7(1)(b)(ii) as construed by the Constitutional Court.

3. Re para. 29 of the BCO recommendation

   This indicates that the building control officer considered that the development limitations in terms of the zoning scheme afforded rights in favour of the second respondent, the full availment whereof could not be prejudiced by considerations bearing on the effect thereof on already established adjacent development. The indication is that no consideration was given to aspects of unsightliness or objectionableness from the perspective of the extant neighbouring building (as distinct from the impression of street

level users in the general area). It is evident that this was because of the building control officer's apparent opinion that the zoning provisions regulating development of the second respondent's property that permitted development up to the boundary line conferred a virtually absolute right. (Zoning actually manifests a scheme of land use *restrictions*, not land use *rights*.[47])

4. Re para. 35 of the BCO recommendation

Once again there is a conflation of the first and second stages of the statutory enquiry in the building control officer's evident conception of how he had to go about applying s 7(1) of the Building Act. His reference to the City's policy of densification is furthermore indicative of his introduction of a quite irrelevant consideration into the second stage enquiry. Density of permitted development is something regulated by the zoning scheme regulations. His reference to it being common practice for buildings in the city centre to be built up hard against each other fails to acknowledge that the buildings concerned were designed to allow for that, with blank walls provided on existing buildings to anticipate such development on the boundary. Examples of this were illustrated in a number of the photographs put in evidence; see, for example some of those annexed as 'GM3' to the affidavit of the architect of the Oracle building, Mr Gavin Mitton. The building control officer fails to engage at all with the consequences of the City's earlier decision to approve what is described as the 'unusual' nature of development of the Four Seasons building.

5. Generally

Nowhere in the recommendation does the BCO deal with the particular impact of the proposed building additions on the Four Seasons building. He does not acknowledge that the City approved the development of the Four Seasons site in a manner that would render the balconies provided for in the approved building plans essentially useless if the adjoining erf were subsequently further developed to the maximum extent permitted in terms of the zoning

[47] Cf. the definitions of 'zoning' and 'land use restriction' in s 2 of the Land Use Planning Ordinance 15 of 1985 (Cape).

scheme. He also does not deal with the impression that the City's approval of balconies along the common boundary with Erf 5284 would have given to objective notional sellers and buyers of the affected units in the Four Seasons building as to the nature of what the City would reasonably be likely to permit on the adjacent property. He concentrates on what he conceives to be the rights attached to the subject property (Erf 5284) and fails to deal at all with what the applicants had raised as the objectionable features of the building from the perspective of owners and occupiers of the Four Seasons building. He also, as counsel for the applicants stressed, twice misstated the test as stated in *Walele*; that is he said, in paras. 22 and 30, that in deciding the application the City had to consider whether it was satisfied that the proposed building would probably or in fact be unsightly or objectionable or disfigure the area or derogate from the value of neighbouring properties instead of acknowledging that the City was empowered to approve the application only if it were positively satisfied that the proposed building would not have any of those unfavourable effects.

[58] As mentioned, Mr Howard approved the building plans on the very day that the building control officer produced his recommendations. Mr Howard purported to set out his reasons in an accompanying memorandum. The part of the memorandum, dealing with the issues to be considered under s 7(1)(b)(ii)(aa) went as follows:

> Having assessed the plans and having regard to the submissions by SVY and BDP [the respective parties' attorneys] I am not satisfied that the area will be disfigured by the additions to the existing building and nor am I satisfied that the building will be unsightly or objectionable.
>
> Having considered the application in its context and the submissions by SVY and BDP and having regard for the judgements in various court cases (inter alia Camps Bay Ratepayers, Turnbull-Jackson and Mill Row Property Owners) I am not satisfied that the additions to the existing building will derogate from the value of surrounding or adjoining properties.
>
> (As an aside: The notion that any person would have an expectation that the City, having produced a set of development rules (the Zoning Scheme), would not permit a property owner to develop his property to the extent permitted in the Scheme is, in my opinion, absurd. I note also that this property lies within the Cape Town Urban Development Zone (a Tax incentive scheme) which was designed to encourage property owners to upgrade their properties.)
>
> In arriving at the decision I also had regard for the judgement in the Mill Row case in respect of the interference of views, light and privacy may be impinged upon (sic) by building on neighbouring land provided that such building is otherwise, as in this case, permitted.

> …
>
> I discussed some the above aspects (sic) contained in his recommendation with the BCO.
>
> Given the above I can find no reason not to approve the application.

[59] I have said that Mr Howard '*purported* to set out his reasons' because, apart from the indication given by the 'aside' and the not altogether coherent reference to his regard to the judgment in the Mill Row case, the memorandum in point of fact does not furnish any reasons for his having reached the stated conclusions. It does not say what, in particular, he engaged with in the attorneys' submissions, or why he accepted or rejected the arguments advanced in them. He also does not identify any of the aspects in the building control officer's recommendation that he found worthy of discussion with that official. Had he provided that information, it might have illuminated his conceptual approach to the task.

[60] The City's counsel sought to make light of the aside, emphasising that it had been expressly indicated to be such and that the functionary's 'views' had already been expressed in the preceding paragraphs. I am unable to accept that submission. Bearing in mind the expressed purpose of the memorandum – to give his reasons for the decision - the so-called aside is, as noted, one of only two parts of the memorandum that approximates a reasoned indication for his stated conclusions. Being aware of the contentious history of the building plan application, it is most improbable that he would have included the pungently expressed aside in the reasons document if it had not informed his approach to the decisions he had been required to make. The aside is, moreover, consistent with the approach propounded by him in various passages of his answering affidavit.[48]

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[48] Examples were quoted at para. 52 of the applicants' counsel's heads of argument. I take four of them:

'*I respectfully submit that the notion of intrusiveness as employed by the Constitutional Court in this regard cannot mean proximity as regulated by the applicable zoning scheme*'.
'*Proximity would presumably be relevant, for example, to the consideration by the local authority of a departure from the zoning scheme to exceed the building line. The approval of such building line can then possibly be said to exceed the legitimate expectations of an informed hypothetical buyer, even though they are lawful*'.
'*Mr. Jonker* [a property valuer engaged by the applicants] *says that a hypothetical informed purchaser would not have expected "a building hard up against another residential building". But that is precisely what such a purchaser would have expected, because that is permitted by the zoning scheme*'.
'*What has to be demonstrated is that a hypothetical informed purchaser would not have expected a building so unattractive or intrusive – and intrusive in this context cannot mean proximity (because that is regulated by the zoning scheme)*'.

[61] In their heads of argument the City's counsel submitted that the aside was '*clearly a comment on one aspect of the test for derogation from value, namely what the legitimate expectations of the parties to the hypothetical sale would be*'. The difficulty with that argument is that Mr Howard's comment fails to engage in any way whatsoever with the critical question in the matter: What the parties to the hypothetical sale would infer from the City's approval of the provision of balconies along the common boundary.

[62] Would not the notional reasonable-minded party to the hypothetical sale be cognisant of the duty on the local authority to apply the planning and building control legislation contextually and form their opinions accordingly? Everyone appears to accept that what the City had allowed in the nature of the development of the Four Seasons building was 'unusual'. It allowed windows and balconies facing onto a common boundary, when the convention is that when the neighbour might build right up to the boundary a blank wall is provided. Would the notional parties to the hypothetical sale not reasonably accept that the local authority would be obliged to take the unusual characteristics that had been permitted into account when considering any application for new or additional development on the adjoining erf? Would the notional parties factor into their judgements that the local authority having sanctioned a design of the Four Seasons building that provided balconies on the common boundary would approve the construction of an adjoining structure that would destroy the utility of those amenities?

[63] It is not the court's function to answer them, but these are the sort of questions that on the established facts of the current case[49] necessarily presented themselves to be answered in deciding whether an aspect of the proposed building additions would be objectionable or unsightly or give rise to a derogation from the value of some apartments in the Four Seasons building. They are the sort of questions that the building control officer should have dealt with in his recommendation and Mr

[49] Each case will call for a determination on its own facts. The hypothesis by the City's counsel that if the local authority were required to take account of the existence of the balconies in the current case, it would also have to consider refusing permission for the otherwise lawful erection of a four storey house in front of an existing single storey dwelling because it would destroy the latter's view does not follow. It is well-established that there is no such thing as a 'legitimate expectation' to the preservation of a view; whether a neighbour might have a legitimate expectation to the accommodation of the ordinary utility of part of the built component of its building when an adjoining property is developed is quite a different question. How it might be answered will always be peculiarly facts-dependent.

Howard in his reasons for approving the building plans if they had properly addressed themselves to the requirements of s 7(1)(b)(ii).

[64] Neither the building control officer nor Mr Howard appears to have considered what sort of development on the adjacent property might qualify as unduly intrusive or unacceptably overbearing, and therefore objectionable, notwithstanding its compliance with the zoning scheme. Absent an explanation of why the construction of a multi-storey solid wall closing off existing balconies would not have those effects, their recital of para. 40 of the judgment in *Camps Bay Ratepayers'* is liable to sound like so much cant. Their failure to deal with these questions suggests that they either did not take those facts into account or did not properly direct themselves on them in forming their judgement.

[65] The only explanations that have been given (in the answering affidavits, rather than in Mr Howard's contemporaneous memorandum) are that the setback of the Four Seasons building along the common boundary was to ensure compliance with regulation T1 of the National Building Regulations and that issues concerning the distance between buildings ('proximity') are regulated in terms of the zoning scheme, not the Building Act. The explanations suffice for the purpose of the first part of the statutory enquiry (viz. that required in terms of s 7(1)(a)), but they beg the question about the second part (viz. the enquiry in terms of s 7(1)(b)(ii)).

[66] The repeated reference in the memorandum to the Mill Row Property case is also puzzling because, as discussed earlier, the factual and legal issues in that matter were materially different. What it was that might have been found helpful in comparing the factual issues raised in the Mill Row case in respect of a group housing development with those concerning adjoining multi-storey buildings in the city centre in the current case also went unexplained. The Mill Row case involved two rows of houses in a suburban setting. The case did not raise any question remotely comparable to that posed by an application which, if approved, would result in a multi-storey solid wall being built hard up against the existing balconies on a neighbouring property. What Mr Howard said he drew from the judgment in that case (i.e. that 'views, light and privacy may be impinged upon (sic) by building on neighbouring land provided that such building is otherwise … permitted') does, however, echo the nub of his 'aside' and various passages of his answering

affidavit[50]: That any building erected within the parameters of the applicable zoning scheme restrictions had to be tolerated by neighbours irrespective of its adverse effects on their properties. That understanding negates the distinctly *second stage* character of the enquiry a local authority is required to undertake in terms of s 7(1)(b)(ii).

[67] What the absence of reasons, properly so called, in the memorandum in respect of the implied determination of the s 7(1)(b)(ii) does show is that Mr Howard does not appear to have appreciated that an important reason for the court in the Mill Row case having declined to interfere with the functionary's decision on review was its satisfaction that the decision-maker had set out '*detailed, plausible and justifiable explanations*' for arriving at the decision in issue in that case. In a matter like the present that is confessedly 'unusual', the reasons for the decision are obviously a critical consideration in the determination in a judicial review context whether the decision is one that an administrator could reasonably have made. If one were to assume that the absence of any reasons in Mr Howard's memorandum falls to be understood in the context as denoting an unqualified acceptance by him of the building control officer's recommendation, then it is significant that he gave no indication of having been astute to the material flaws in the recommendation identified above. He certainly did not say anything to qualify his approach from that evinced in the recommendation. Indeed, as the applicants' counsel pointed out, Mr Howard, in the first of the paragraphs of his memorandum quoted above (and indeed, also at para. 102 of his answering affidavit on behalf of the City) repeated the building control officer's incorrect formulation of the test as expressed in *Walele*.

[68] To recap, the decision in issue in the current matter was made because of the functionaries' misdirected opinion that any conventional structure erected within the applicable land use restrictions had to be factored in by anyone purchasing a unit in the adjoining Four Seasons property irrespective of its effect on an extant building on the adjoining erf. That was a mistaken view based on a misapprehension of the law. The functionaries failed to consider and address the question whether a reasonable and informed purchaser of a unit on the eighth floor of the Four Seasons building would foresee that the regulating authority, having approved balconies along the

[50] See note 48 above.

common boundary would permit the development of the adjoining erf in such a manner as to effectively destroy the utility of the balconies as such, and with the degree of overbearing intrusiveness that allowing a three storey solid wall to be built up hard against them would unavoidably occasion.

[69] For these reasons I have concluded that the applicants have established that the approval of the second respondent's building plan application occurred in circumstances in which the decision-maker was materially influenced by an error of law (i.e. a misapprehension of the import and requirements of s 7(1) of the Building Act) and in which there was a resultant failure by the decision-maker to take into account a relevant consideration (i.e. whether, *in the peculiar factual circumstances*, the construction of the second respondent's building hard up against the balconies on the eighth floor of the Four Seasons building and close to the windows on the ninth and tenth floors in the manner required by the provision gave rise to any of the disqualifying factors). The approval of the plans will therefore be reviewed and set aside, and the application remitted for appropriate reconsideration by the first respondent.

[70] Before concluding, I should mention that there was quite extensive and contesting evidence adduced by the applicants and by the respondents concerning the impact of the proposed additions to the Oracle Building on the market value of the affected apartments in the Four Seasons building. The applicants' counsel submitted that if I found myself unable to determine that issue on the papers, they would wish it to be referred for determination on oral evidence. I do not propose, however, to enter into that question determinatively. As mentioned, I would imagine that if the proposed new building were found, upon proper enquiry in terms of s 7(1)(b)(ii), to be unacceptably intrusive or overbearing in any relevant respect, and therefore unsightly or objectionable, it would probably follow that there would be a derogation from the value of the affected apartments were its construction to be approved. But the question is one for the local authority to decide in the context of a properly directed determination of the required second stage enquiry. If the court were to purport to decide it, it would be overstepping its review powers and putting itself in a role that the statute has reserved for the local authority. It is in any event a question that cannot be determined in isolation from the other questions (some of which have been indicated above) that the local authority has to answer in determining the

building plan application. This is not a case in which the applicants contended for the exceptional remedy of a substitutive decision; on the contrary, they expressly (and appropriately) prayed in their notice of motion for an order remitting the building plan application for determination by the City.

[71] After receiving the administrative record produced by the City in terms of rule 53, the applicants amended their notice of motion to include a prayer that the building plan application be remitted to the City to be reconsidered by a different decision-maker on the basis of a fresh recommendation by a different building control officer. The City's counsel submitted that the amendment of the notice of motion was irregular because it was not predicated on anything first disclosed to the applicants in the administrative record. Counsel cited *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC), at para. 53, in support of that argument. They also submitted that the applicants had not adduced any evidence in support of the amended relief in the supplementary founding affidavit put in in terms of rule 53(4). The judgment in *Lufuno* is not on point in my view. The question in that matter was whether the applicant had been entitled to make out an entirely new case in its supplementary founding affidavit. All that the applicants sought to obtain in terms of the contentious paragraph in their supplemented notice of motion in the current case was more detailed ancillary relief in respect of the case that had been advanced in their founding affidavit. If the City considered itself prejudiced by the amendment, it could have applied to have the supplemented notice of motion set aside as an irregular step. I think it was wise not to have done so. In my view, when a court decides to set aside an administrative decision on review and remit the matter for reconsideration, it is within the court's discretion to decide *mero motu*, predicated upon what appears to it to be just and equitable in the circumstances, whether the remittal should be with or without directions.[51]

[72] Meaning no discourtesy to the officials concerned, I do think that it would be just and equitable to direct that the reconsideration of the second respondent's building plan application should be done on the basis of a freshly prepared building control officer's recommendation and by a different decision-maker. (I understand that Mr Howard has in any event retired, even though he reportedly does still work for

[51] See s 8(1)(c)(i) of PAJA.

the City on an ad hoc contract basis.) It is desirable, particularly, in view of the trenchantly expressed aside by Mr Howard, that someone without his preconceived opinion should decide the matter. I should make it clear, however, that the order to be made does not require the recirculation of the application for departmental comment. An expeditious determination is to be encouraged. The building control officer and decision-maker may, of course, make whatever further enquiries from any source they may consider appropriate.

[73] Costs were sought only against the second respondent in the notice of motion. In argument, however, the applicants' counsel sought costs also against the City because it had chosen to enter the fray and oppose the application. The City sought costs against the applicants in the event of the application being dismissed. The usual consequence of an administrator adopting an actively oppositional role is an exposure to costs. I see no reason why the current case should be an exception to that rule.

[74] The following order is made:

(a) The decision by the first respondent made on 25 February 2015, in terms of s 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 ('the Act'), to approve the building plan application submitted by the second respondent under plan no. 70155981 in respect of Erf 5284, Cape Town, at 41 Buitenkant Street, Cape Town, is reviewed and set aside.

(b) The building plan application is remitted to the first respondent for reconsideration, with the following directions:

    (i) the application is to be decided with reference to a fresh recommendation in terms of s 6(1)(a) of the Act to be rendered by a different building control officer from that who prepared the recommendation dated 25 February 2015; and

    (ii) the decision is to be made by a person other than Mr Peter Henshall-Howard

(c) The first and second respondents shall be liable jointly and severally for the applicants' costs of suit, including the costs of two counsel.

A.G. BINNS-WARD
Judge of the High Court

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