IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE:28/01/2014
CASE NO:66324/12

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

28/01/2014 .....

DATE SIGNATURE

In the matter between:

ALEXANDER WHYTE MORRISON Applicant

And

THE CITY OF JOHANNESBURG First Respondent

THE CITY MANAGER OF THE CITY OF JOHANNESBURG Second Respondent

GABRIEL JACOBUS MARX Third Respondent

SAN CHIARA DEVELOPMENT HOME OWNERS ASSOCIATION Fourth Respondent

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JUDGMENT

MURPHY, J

1. Mr AW Morrison ("Morrison"), the applicant in this application, seeks an order reviewing and setting aside the decision of the City of

Johannesburg, the first respondent, ("the City") to approve the building plans submitted to it by the third respondent, Mr GJ Marx ("Marx") and remitting the decision back to the City for reconsideration.

2. The application follows upon an urgent application in which Spilg J on 22 October 2012 interdicted Marx from continuing with building operations at his property pending the final determination of an appeal in terms of section 139 of the Town-Planning and Townships Ordinance 15 of 1986 ("the Ordinance") or a review of the decision of the City to approve the building plans submitted by Marx.

3. Morrison is the owner of Unit 6, San Chiara Estate, being Portion 10 (a Portion of Portion 4) of Erf 39, Lonehill Ext 5, Calderwood Rd, Lonehill, Johannesburg. Marx is his neighbour, being the owner of unit 5 (Portion 9).

4. During 2010 Marx decided that he wanted to extend portions of his house and instructed his architect to prepare a plan, Annexure RA3 to the founding affidavit. It is evident from the plan that Marx proposed to build a double story structure adding additional floor area of 85,026 square metres to his house. The ground floor consists of an extended TV area and a new "Hollywood carport/double garage", and the first floor comprises a new gym or bedroom of 27,286 square metres.

5. The Site Development Plan ("SDP"), Annexure RA4, reveals that the estate contains 17 units built on stands of approximately 500 metres. It is evident from the SDP that each property was placed in such a way as to give the adjacent properties a corridor of open space to allow for light and some outlook. Morrison has annexed photographs to his founding affidavit, including a photo shopped version, depicting the situation if the double story structure is built, and has submitted that the proposed structure will significantly obstruct sunlight from reaching his outside entertainment areas, consisting of a swimming pool and adjacent patio-style porch. Whereas presently the outlook from his garden and porch is an open view facing north, if the structure is built, the view will be obscured by a pitched tile roof which he claims will over-shadow and disturb his enjoyment of his garden and porch-area. Moreover, as the structure will impede the north-facing aspect of his property, it will diminish the amount of sunlight capable of entering the ground floor of his home. He maintains that the impact of the proposed new structure will reduce the value of his home by an amount of about R500 000.

6. The City's attitude to Morrison's concerns is that Marx's property already casts a shadow over Morrison's entertainment area, and that such should be expected in an urban environment where densification is approved, properties are smaller and people have to live in close proximity. Marx adds that the SDP in fact contemplated a double garage, denies that the structure will have the impact alleged, maintains that Morrison should appreciate that one of the impediments of high-

density housing is restricted views and contends that the structure will give them both greater privacy.

7. Marx lodged the building plans for consideration and approval by the City in December 2010. These plans could not be approved because they showed parts of the building within the building restriction area on Marx's property which building line had not been relaxed. The City accordingly invited an application for relaxation of the building line.

8. The property falls within the scope of the Sandton Town-Planning Scheme ("STPS"). Section 18 of the Ordinance provides for the preparation by local authorities of town-planning schemes for land situated within their jurisdiction for the purpose of ensuring co-ordinated and harmonious development of the area to which it relates. In terms of section 58(2) of the Ordinance any person who contravenes or fails to comply with a provision of an approved scheme of an authorised local authority shall be guilty of an offence. Clause 11(1) of the STPS provides that no building other than boundary walls or fences or temporary structures erected in connection with building operations shall be erected in the "building restriction area". Clause 1 (xi) defines the building restriction area to mean an area of uniform width, unless otherwise stated in the scheme, upon which no building, save that which is allowed elsewhere in the scheme, may be erected. The definition must be read with the definition of "building line" in Clause 1 (x) of the STPS which means a line indicating the furtherest boundary of a building

restriction area from a street, a proposed street, street widening, or any other boundary of a property and which is a fixed distance from the boundary of an erf. Clause 11(2) of the STPS provides that unless otherwise stated on the map, building lines shall apply to properties according to use zones as indicated in Table B. It is common cause that the property has been zoned as "Residential 2", which according to Table B requires building lines along a street boundary of 5 metres and one of 3 metres along other boundaries.

9. The building plans submitted by Marx in December 2010, as I have said, indicated that the structure would encroach into the building restriction area. Clause 10(2)(d) of the STPS provides:

> "The local authority may, upon receipt of a written application or the submission of a site development plan, allow the erection of a building in the building restriction area in the case of a corner erf or if, as a result of the topography of the property or of the adjacent land or of the propinquity of buildings already erected on the building restriction area, adherence to the building line requirements would unreasonably hamper the development of the property."

10. During the course of the interaction by the parties with the City it became apparent, because of the proposed encroachment in the building restriction area, that Marx was required to make an application in terms of Clause 10(2)(d) of the STPS for a relaxation of the 3 metre building line between the two units. I have not been able to locate a

copy of the written application in the inadequately indexed record of decision filed by the City, nor is it referred to in any of the sets of affidavits. It appears to be common cause though that such an application was made. Morrison's previous attorneys objected to the building plans submitted by Marx in December 2010 in a letter dated 11 February 2011. The basis of the objection was that Morrison had not consented to the proposed alterations and that they "disobeyed" the building lines defined in the STPS. This latter objection no doubt prompted the City to call for an application in terms of Clause 10(2)(d) of the STPS.

11. On 1 June 2011, Morrison's current attorneys addressed a detailed letter of objection to the City on his behalf. They objected to the proposed structure's impact on the use and enjoyment of the property, and raised the additional point that the proposed additions and alterations to Marx's property would be inconsistent with the SDP and hence could not be approved until such time as the SDP has been amended. Reference was made in this regard to Clause 14(1) of the STPS, the relevant part of which reads:

> "A site development plan, compiled to a scale of 1:500 or to any other scale as may be approved by the local authority, shall be submitted for approval to the local authority before the submission of any building plans. No buildings shall be erected on the erf until such site development plan has been approved by the local authority, and the entire development of the erf shall be in accordance

> with the approved development plan: Provided that, with the written consent of the local authority, the plan may be amended from time ...."

The attorneys accordingly requested the City to confirm that it would not consider the approval of any building plans that are inconsistent with the STPS and the SDP, and to return the plan to Marx with an instruction to initiate steps to have the SDP amended.

12. Marx brought the application for a relaxation of the building lines subsequent to the delivery of this letter on a date and basis unknown (on account of the application not forming part of the record).

13. It appears from a letter dated 2 February 2012, addressed by Morrison's attorneys to the City, that on 20 December 2011 the City notified Morrison's previous attorneys that a hearing was to be convened in terms of section 131 of the Ordinance. The notification is not annexed to the affidavits and does not form part of the City's record of decision. It is accordingly not possible to identify precisely the scope and purpose of the hearing. Morrison however annexed the heads of argument filed at the hearing which are headed:

> "Application for consent: Relaxation of Building Lines in respect of Portion 9 of Erf 39 Lonehill Extension 5 in terms of the Sandton Town Planning Scheme, 1980."

It is clear also from the content of the heads of argument that the application for which the hearing was scheduled was the application for the relaxation of the building lines.

14. The hearing was convened on 16 February 2012. The argument advanced on behalf of Morrison was to the effect that in terms of the STPS the erection of the structure on the property could only take place in accordance with the SDP approved by the City which allegedly did not allow for the construction of the building proposed by Marx, and, as such, the relaxation of the building lines would be contrary to the SDP and the STPS. Reliance was placed upon the City's decision of 13 June 2011 (attached as Annexure G to the heads of argument, Annexure RA12) initially refusing to accept the application for relaxation of the building line due to the fact that it was "legally incomplete" because an amended SDP was required for the alterations and additions. Morrison argued that two applications were required: firstly, an application to amend the SDP, and secondly an application for relaxation of the building lines. And, it was submitted, the City could not approve the relaxation of the building line until such time as an amended SDP was submitted and approved, and as required by its own decision of 13 June 2011. Since no application to amend the SDP had been made, the City was precluded from granting the application to amend the building lines. In other words, the application for relaxation was contended to be premature.

15. It was submitted on behalf of Morrison at the hearing that the failure to make application for an amendment of the SDP prejudiced the other residents of the estate in that their rights to object to any amendment had not been given effect to. It was argued further that the application for relaxation did not include sufficient information substantiating and motivating the approval of the application, and allegedly had not been brought following the proper process and on due notice to all interested and affected parties.

16. In addition to the technical aspects, the attorney for Morrison addressed the substantive issues relating to the effect the structure would have on Morrison's property, in particular the derogation of value and his ability to enjoy the benefits of his property.

17. The respondents have disputed the merits of the arguments advanced on behalf of Morrison at the hearing. I will refer to their contentions later.

18. The City's decision on the application is set out in a letter dated 19 April 2012 but which Morrison claims only to have received in June 2012. The letter records that the following resolution was adopted by the City of Johannesburg Development Planning and Urban Management Planning Committee:

"Subject to the general provisions of the Sandton Town Planning Scheme, 1980, the City of Johannesburg hereby relaxes the side space from 3 metres to 1.22 metres along the south western boundary over such distance as is necessary to permit the construction of a double garage, bedroom and patio"

The effect of the decision is that the structure proposed by Marx would come within 1.22 metres of the boundary of Morrison's property. The letter of decision however stated explicitly that the relaxation did not bind the City to approve building plans, or absolve Marx from complying with any restrictive condition of title, the City's by-laws or the approval of building plans in terms of the National Building Regulations.

19. By way of a letter dated 20 June 2012 addressed to the Gauteng Townships Board, ("the Board"), Morrison's attorney noted an appeal against the decision of the City to the Board in terms of section 139 of the Ordinance. Paragraph 2 of the letter sets out the grounds of appeal as follows:

"2.1 The Municipality erred in finding that the notification and advertisement of the application was in accordance with the provisions of the Scheme.

2.2 The Municipality erred in failing to consider the provisions of the Promotion of Administrative Justice Act, Act 3 of 2000 when finding that the notification and advertisement of the application was administratively fair.

2.3 The Municipality erred in exempting the applicant from having to comply with the requirements for the amendment and approval of the Site Development Plan in respect of properties with a zoning of "*Residential 2*" as contemplated in the provision of the Scheme.

2.4 The Municipality erred in considering the impact that the approval of the application would have on the surrounding properties such as overshadowing and visual intrusion. Further, the Municipality failed to consider the development concept of the gated residential estate when making its decision.

2.5 The Municipality erred in finding that the application was capable of consideration and that such was not fatally defective.

2.6 The Municipality erred in approving the application and should have found that the application was inconsistent with the DFA Principles.

2.7 The Municipality erred in approving the application and should have found that the procedure followed was inconsistent and at variance with the Town Planning Scheme."

20. Section 139(1) of the Ordinance reads:

"139. Appeals to Board. - (1) An applicant or objector who is aggrieved by -

(a) a decision of a local authority-

(i) in terms of section 20(3)(b), 48(1)(b) or 63(1)(b);

ii) on any application in tems of-

(aa) any provision of this Ordinance;

(bb) any town-planning scheme, may, within a period of 28 days from the date he has been

notified in writing by such local authority of the decision, or within such further period, not exceeding 28 days, as the Board may allow:

(b) the refusal or unreasonable delay of a local authority to give a decision contemplated in paragraph (a) may, at any time,

If this Ordinance does not provide for an appeal to the Administrator, a compensation court or a services appeal board, appeal through the Director to the Board by lodging with the Director a notice of appeal setting out the grounds of appeal, and he shall at the same time provide the local authority with a copy of the notice."

It is Morrison's contention that he is an objector aggrieved by a decision of a local authority on an application in terms of Clause 10(2)(a) of the STPS and is accordingly entitled to appeal to the Board in terms of section 139(1)(a)(ii)(bb) of the Ordinance.

21. Morrison's attorney then addressed a letter dated 18 July 2012 to Marx informing him that an appeal had been noted and that the effect of such noting was that the decision of the City could only take effect after the conclusion of the appeal.

22. The City approved the building plans submitted by Marx, on 17 August 2012. It is this approval Morrison seeks to have set aside and remitted to the City for reconsideration. As stated at the outset, Marx has been

interdicted from continuing with building operations at his property pending the determination of the appeal or the review.

23. In argument before me, counsel were agreed that the application had to be determined with reference to four grounds of review, namely:

i) The approval of the building plans was illegal because a mandatory and material procedure or condition (a jurisdictional fact or condition precedent) prescribed by the provisions of the National Building Regulations and Building Standards Act 103 of 1977 was not complied with; namely, the City before taking the decision failed to consider any recommendations made by the Building Control Officer in terms of section 6(1)(a) of the Act, as it was required to do in terms of section 7(1) of the Act.

ii) The approval of the building plans was illegal because the administrative decision to allow relaxation of the building line was pending an administrative appeal to the Board and thus the relaxation was suspended with the result that the building plans could not be approved. Section 7(1)(a) of the Act permits the approval of building plans if they comply with the requirements of the Act "and any other applicable law". As the decision to relax the building line was suspended by the noting of the appeal, the

plans did not comply with the applicable law, namely the STPS as promulgated under the Ordinance.

iii) The approval of the building plans was illegal because the proposed alterations would not be in accordance with the approved SDP for the estate and would thus contravene the provisions of the STPS until such time as the SDP is amended to allow for the relaxation of the building line and the erection of the proposed structure in the building restriction area.

iv) The approval of the building plans is reviewable administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") in that the City failed to take account of the pending administrative appeal in relation to the relaxation of the building line and the alleged impact of the alteration on the value, use and enjoyment of Morrison's property.

24. For reasons which will become apparent, I consider it appropriate to deal with the second ground of review first.

25. Mr Oosthuizen SC, who appeared for Marx, posed two challenges to the second ground of review. The first was to the effect that Morrison was not an "objector" within the meaning of that term as used in section 139

of the Ordinance and hence no valid appeal had been lodged with the effect of suspending the decision of the City. The second was that even if there was a valid appeal it did not have the effect of suspending the decision of the City.

26. Mr Oosthuizen's first argument is predicated on the submission that the Ordinance shows that the terms "objector" and "objection" were intended to be used in a narrow and particular sense. He argued with reference to various provisions of the Ordinance that the word "objection" usually relates to objections made to decisions with regard to land use rights and not building line restrictions. I do not agree. The term "objector" is not defined in the Ordinance. It should therefore be assumed that the legislature used the term in its popular sense unless the context or the subject matter clearly indicates that the term was intended to be used in a different sense - *Beadle and Co v Bowley* 12 SC 401, 402. An objector is one who objects, as to a proposition or measure; and "to object" means to make opposition (*Websters New International Dictionary*). There is nothing in section 139 of the Ordinance which suggests that the terms objector should be restricted in the manner suggested. The right to appeal is conferred on an objector who is aggrieved by a decision on "any" application in terms of any town-planning scheme. In other words any person who opposes an application be it in respect of land use, the grant of exemptions or the relaxation of any requirements of the provisions of the scheme, may appeal. Moreover, the right of objection is not restricted in the Ordinance to decisions in relation to consent use or land use rights.

Section 56, for example, allows for objections to a town-planning scheme sought by individual owners of land. Nothing in the section restricts an applicant to any particular kind of amendment or, by extension, an objector, to any particular kind of objection.

27. In the result, Morrison as an aggrieved objector had a right and standing to note an appeal in terms of section 139 of the Ordinance against the decision of the City to relax the building line. The question then is whether the noting of the appeal suspended the decision.

28. It is trite that in judicial proceedings the noting of an appeal has the effect of suspending the order appealed against pending the outcome of the appeal before a court of appeal. The rationale of the common law rule is that the *status quo* between the parties should be maintained until the adjudication process is complete and a final decision reached. The law hopes in this way to avoid the potentiality of prejudice caused by giving effect to an order or decision that may be reversed. However, in administrative proceedings there is no similar rule of the common law which suspends any administrative decision once an administrative appeal has been noted. Whether the noting of an administrative appeal has the effect of suspending the administrative decision depends upon the interpretation of the provision bestowing the statutory right of appeal. According to Baxter, *Administrative Law* (Juta) 381, the common-law principle of suspension can constitute no more than a presumption in the case of administrative decisions, and this

presumption may be negatived by the implications of the statute. He adds though that the presumption appears nevertheless to be a strong one. (See *Marinepine Transport (Pty) Ltd vs Local Road Transportation Board, Pietermaritzburg* 1984 (1) SA 230 (N) 232 B - D; and *Max v Independent Democrats* 2006 (3) SA 112 (c) at 118E - 120H).

29. Section 139 of the Ordinance does not expressly provide for the suspension of the decision appealed against. In keeping with the common-law principle it nonetheless may be presumed that such was the intention. Mr Oosthuizen however referred to two provisions of the Ordinance which he submitted reveal a contrary intention in that they provide expressly for suspension and this he argued was a clear indication that the legislature did not intend suspension to be the general rule but rather the exception. By making express provision for those cases where there will be a suspension, it follows by implication that in other instances the right of appeal will not have the same consequence - *inclusio unius est alterius exclusio.*

30. The first provision upon which Mr Oosthuizen relied to support his argument is section 25 of the Ordinance, which reads:

> "(1) Subject to the provisions of subsection (2), the Surveyor-General shall not approve a general plan or diagram of-

(a) a subdivision of land to which a town-planning scheme in operation relates, unless-

(i) the local authority or the Board, in a matter before the Board on appeal, or the Administrator or a Minister of State has approved the subdivision in terms of the provisions of this Ordinance or any other law relating to the subdivision of land;

(ii) the Administrator or a Minister of State has, in terms of the provisions of this Ordinance or any other law relating to the subdivision of land, granted exemption, either generally or specifically, from compliance with the provisions of this Ordinance or that other law;

(b) a consolidation of land to which a town-planning scheme in operation relates, unless the local authority or the Board, in a matter before the Board on appeal, has approved the consolidation.

(2) Where application is made to a local authority to consolidate land as contemplated in subsection 1(b) and the local authority fails to approve or refuse the application within a period of 60 days from the date of receipt of the application it shall be deemed that the local authority has approved the application.

(3) The provisions of subsection (1)(b) shall not apply to a consolidation of land where the diagrams for consolidated title were lodged with the Surveyor-General prior to the date of the commencement of this Ordinance."

Section 25(1)(a)(i) makes it clear that where there is an appeal to the Board in respect of the approval of a general plan or diagram of a

subdivision of land, the Surveyor-General is prohibited from approving the plan or diagram unless the Board on appeal approves it.

31. The second provision of the Ordinance expressly providing for suspension is section 59(15) which reads:

> "(15) Where an applicant or objector has, in terms of subsection (1)(a)(i), appealed against any provision of a town-planning scheme of which notice was given in terms of section 57(1)(a)-
>
> (a) and the appeal is upheld-
>
> (i) the authorised local authority shall amend such provision within a period of 30 days from the date it has been notified in terms of sub-section (11) of the decision of the Administrator, and it shall forthwith give notice thereof in the *Provincial Gazette*;
>
> (ii) the Administrator shall, where the authorised local authority fails to comply with the provisions of sub-paragraph (i), amend such provision and forthwith give notice thereof in the *Provincial Gazette* and thereupon he may recover the costs from the local authority;
>
> (b) such provision shall not come into operation until such time as the appeal has been considered by the Administrator and, if upheld, notice has been given in terms of paragraph (a)."

This provision governs an appeal against the adoption of a draft town-planning scheme by a local authority or the decision of a local authority on an application for the amendment of a town-planning scheme made in terms of section 56(1). It provides that the relevant provision will not come into effect while an appeal is pending before the Premier of the province.

32. Mr Oosthuizen referred also to clause 19 of the STPS which expressly provides for suspension. However, I am not convinced that the provisions of the STPS provide a legitimate aid to interpreting the Ordinance. The question is what was the intention of the provincial legislature in enacting the right to appeal in section 139 of the Ordinance; or more particularly whether the express provision for suspension in section 25 and section 59(15) is sufficient to negative the presumption that the common law principle of suspension will normally apply to administrative decisions? The argument, as indicated, rests upon the maxim *inclusio unius est alterius exclusio*, which is a canon of literalist or textual interpretation. In recent years our courts have favoured a more contextual and purposive approach to interpretation based on the understanding that a literalist or overly textual approach can at times be a sterile exercise defeating of the true intention or purpose of the legislation. In *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (cc) at para [40], the Constitutional Court offered the following salutary caution in relation to the application of the maxim:

"Although there is no express reference thereto in its judgment, the High Court clearly relied implicitly on the interpretative maxim that the 'specific inclusion of one implies the exclusion of the other', in coming to this conclusion. This maxim has been described as 'a valuable servant, but a dangerous master'. It is not a rigid rule of statutory construction; in fact it has on occasion been referred to as a 'principle of common sense' rather than a rule of construction, and 'it must at all times be applied with great caution'."

33. The purpose of section 139(1) of the Ordinance is to confer upon an aggrieved party a right of reconsideration of a decision rendered by a local authority in relation to, amongst other things, an application in terms of any town-planning scheme. The value of an appeal (to state the obvious) is that it allows for reconsideration of the merits of a decision and substitution of another decision on the basis of correctness. It is not aimed at curing irregularity but allows an aggrieved party a second bite of the cherry in relation to the rightness of the decision.

34. In certain circumstances the safeguard provided by an appeal is more necessary than others. This is especially the case where the initial decision-maker is the legislator and executive body responsible for the policy and legislative provisions which form part of the subject-matter and matrix of the appeal. Baxter *Administrative Law* 255 puts it well as follows:

"A right of appeal is an invaluable safeguard. It provides an aggrieved individual with the assurance that the decision will be reconsidered by a second decision-

> maker. The appellate body is able to exercise a calmer, more objective and reflective judgement. Detached from the 'dust of the arena', as it were, and the immediacy of the initial decision, the second decision-maker is in a better position to discern a faulty reasoning process and, in particular to evaluate facts. This assumes special importance in the case of a discretionary decision since much of that decision is likely to depend on the inferences ('ultimate facts') drawn from the raw evidence ('basic facts'). In the end the final decision will have been the subject of more careful scrutiny, prolonged debate and sober reflection."

35. The policy in relation to building within building restriction areas is a matter for local authorities, as is the determination of applications for relaxation or exemption of or from that policy. Thus, for obvious reasons, where the first decision-maker is the maker of policy, the legislator of it and the adjudicator of applications for exemption from it, the existence of a right to appeal to an independent, detached and more objective body assumes greater importance. Section 139(1) of the Ordinance provides for that possibility. However, such legislative provision will be rendered nugatory in effect should it be held that an appeal against a decision to permit building in the restriction area has no suspensive effect. That would mean that despite the appeal the applicant for relaxation, on obtaining approval of his plans, could commence building and the appellate body would be presented with a *fait accompli*, or facts on the ground, which would have a naturally chilling effect on its decision. The appellate body will no longer merely be confronted with determining whether to prohibit building but will have the additional burden of deciding whether to order the demolition of the building built within the restriction area while the appeal was

pending, assuming it had such power, which if it did not would render the appeal worthless. In either instance the appellate body would be faced with making a more difficult decision of potentially disproportionate quality.

36. Our system of constitutional and administrative law is suffused with the principle of proportionality, constituting as it does a constituent element of the rule of law and the overarching principle of legality. The purpose of the principle is "to avoid an imbalance between the adverse and beneficial effects ... of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end" - Hoexter *Administrative Law in South Africa* (Juta) 344. The principle finds expression in our law not only as a recognised ground of constitutional and administrative review but also in the presumptions of statutory interpretation that the legislature does not intend an unreasonable or unfair result or to alter the existing law more than is necessary. While there may be instances where the non-suspension of a decision on appeal will be both legitimate and legal, and hence proportional, the presumptions and the doctrine of the rule of law require courts when faced with legislative ambiguity to choose a meaning which most effectively promotes the principle of proportionality. The delay suffered by a litigant pending appeal is less oppressive than the right of appeal being rendered practically worthless by allowing the decision of the initial decision-maker, in this instance a not entirely disinterested party, to assume an almost final quality.

37. For those reasons, therefore, I am not persuaded that the failure of section 139(1) of the Ordinance to make express provision for suspension of the decision appealed against is decisive. The ordinary principle that the noting of an appeal suspends the decision is the least oppressive means of advancing the policy of the scheme of regulation and the provision should be interpreted in accordance with the presumption favouring proportionality, fairness and reasonableness. The existence of explicit provision for suspension in two instances in a detailed and complex statute is insufficient basis, in my view, to negative the presumption that the legislature intended the proportional result which the principle of suspension will achieve. Moreover, the policy of our system of administrative law, as reflected in section 7(2) of PAJA, normally imposes a duty to exhaust domestic remedies. A complainant is usually obliged to make use of a statutory extra-judicial remedy before seeking review in a court of law. Where noting a statutory appeal does not have the effect of suspending the administrative decision, the statutory remedy will be ineffective to the extent that a court could not in good conscience impose the duty to exhaust the remedy. By effectively allowing litigants to proceed directly to court, the autonomy of the administrative process would be undermined and the benefit of the appellate tribunal's technical expertise, access to relevant information and know-how would be lost to the process - *Koyabe v Minister of Home Affairs* - 2010 (4) SA 327 (CC) para 36-38.

38. The consequence of this finding is that the City was not entitled to approve the building plans because the issue of the relaxation of the building line had not been finally determined and hence the approval did not comply with the provisions of the STPS. The approval accordingly falls to be set aside on that ground alone on account of illegality in terms either of section 6(2)(f)(i) of PAJA or the doctrine of the rule of law.

39. The City in its answering affidavit contended that Morrison was never entitled to participate in any hearing relating to the relaxation of the building line as no provision is made for such in the Ordinance or STPS. That may or may not be so, but the very existence of a building restriction area is for the benefit of neigbours and a decision relaxing the building line will constitute administrative action which materially and adversely affects the rights or legitimate expectations of such persons and accordingly is required to be procedurally fair in terms of section 3 of PAJA. Having decided to grant Morrison a hearing to determine his objections, the City recognised him as an objector, and aggrieved as he was by the decision of the City on the application in terms of Clause 10(2)(d) of the STPS, he was entitled to appeal to the Board in terms of section 139 of the Ordinance.

40 As I have said, the validity of the second ground of review is sufficient to set aside the approval. I am accordingly disinclined to pronounce on the third ground of review which alleges that the proposed alterations would contravene the STPS until such time as the SDP is amended to

allow for the relaxation of the building line and the erection of the proposed structure in the building restriction area. The issue is at the heart of the appeal pending before the Board and may form the basis of a further application for review of the Board's decision. The Board as the mandated specialist tribunal is better qualified to pronounce on the issue after considering the relevant policy considerations and hence it seems to me that it would be inappropriate for this court to pronounce on the issue at this stage, especially when it is not necessary to do so.

41. The fourth ground of review has two components: firstly the City failed to give proper consideration to the pending appeal and secondly it did not properly consider the impact of the approval on Morrison's use and enjoyment of his property and the concomitant loss of value. The first allegation is in effect the second ground of review in a different guise and is valid for the same reasons. The second allegation is again an issue at the heart of the appeal pending before the Board and is best left for determination by it.

42. The remaining ground of review, the first ground, is that the approval of the building plans was illegal because the decision was taken in the absence of any report or recommendation by the Building Control Officer.

43. Section 6 of the Act requires that a Building Control Officer 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), which relates to the approval of applications in respect of the erection of buildings.

Section 7 of the Act states as follows:-

"(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 in which the application in question relates -

(aa) is to be erected in such manner or be of such nature or 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 the adjoin or neighbouring property;

Such Local Authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal;"

44. The City in terms of section 7(1) of the Building Regulations Act has to consider the recommendation referred to in section 6(1)(a) of the Building Regulations Act by the Building Control Officer.

45. The City filed a record in terms of the requirements of Rule 53 for purposes of the review. In such record, no recommendation, as referred to in Section 6(1)(a) of the Building Regulations Act by a Building Control Officer was to be found.

46. Notwithstanding same, when the City filed their Answering Affidavit, they attached to their Answering Affidavit, as Annexure "SN1", what appears to be a proforma document purporting to be such a recommendation. The document reads as follows: -

"I, CM Mabeba hereby state that I have scrutinised this building plan application. It is my finding that this building plan application conforms with the requirements of Act 103 of 1977 and any other applicable law, and I do not find

any of the detrimental condition referred to in Section 7(1)(b)(ii)(aa) of Act 103 of 1977. This recommendation is in accordance with the function that has been delegated to me by the Building Control Officer of the City of Johannesburg in accordance with Section 6(4) of Act 103 of 1977."

47. The document purported to have been signed on 17 August 2012. Thereunder, the following is stated: -

"I, A Bouwer, hereby state that I have considered the above recommendation for approval made in terms of Section 6(1)(a) of Act 103 of 1977. I am satisfied that this building plan application conforms with the requirements of Act 103 of 1977 and any other applicable law, and I do not find any of the detrimental conditions referred to in Section 7(1)(b)(ii)(aa) of Act 103 of 1977. I therefore approve this building plan application in accordance with Section 7(1)(a) of Act 103 of 1977. This approval is in terms of the authority that has been delegated to me by the Executive Director: Development Planning & Urban Management, City of Johannesburg. Signed and dated 17 August 2012."

48. In paragraph 43 of the replying affidavit Morrison stated that the recommendation annexed to the answering affidavit was "surprising" in view of it not forming part of the record of decision. It was submitted that if the document existed at the time that the record was filed, then it should have formed part of the record. Moreover, it was pointed out that the City tendered no explanation for the report not forming part of the record and the document was not proved by virtue of the author of the document not having made an affidavit in relation to it. The City did

not respond to any of these allegations and averments in the replying affidavit by filing a supplementary affidavit.

49. Where new material is introduced in a replying affidavit, especially where it deals with inadequately particularised or explained averments in the answering affidavit, a respondent should file replicating affidavits dealing with the new material and seek leave for the additional affidavit to be admitted. Failure to do so in the event of a material dispute of fact arising, may result in the averment in the answering affidavit being held to be untenable or uncreditworthy and the applicant's version being preferred - *Sigaba v Minister of Defence and Police and another* 1980 (3) SA 535(TKSC) at 550F.

50. While the manner in which the City has dealt with the report in its papers is inadequate, it is clear from paragraphs 49-54 of its answering affidavit that the City positively averred that it considered the recommendation of the Building Control Officer. The record shows that there was prior correspondence with the Building Control Officer by the representatives of Morrison and that the plans were endorsed as recommended by the Building Control Officer on the same day as the plans were approved. These are indications supporting the City's assertion that it considered the recommendations. The late and unexplained filing of the recommendation is indeed suspicious but I am not persuaded that it is sufficient to infer that the City has fraudulently sought to mislead the court. There is insufficient basis for rejecting the

averment of the City as untenable or uncreditworthy and accordingly its version must be accepted.

51. In argument, counsel for Morrison, Mr Rip SC, submitted that the report of the Building Control Officer was defective by reason of its failure to elaborate on the factors considered before making the recommendation. That case was not made out on the affidavits and the respondents were not called upon to meet that case. I agree with Mr. Oosthuizen that Morrison should not be permitted to change tack in this way during argument. The case that the respondents were called to meet was that no recommendation was made or considered before approval was granted and not whether or not the report of the Building Control Officer was sufficient - see *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A).

52. In the result, the first ground of review has not been substantiated on the evidence.

53. Be that as it may, the application must succeed on the basis of the second ground of review. The decision approving the building plans must be set aside and remitted to the City for reconsideration with the direction that it should do so only once the appeal in relation to the consent for relaxation of the building line has been finally determined by the Board or another court.

54. Spilg J in his order of 22 October 2012 ordered that the costs of the urgent application will be costs in the cause of the review application or the appeal before the Board whichever is disposed of first. There is no reason why the costs of the review application should not follow the result.

55. In the premises, the following orders are made:

i) The decision of the first respondent taken on 17 August 2012 to approve the building plans submitted to it by the third respondent is hereby reviewed and set aside.

ii) The decision of the first respondent is remitted to it for reconsideration with the direction that such reconsideration should take place only once the question of consent for the relaxation of the building line has been finally determined by the Gauteng Township Board on appeal or on review by another court.

iii) The first, second and third respondents are ordered to pay the costs of this application, as well as the urgent application heard by Spilg J, jointly and severally, the one paying the other to be

absolved; such costs to include the costs of employing two counsel and senior counsel.

JR MURPHY

JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on:	27 November 2013
For the Applicant :	Adv M Rip SC
Instructed by:	Ivan Pauw & Partners
For the First and Second Respondents :	Adv SD Mitchell
Instructed by:	Mojela Hlazo Attorneys
For the Third Respondent:	Adv MM Oosthuizen SC
Instructed by:	Rothmann Phahlamohlaka Inc
Date of Judgment:	