IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Reportable

Case No: **10278/2006**

In the matter between:

CLUB MYKONOS LANGEBAAN LIMITED	Applicant
and	
THE LANGEBAAN COUNTRY ESTATE JOINT VENTURE	First Respondent
OWEN WIGGINS (LANGEBAAN) (PTY) LTD	Second Respondent
BASFOUR 3632 (PTY) LTD	Third Respondent
THE SALDANHA BAY MUNICIPALITY	Fourth Respondent
THE LANGEBAAN COUNTRY ESTATE HOMEOWNERS ASSOCIATION	Fifth Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL OF TRANSPORT AND PUBLIC WORKS, WESTERN CAPE	Sixth Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	Seventh Respondent

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JUDGMENT DELIVERED ON 24 JULY 2008

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[1] The applicant in this matter (to which I shall henceforth refer as "CML") is Club Mykonos Langebaan Limited, a property development company carrying on business at Langebaan in the Western Cape Province.

[2] The first respondent, the Langebaan Country Estate Joint Venture, is also a property developer. It was formed by the second and third respondents, which were the owners of a large tract of land described as portion 1 of the farm Oliphantskop No. 191 at Langebaan ("Oliphantskop"). The purpose of the joint venture was to develop Oliphantskop, in six phases, and to establish what is now known as the Langebaan Country Estate.

[3] The first three respondents were represented by one set of attorneys and counsel and were referred to collectively in the proceedings as "the developer". I shall continue to describe the first three respondents in this manner.

[4] The fourth respondent is The Saldanha Bay Municipality. Oliphantskop fell within the municipality's area of jurisdiction under the Land Use Planning Ordinance, 15 of 1985 (I propose, in what follows, to refer to this Ordinance as "LUPO" and to refer to the fourth respondent as "the Municipality").

[5] The remaining respondents were cited only because of their potential interest in the matter. No relief was claimed against them and they played no part in the proceedings. No more need be said about them.

[6] For the development of the Langebaan Country Estate to commence it was first necessary for the developer to rezone and subdivide Oliphantskop.

Section 16 (1) of LUPO empowers the Council of the Municipality *"to grant or refuse an application by an owner of land for the rezoning thereof"*, and section 25 (1) entitled the Council to *"grant or refuse an application for the subdivision of land"*. Approval for such rezoning and subdivision had to be obtained from the Council on application made under sections 17 and 24 of LUPO. The developer made such an application. Pursuant to an objection from CML, with which the Council of the Municipality concurred, approval for the rezoning and subdivision of the first phase of the development was subsequently granted. However, the approval was granted subject to conditions imposed under section 42 of LUPO which, in general, entitles the Council to grant applications of this kind *"subject to such conditions as* [it] *may think fit"*. This matter concerns the meaning, and enforceability, of some of the conditions which were imposed by the Council, and also some of the conditions imposed in respect of the approval of a second application to rezone and subdivide Oliphantskop further, so as to enable phase 2 of the development to proceed.

[7] So much for a brief outline of the parties and the main point of contention between them. It is necessary now to examine the facts in closer detail.

[8] Structure plans are an important town planning and urban development tool. Section 5 (1) of LUPO provides that a structure plan *"lay[s] down guidelines for the future spatial development of the area to which it relates (including urban renewal, urban design or the preparation of development*

plans) in such a way as will most effectively promote the order of the area as well as the general welfare of the community concerned." The structure plans for the Langebaan/Saldanha Bay area, approved in terms of section 4 of LUPO, have since 1992 reflected there to be a road linking the Main Road 233, which runs into Langebaan from the north east, with Minor Road 45, another larger road providing access from Langebaan to the town of Saldanha and from there to towns further up the west coast. I shall refer to the proposed road reflected on the structure plan as the "link road". The structure plan shows the link road to follow a route directly across that part of Oliphantskop which the developer intended to develop. I should mention, at this point, that the linking is at present constituted by the so-called "Leentjiesklip Road" which runs in a north/south direction from the MR 233 to the MR 45 more or less parallel to the edge of Langebaan lagoon.

[9] The original application for approval to rezone and subdivide Oliphantskop did not make provision for the possibility that the link road contemplated in the structure plan might one day be constructed. Notice of the application was duly given by the Municipality to CML, which owned neighbouring property immediately to the north of Oliphantskop, by way of a letter dated 14 February 2003. It is apparent that the fact that the developer's application made no provision for the link road was of concern to CML. A meeting to address this concern was convened and on 5 March 2003 representatives of the Department of Transport and Public Works (the sixth respondent in this

application), CML, the Municipality, and the developer met in Cape Town. A minute of the meeting was subsequently produced. Because the parties submitted that the content of the minute was important I shall quote from it in some detail. In doing so I refer to those persons who are referred to in the minute by referring to the party they represented, rather than their names. The material portion read as follows:

> *"2. **BACKGROUND***
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> *[The developer] said that the meeting was arranged because of a query from [CML] that the planning for the Langebaan Country Estate does not take his rights (approval for a Subdivisional area) as neighbour into account. The aim of the meeting is therefore to discuss the issue and try to find a solution that will benefit both parties and in doing so facilitate the approval process.*
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> *The roads under discussion are the following:*
>
> *(a) Existing Leentjiesklip road/street (Minor Road 45) between Langebaan and Club Mykonos*
>
> *(b) The road as shown on both of the Structure Plans for the area, linking Main Road 233 from the Golf Club House intersection with Club Mykonos*
>
> *(c) Main Road 559 (partly proclaimed also known as the Oliphants Kop road.)*
>
> *3. **DISCUSSION***
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> *A lengthy and detailed discussion followed on each of the roads as mentioned as well as all aspects linked to that. The consensus was that*

Main Road 559 is the preferred road for access to Club Mykonos. The following decision was then agreed upon by all parties present:

DECISION

(1) Saldanha Bay Municipality to formally apply (by mean of a Council decision) to the Department of Transport & Public Works for the proclamation of the remainder of Main Road 559 that has not been proclaimed.

(2) [The developer] to supply [CML] with a plan showing:

(a) The re-alignment of Minor Road 45 to be partially accommodated in future on land (north western corner belonging to [the developer].)

(b) Detail regarding the section of the link road between Main Road 233 and Club Mykonos falling within the first phase of development of the Langebaan Country Estate.

(3) [CML] to provide [the Municipality] with a letter of objection stating:

(a) their concern regarding the ignorance of the future road linking Main Road 233 with the existing Minor Road 45 to the east of Club Mykonos, as included in the section 4 (6) Structure Plans of Langebaan and Verdenburg-Saldanha and Environment

(b) endorsing the solution as proposed for the re-alignment of Minor Road 45 through phases 1 and 6 of the proposed

development (Golf Estate) up to the existing intersection with the MR 233 at the road from the Golf Club House.

(4) [The developer] to respond to [CML's] letter of objection to [the Municipality] by stating that

(a) the link Road between Main Road 233 and Club Mykonos as currently planned in the Golf Estate is not in line with the approved Structure Plans as applicable, but will be re-aligned to accommodate the future link road as indicated in the Structure Plans

(b) the section of this road within the first phase of the development of the Langebaan Country Estate conforms to the standards required for such a link road should it be implemented in the future."

[10] On 10 March 2003, as foreshadowed in the minute, CML's town planner wrote to the Municipality to object to the application stating that the application to rezone and subdivide Oliphantskop did not take account of the link road. The relevant portion of the letter read as follows:

"We are acting on behalf of Club Mykonos Langebaan Ltd., the registered owner of erf 2802 Langebaan. The postal address of our client is P.O. Box 6140, ROGGEBAAI 8012.

Our client is not against the development of the Langebaan Golf Estate, as long as such development is carried out in a responsible and desired manner and without being prejudicial to the existing zoning rights

applicable to erf 2802. It is important that all interested and affected parties, the Council and the applicant are not prejudiced by wrong and inadequate planning decisions. With this in mind we would like to raise the following objection.

The Vredenburg-Saldanha and environment Urban Structure Plan as well as the Langebaan Local Structure Plan (both approved in terms of Section 4(6) of LUPO) indicate a future road linking Main Road 233 from the Golf Club House intersection with Minor Road 45 to the east of Club Mykonos. The proposed rezoning and subdivision as advertised, unfortunately do not take cognizance of the link road as required in terms of the two structure plans (Attached please find extracts A and B from these plans showing the future road). Please note that the proposed rezoning and subdivision (phase 1) will affect the southern section of the future link road (Annexure C), close to the intersection with Main Road 233.

After discussions were held between the applicant, the Department of Transport & Public Works and our client on 5 March 2003, we were issued with an amended plan (Annexure D, Diagram No.358/4000 J – no date) showing a link road between Minor Road 45 and Main Road 233 and described as Alternative Route 2. This proposed road is in line with the requirements of the 2 Section 4(6) Structure plans and therefore acceptable to our client. If Council resolved to support this proposed link road, our objection will automatically lapse."

[11] Shortly after this letter was written, and as had been choreographed at the meeting on 5 March 2003, a response to the objection was forthcoming from the developer's town planners. Although the only copy of this letter available to the Court is extremely poor it is possible to discern that it was received by the Municipality on 18 March 2003. It appears to reiterate much of what was contained in the minute of the 5 March 2003 meeting. As far as can be made out the letter confirms that the first stage of the link road *"should it be implemented in the future"* would conform to the required standards, and that the section of the link road which fell outside of phase 1 of the development would be realigned so as to accord with the structure plans. Finally, the letter records that CML's objection to the rezoning and subdivision application had *"lapsed"*, because a revised subdivision plan reflecting the link road was acceptable to CML.

[12] On 29 April 2003 the Municipality wrote to notify the developer that its application for rezoning and subdivision approval had been conditionally granted by the council. At this stage it is sufficient to refer to conditions (c) and (e) of the approval, the latter incorporating a condition described as Special Development Condition: Civil 11.

[13] Condition (c) provided as follows: *"that a revised subdivision plan for Phase 1 be submitted to the satisfaction of the Chief: Town Planning and*

Building Control that indicates the proposed linking of Main Road 233 from the Golf Club House intersection with Minor Road 45 to the east of Club Mykonos;".

[14] Condition (e) provided that *"all detail must be in accordance with the Engineer's Conditions"* attached to the approval as an annexure. Clause 11 of the Engineer's conditions related to the link road. It read as follows:

> *"Council concurs with the objection of Club Mykonos Langebaan Limited to the original layout not making provision for a suitable link road for the area to the north of the development with the area to the south of the development. As Club Mykonos has done, Council withdraws its objection provided that the layout is altered to make provision for a north / south link road as per the "Amended Plan received from Warren Simpson and Partners" dated 10 March 2003. The approved arterial link road is shown in bold on Annexure "E". This proposed link road shall run from the existing bend on Provincial Road DR45 adjacent to erf 4895 south towards the existing Langebaan Country Club and meeting Provincial Road MR233 at the existing access to the Country Club.*
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> *This arterial link road shall have a road reserve width of at least 25 metres.*
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> *It is advisable that the number of roads within this development which will intersect with this proposed arterial road should be restricted.*

The spacing of all proposed access roads from this proposed arterial road shall be in accordance with the standards contained in the Provincial Guidelines on access roads."

[15] It must be mentioned that the *"amended plan received from Warren Simpson and Partners dated 10 March 2003"* referred to in condition 11, reflected the link road to run across the whole of Oliphantskop from the MR 233 to its northern boundary.

[16] A revised subdivision plan as contemplated in condition (c) was prepared on behalf of the developer. This plan, a copy of which was annexed to the replying affidavits marked "PC56", was to the satisfaction of the appropriate official and certified thus on 1 May 2003. Although the plan was the subject of much debate about its import and meaning it speaks for itself. It is simply a subdivision plan, and it shows what it shows - nothing more and nothing less. I shall endeavour, in words, to adequately describe what is so much better shown by the plan itself.

[17] The plan shows the boundaries of the southern portion of a road in the position of the link road, where it intersects with the MR 233 at the Golf Club house intersection. It can be calculated from the scale that the plan reflects the road to be 25 metres wide. The part of the road reflected on the plan is adjacent to phase 1 of the development - it goes no further north. The road

reflected on the plan is zoned transport zone, the same zoning description given to that part of Main Road 233 also shown on the plan. In terms of the Langebaan Scheme Regulations made in terms of section 7 of LUPO the primary use of a transport zone is as a public road. And the road depicted on the plan is allocated a separate erf number, namely erf 6968. Because this was a point of contention between the parties it must be mentioned that what the plan does not show is the entire length of the link road referred to in the structure plans.

[18] A month or so later, on or about 6 June 2003, the developer made application to the Municipality for the rezoning and subdivision of Phase 2 of the development. It included in its second application a tract of land which had not formerly formed part of Phase 2 (the developer had intended to develop this piece of land in phase 6) but which also lay to the west of the link road reflected on the structure plan. The development of the additional piece of land was described as Phase 2A. Thus Phases 1 and 2 (Phase 2 now including 2A) related to all of Oliphantskop which lay to the west of the link road, and these phases connected the southern boundary of Oliphantskop adjacent to the MR 233 with its northern boundary, near to the southern end of the MR 45.

[19] The application for rezoning and subdivision of Phase 2 and Phase 2A contained some detail of the proposed development. The application document for Phase 2 stated that *"This northern part of the golf course will also be*

secured once the issue regarding the Mykonos/ Oliphantskop road has been resolved. Construction on the first part of the link road from MR 233 to Mykonos that falls within the Estate has already started and this road is being built to the standard as prescribed in the Langebaan Structure Plan." To understand fully the relevance of the first sentence of the above quoted portion of the application it is necessary to point out that it is apparent from the application document that what the developer had intended was an estate *"secured by means of a 24-hour security service, security fences as well as controlled access gates"*. It is clear from an examination of the original plan relating to the Phase 1 application for rezoning and subdivision approval that what had originally been intended was a private, fenced and secured estate, with controlled access points. The original concept entailed the entire northern boundary of the development being closed off. It will be appreciated that the route of the link road reflected on the structure plan (which, if it was to be constructed, would be a public road) cuts through the development, and complicates securing the estate in the manner originally intended by the developer.

[20] The phase 2A application document described the reason for the application to rezone and subdivide as follows: *"This motivation is for the extension of the second phase in that the design for the link road from Main Road 233 (from the Club House) with Minor Road 45 to the east of Club Mykonos (as per the Structure Plans) has been finalized and this extension*

serves to consolidate all development west of the said link road." The phase 2A application included a preliminary site layout plan which shows the entire length of the link road, from the MR 233 in the south, to the northern boundary of Oliphantskop.

[21] The application to rezone and subdivide Phases 2 and 2A also elicited an objection from CML. On 10 June 2003 CML's town planners wrote to object to the application, stating: *"We would like to refer you to our letter dated 10 March 2003, ref. 1.172/03019 re the important future link road through phase 1. The only access to your proposed phase 2 (Woltemade) is a road connecting with the above north-south major link road. In par 7.1 of the motivational report received from CK Rumboll and Partners* [the developer's town planners], *reference is made to the fencing off of the northern section of the proposed Estate (consisting of phases 1,2 and 6) with a security access point opposite the existing entrance to the club house. According to the report all roads within the Estate will be private roads.*

On behalf of our client we object against the proposed securing and privatization of the future link road between Minor Road 45 and Main Road 233. No alternative link road has yet been proclaimed and built, and until this alternative future road has been proclaimed and constructed, the major north-south link road through phase 1 may not be privatized and/or closed for the general public."

[22] On 27 May 2004 the developer was notified that its application for rezoning and subdivision approval for Phase 2 was approved by the Municipality. Again, the approval was subject to conditions. Condition (c) was relevant to the link road and it provided, in much the same way as had phase 1 condition (c), as follows: *"that the proposed subdivision plan for phase 2 be approved inclusive of the linking of Main Road 233 from the Golf Club House intersection with minor road 45 to the east of Club Mykonos."* Condition (d) incorporated the Engineer's conditions and condition 11 was in identical terms to that imposed in respect of the phase 1 application.

[23] The subdivision plan referred to in the Phase 2 condition (c) approval was not the same as the preliminary site layout plan which had accompanied the Phase 2 application. The latter plan had reflected the link road extending from the MR 233 all the way to the northern border of Oliphantskop. As was the case with the phase 1 *"revised subdivision plan"* the approved plan did not reflect the link road at all.

[24] Development in the area was proceeding apace and on 16 May 2005 CML, which had applied to the Municipality for permission to subdivide its own land which lay immediately to the north of Oliphantskop. CML's application was approved by the Municipality. This approval was conditional upon, *inter alia*, CML extending the Minor Road 45 to the northern border of Oliphantskop, in a position where it would join with the link road reflected on the structure plans.

The extension to MR 45 was physically completed by December 2005. Thus the southern part of the link road, intersecting with the MR233 at the Golf Club house intersection and adjacent to Phase 1 of the Langebaan Country Estate development, was in place. Furthermore, the MR 45 had been extended by CML in compliance with the condition imposed in respect of its subdivision application, in a southerly direction to meet with the northern boundary of Oliphantskop.

[25] The District Roads Engineer was also involved in the extension of the MR 45 in a southerly direction to the northern boundary of Oliphantskop. He had written, on 6 May 2005, to CML's engineers about the extension of the MR 45 and in a postscript to that letter, copied to the Municipality, confirmed that the Municipality "*would do everything in its power to expedite extension of Minor Road 45 and through the Langebaan Country Estate*". That this was the desired objective of the Municipality is evident from the terms of a letter it had written on 5 May 2005 to the District Roads Engineer. In this letter the Municipality stated that the approved structure plans had made provision for the link road to be extended through the Langebaan Country Estate; that with the development in the Langebaan/Mykonos area the construction of the link road had become a reality; that the construction of the road was being undertaken by two developers, namely CML and the developer (that is, the first respondent); and that CML were busy with the construction of its portion of the link road; and the developer was in the process of obtaining environmental

impact approval before its portion of the link road would also be built. It is evident that the scene had been set for the possible construction of the link road, following a route through the Langebaan Country Estate, as the structure plans has envisaged.

[26] During July 2005 Withers Environmental Consultants, having been appointed by the Municipality, commenced work on an environmental impact assessment relating to the link road over Oliphantskop. It is unclear how far their work progressed. It is obvious that it was CML's frustration with what it believed to be tardy progress towards the realisation of the link road that caused it to write to the Municipality on 7 August 2006 to ask whether the developer or the Municipality were to build the road. No answer to this letter was, or has been, forthcoming. The environmental assessment process referred to above came to a standstill shortly after this application was launched in September 2006, after the developer's attorneys had written to the consultants to suggest that it be stopped. Nothing further in regard to the possible construction of the link road has happened. In short, matters ground to a halt.

[27] These are the important facts. To determine whether or not phase 1 condition (c), read with clause 11 of the civil conditions, and phase 2 condition (c), read with the same civil condition clause have been complied with by the

developer, one must first establish what the conditions required. It is this question which lies at the heart of the dispute between the parties.

[28] CML's claim for declaratory relief began as one based upon an interpretation of the conditions as a whole which, so its counsel argued, imposed upon the developer, or the Municipality, or both of them, an obligation actually to construct the link road. Once it became obvious that this argument would not hold water CML changed tack. In the end the substance of the primary declaratory relief claimed by CML was an order declaring that in terms of the conditions (taken as a whole) the developer was *"required in terms of the conditions of subdivision...to make provision for the creation and construction of the link road"* and to this was coupled a prayer for an order directing, inter alia, the developer to submit revised subdivision plans for phase 1 and phase 2 which included a depiction of the entire length of the link road, and the other detail set forth in civil condition 11. The developer and the Municipality argued that the conditions did not require the entire length of the road to be reflected on the subdivision plans and, they contended, the plans which had been submitted by the developer did comply with the conditions.

[29] The developer contended, in the alternative, that if the conditions were interpreted in such as way so as to amount to a vesting of land in the Municipality this would result in there being an unlawful expropriation of the developer's property without compensation. The conditions, interpreted in this

manner, would be *ultra vires* the powers accorded to the Council to impose conditions under section 42 (2) of LUPO. The *ultra vires* point was relevant it was argued, firstly, because it pointed against an interpretation of the conditions which had this result, and secondly, because the Court could not order compliance with an invalid condition. In regard to the second leg of the *ultra vires* argument the developer contended that it was entitled, notwithstanding that the validity of the conditions were not in issue in these proceedings, to mount a collateral challenge to their validity.

[30] An interpretation of the conditions in the manner contended for by CML had, according to it, far-reaching implications, such as the automatic vesting of the developer's land in the Municipality. In order to understand the argument it is necessary to examine how subdivisions come to be in terms of LUPO.

[31] Section 23 (1) of LUPO provides that land can only lawfully be subdivided once an application under section 25 (1) has been granted. Section 26 provides that once an application to subdivide land has been granted *"the owner of the land concerned shall submit a general plan or diagram, as indicated by the Surveyor-General concerned, to that Surveyor- General for his approval."*

[32] Section 27 of LUPO governs what happens after the general plan or diagram referred to in section 26 has been approved by the Surveyor-General. In summary, once the requirements listed in section 27 (1) have been complied

with in such a manner that the subdivision approval granted under section 25 cannot lapse, the subdivision is regarded to be *"confirmed"*.

[33] On confirmation of the subdivision the provisions of section 28 become relevant. Section 28 provides *"The ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under section 25 shall, after confirmation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said streets and public places is based on the normal need therefore arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need."*

[34] CML contended that the provisions of section 28 of LUPO had the result that the southern portion of the link road reflected on the phase 1 revised subdivision plan vested in the Municipality. Had the entire length of the link road been reflected on the subdivision plans the entire length of the link road would have vested in the Municipality as opposed to simply the southern portion of the link road adjacent to phase 1 of the development. This would, so the argument went, have considerably facilitated the process by which a final decision to construct the link road would have been made, which is what CML's ultimate objective was.

[35] But it is clear that the operation of Section 28 does not inevitably lead to an automatic vesting. It is only *"...if the provision of the said public streets...is based on the normal need therefore arising from the said subdivision, or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need"* that a vesting occurs. Whether or not the link road was "*...based on the normal need therefore arising from the said subdivision...*" was not an issue pertinently addressed in the evidence placed before the Court on affidavit in this matter and to make a finding in this regard would involve an unacceptable measure of speculation. I should add that CML also contended that the structure plans amounted to a policy determined by the Administrator, but there was no evidence in the papers of there being such a policy and its contentions in this regard are without merit.

[36] As I have intimated above, section 42 of LUPO empowered the Council to impose conditions when granting an application for rezoning and subdivision. Stripped of provisions irrelevant to this case the section reads as follows:

> *"42(1) When ... a council grants... an application ... under this Ordinance,* [it] *may do so subject to such conditions as* [it] *may think fit;*
>
> *42(2) Such conditions may, having regard to –*
>
> *(a) the community needs and public expenditure which in ... its opinion may arise from the...application... concerned and the public expenditure incurred in the past which in... its opinion facilitates the said ...application..., and*

(b) the various rates and levies paid in the past or to be paid in the future by the owner of the land concerned,

include conditions in relation to the cession of land or the payment of money which is directly related to requirements resulting from the said...application...in respect of the provision of necessary services or amenities to the land concerned."

Counsel for the developer argued that if the conditions which required the revised subdivision diagram to show the link road had the result that such land vested in the Municipality under section 28, or in any other way becomes owned by it, then they were *ultra vires* the powers of the Council. Relying on *South Peninsula Municipality and Another v Malherbe NO and Others* 1999 (2) SA 966 (CPD) it was submitted that the Council could only impose conditions which had this result – a taking of land by the Municipality without compensation to the owner – in the exercise of its powers under section 42 (2) of LUPO. And under section 42 (2), as I understood the argument, the *"...cession of land..."* inherent in the vesting had to *"directly relate to the requirements resulting from* [the rezoning and subdivision approvals] *in respect of necessary services or amenities to the land concerned."* The need for such a road had been anticipated when the structure plans were first produced and it could not be said that such a need arose from the approvals. It followed, it was argued, that a condition with the meaning contended for by CML had the effect of depriving the developer of its rights in the land and it could thus not validly be imposed.

[37] I have some doubt whether a vesting of *"public streets or public places"* which is the automatic legal consequence of the confirmation of a subdivision can be equated to a condition requiring a *"cession of land"* imposed under section 42 (2) of LUPO, or with the kind of cession of land which was the subject of the decision in the *South Peninsula Municipality* case. Sections 28 and 42 (2) of LUPO are different in language and unrelated in purpose (see the analysis of the two sections in the minority judgment in *City of Cape Town v Helderberg Park Development (Pty) Ltd* (291/07) [2008] ZASCA 79 (2 June 2008) at paragraph 45). Land which is indicated as public streets or public places *"at the granting of an application for subdivision under section 25"* vests automatically in the Municipality under section 28 only if the provision for the public streets and public places is based on the normal need therefor arising from the subdivision. Section 28 envisages a situation, as I understand it, where the owner of the parent erf applying for subdivision (that is, before the application is considered by the Council) contemplates that it will be necessary that part of the parent erf be used as public streets and public places and thus submits to the automatic legal consequence of vesting upon the confirmation of the subdivision. This is not the same, as I see it, as a condition imposed after the application has been considered by the council which requires a cession of land to the Municipality where all the different factors referred to in section 42 (2) of LUPO, such as the needs of the community, public expenditure, the rates and levies paid in the past, or to be paid in the future, have been considered.

[38] But even if the conditions were invalidly imposed I do not see how this will avail the developer in this matter. It is settled law that administrative decisions stand until they are set aside by a Court, and outside of direct review proceedings the circumstances in which a party may indirectly or collaterally challenge the validity of administrative action are narrow (see *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at 244C – 244D; *V & A Waterfront Properties v Helicopter and Marine Services* 2006 (1) SA 252 (SCA) at 255F). In *Oudekraal* it was said, quoting with approval from the decision of Conradie J. in *Metal and Electrical Workers Union of SA v National Panasonic (Parow Factory)* 1991 (2) SA 527 (C) at 530 C-D, that *"a collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings'."* Generally, this is where an administrative authority seeks to enforce an invalid act against the party challenging the validity of that act.

[39] In *Helderberg Park Development* the majority held (following the line of reasoning expressed in *Administrator Cape Province v Ruyteplaats Estates (Pty) Ltd* 1952 (1) SA 541 (A) and *Belinco (Pty) Ltd v Bellville Municipality* 1970 (4) SA 589 (A)) that the imposition of a condition requiring a piece of land to *"be given off free of charge before any sub-divisional plan will be approved"* did not amount to an expropriation without compensation because the owner need

not have accepted such a condition, and because his freedom of choice in deciding not to challenge the imposition of such a condition had not been interfered with to the degree that it could be said that he had not enjoyed a real freedom to choose. In *Helderberg Park Development* the Court concluded that the applicant in that case, which had accepted the condition referred to above, wanted *"to take the benefits of the unlawful decision whilst being freed from the obligations flowing from it"*. The court concluded that *"(t)his is something that public or legal policy considerations cannot contemplate."* The position of the developer in this case is strikingly similar. It has reaped all of the benefits flowing from the permission granted to it by the Council to rezone and subdivide its land. Its land has been developed and much of it sold off. For it now to seek to avoid obligations on account of their having been invalidly imposed seems to me to be impermissible.

[40] Furthermore, the form in which this matter was brought does not facilitate a challenge to the validity of the conditions. In these proceedings there was no *lis* between the developer and the Municipality. They are both respondents. Issues which may be relevant to the validity of the conditions have thus not been properly addressed in the evidence and, as I have already intimated, to make findings about the validity of the conditions, an exercise which involves examining whether the different requirements of section 28 and/or section 42(2) of LUPO have been complied with, will involve too large a degree of speculation for such findings to be reliable. It is plainly unwise to fish in a sea of

evidence put before a Court by the parties for the purpose of resolving one issue, in the hope of finding evidential material which answers another issue.

[41] I therefore conclude that this is not a matter where *"the right remedy is sought by the right person in the right proceedings."* In these proceedings it is not open to the developer to contend that the conditions in question were *ultra vires* the powers conferred on the Council by LUPO, and thereby avoid having to comply with them.

[42] It was submitted by counsel for the parties that in construing the conditions I should follow the technique summarized by Joubert J.A. in *Coopers and Lybrand v Bryant* 1995 (3) SA 761 (A) at 767 D to 768 E and described in some detail in Christie *Law of Contract in South Africa* (5th edition). In the *Coopers and Lybrand* matter Joubert JA put it as follows: *"According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument...The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself...The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:*

(1) to the context in which the word or phrase is used with its interrelation to the contract...;

(2) *to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted...;*

(3) *to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions".*

[43] It must be borne in mind that in the *Coopers and Lybrand* matter the Court was concerned with the interpretation of a document evidencing a bilateral juristic act, namely an agreement to cede book debts. The imposition by the Council of the conditions in question was not the recording of an agreement, but a unilateral administrative act. There are, of course, aspects of the approval process which resemble the process of concluding a contract. Thus in *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 (A) at 531C-E it was said that *"there is authority and reason for holding that the steps by which a township is established...involve mutual consent between the Administrator and the applicant as to the township conditions, and the Administrator may be regarded, not inappropriately, as making an offer to the applicant which the latter must accept if a township is to be brought into existence".* That case, however, was about prescription and did not concern the question of the interpretation of such conditions. Once they are imposed the conditions acquire

the force of law, because section 39 of LUPO compels both the local authority and all other persons to comply with them (cf. the separate assenting judgment of Centlivres C.J. in *Estate Breet* at 525B-D). It is, as I see it, what was intended by the Council that matters, not what was intended by the developer or by CML. Thus, whilst the discussions which took place before the conditions were imposed place the imposition of the conditions in context, limited, if any, assistance in interpreting them can be had by having regard to the conduct of the parties. What CML and the developer actually did after the approvals had been granted, whilst it may be evidence of what those parties believed the conditions to mean, cannot be useful in determining what the intention of the Council was when it imposed the conditions. To this I must add that because direct evidence of a party's own intention may not be had regard to, to have regard to what officials in the employ of the Municipality now say they thought the conditions meant (to the extent that they may speak for the Council) is not permissible.

[44] It is apparent from civil condition 11 that the Council itself considered with disfavour the failure of the original phase 1 application to take account of the link road and that it required recognition to be given to the structure plans, which reflected the link road. The condition stated expressly that the Council agreed with CML that the subdivision plan should show the link road. The structure plan is an important town planning guide. It informs urban and town planning and the orderly development of towns, so often achieved by way of

the rezoning and subdivision of land. It seems to me that the conditions were imposed precisely because the structure plan reflected the link road. Furthermore, the officials who deposed to affidavits on behalf of the Municipality have made it clear that the Municipality desires the road actually to be built, and the Municipality has taken some steps to bring this to fruition. It follows, in my view, that the Council is unlikely to have meant for only a part of the link road to be reflected on the revised subdivision plan, as counsel for developer, and the Municipality, contended. What use would that have served? What had to be reflected on the revised plan was *"the proposed linking of main road 233 from the golf clubhouse intersection* [at the south end of Oliphantskop] *with the minor road 45 to the east of Club Mykonos* [at the northern boundary of Oliphantskop]". On the face of it the plain meaning of the words used indicate a reference to the whole length of the link road. The part of the road actually reflected on the diagram submitted is not a link, because it links, or connects, nothing. For a link road to be reflected on a plan one must necessarily indicate the two places being linked, and show the route of the road linking those places. The road reflected on the amended subdivision plan submitted by the developer in purported compliance with the condition is a *cul de sac* providing only access to the development itself. And the same reasoning, as I see it, applies to phase 2 condition (c).

[45] The developer and the Municipality argued that it would be unusual to require the subdivision plan to reflect detail not directly relating to phase 1 or to

phase 2. However, in the exercise of its power to impose conditions nothing prevented the Council from requiring the whole length of the link road to be reflected, notwithstanding that part of the link road fell outside of the borders of phase 1, or of phase 2. Indeed, to reflect only a part of the link would have been more unusual, if one takes account of the factors outlined above. Moreover, that the whole length of the road was meant to be reflected seems to have been accepted by the developer in its letter written in response to the original objection made by CML where it stated that the section of the link road which fell outside of the phase 1 approvals would be realigned so as to accord with the structure plans.

[46] In my view, then, phase 1 condition (c) and phase 2 condition (c), read with civil condition 11, required the subdivision plans to reflect the entire length of the link road. I think that one can arrive at this conclusion by having regard to the plain words employed by the framers of the condition without it being necessary to rely to any material degree on other tools of interpretation. This interpretation may or may not have the result of vesting the road in the Municipality in terms of section 28 or, perhaps, under section 42 (2) of LUPO, depending on whether the requirements of those sections were fulfilled. However, these are not questions which the Court can decide in this matter, and as I have said, I make no findings in this regard. What is clear is that the conditions, construed in this manner, have not been complied with.

[47] Uncertainty concerning the meaning of the conditions lies at the heart of this dispute. It is also apparent that the imposition of these conditions was central to the approval – indeed they comprise virtually the only "non-standard" condition imposed by the Council. The conditions in question did not impose an immaterial or insignificant obligation on the developer. They were important and had to be complied with. That the legislature intended that compliance with conditions imposed by a Council when approving a rezoning or subdivision application is essential and imperative is underscored by the fact that a failure so to comply is a criminal offence in terms of section 41 of LUPO.

[48] The primary relief sought was declaratory in nature, and the Court could only make a finding about the second or enforcement issue once it had determined the first declaratory issue. In *Luzon Investments (Pty) Ltd v Strand Municipality and Another 1990 (1) SA 215 (CPD)* at 230A the full bench (Friedman, Howie and Conradie JJ.) quoted with approval from a decision of the Supreme Court of Canada in *Solosky v The Queen* 105 DLR (3d) 745 at 754 where it was held that "[d]*eclaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined".* In *Luzon Investments*, where a *"live and real issue between the parties"* had been fully canvassed in evidence and in argument it was found to be appropriate that an

order which settled the dispute between the parties be made in terms of the prayer for alternative relief.

[49] In this case, as I see it, similar considerations apply. As will have appeared from the facts outlined above a curious state of affairs has come to exist. The Municipality wants the link road to be built. Undoubtedly, it has concluded that it is in the interests of the community that this be done. The Provincial Roads Engineer also wants the road to be built. CML has extended the MR45 southwards to the boundary of the Langebaan Country Estate so that the road can be built. The developer has built the southern part of what might become the link road and has on its own version provided what it terms a corridor of land through the estate for the link road to be built, once a final decision to do this is taken. In its application for the phase 2 approval the developer stated that "[c]*onstruction on the first part of the link road from MR 233 to Mykonos that falls within the Estate has already started and this road is being built to the standard as prescribed in the Langebaan Structure Plan"* and in the phase 2A application it stated that the design for the link road had been finalized. Yet for years nothing has happened. The process by which a decision should be taken whether or to not build the road has stalled because the meaning of the conditions has become the subject matter of a dispute.

[50] The real issue between the parties is what the conditions mean and it is to take too narrow a view of the Court's function and powers in regard to the

resolution of disputes, particularly where the exercise of public law rights and the performance of public law duties are in issue, to avoid that issue because the declaratory relief initially sought had been unwisely formulated. CML, the developer and the Municipality are all interested parties upon whom a declaratory order will be binding. Moreover, the Municipality has a duty to the public it serves to enforce the conditions imposed and it is plainly desirable that any lack of clarity about their import and meaning is resolved. The depiction of the whole of the link road on the subdivision plan is of tangible utility to the parties in that it will give physical form, where none presently exists, to what was required when the conditions were imposed. It is therefore appropriate in my view, that a declaratory order, coupled with an enforcement order, be made.

[51] CML sought to persuade me that a number of other conditions imposed by the Council in regard to both the phase 1 and 2 approvals were related to the link road, and that to progress the process by which the road might be made a reality I should order that they be complied with. Because I have concluded that they were not intended directly to relate to the link road I do not propose to deal with them in great detail. Special condition 24 required the developer to transfer ownership of all public roads and public open spaces to the Municipality; Conditions (o) and (t) required the approval of the Provincial Roads Engineer before roads were built, and for a copy of an agreement between that official and the developer to be submitted to the Municipality; and condition (gg) required environmental approval for the development to be obtained. It was

argued that compliance with these provisions were "building blocks" and that for the link road obligation to be fulfilled in its entirety all of the so-called building blocks needed to be in place.

[52] I do not think that in imposing the obligations referred to in the previous paragraph the Council had regard to the link road. The evidence was that the conditions were standard, or generic ones, and there are no facts to suggest that their imposition was in any way connected to the link road, or its possible creation. In many respects these conditions simply echo obligations imposed by other town planning and environmental laws in respect of all aspects of the development. Similarly, that the Municipality engaged environmental consultants in July 2005 to commence an assessment of the desirability of the link road is no more connected to the conditions it imposed in approving the subdivision than the fact that it caused CML to extend the MR 45 to the northern boundary of Oliphantskop when it imposed conditions relating to an unrelated CML subdivision application. These facts merely confirm that the Municipality regard the road to be desirable, and that it had initiated the process of making the link road a "reality," to use the word used in its own correspondence to which I have referred in paragraph 24 above. The decision of the Municipality to initiate the process to have the road (possibly) constructed did not flow from its approval of the developer's rezoning and subdivision application. It was a decision independently taken and is unrelated to the conditions it imposed upon the developer. Whether or not the road is

necessary, and in the interests of the community, is not a matter upon which a Court can pronounce, and I am satisfied that it would not be correct for me to order compliance with these conditions, with a view, at least, that such compliance might eventuate in the link road being built. This should not be understood to mean that these conditions need not be complied with. It means simply that they are not sufficiently connected to the primary declaratory relief sought for it to be necessary or desirable to order compliance with them in this application.

[53] CML also sought an order directing the Municipality to do all things necessary to enforce compliance with the conditions imposed by Council in order to make provision for the link road. It based its entitlement to such an order primarily on the provisions of section 39 (1) (c) of LUPO, the material part of which provides as follows:

> *"39 (1) Every local authority shall comply and enforce compliance with –*
>
> *...(c) conditions imposed in terms of this Ordinance...*
>
> *and shall not do anything the effect of which is in conflict with the intention of this subsection."*

[54] It is well established in our law that a *mandamus* is available to compel an administrative organ to perform a statutory duty. However, counsel for the Municipality contended that to order the Municipality to enforce any condition was

unnecessary, firstly, because there was no evidence to suggest that it would not do so and thus no need for it to be compelled to perform its duty. Its failure, as I understood the argument, not to enforce conditions which it may be found not to have enforced was attributable to it having a different understanding of the meaning of such conditions, and not attributable to an unwillingness on its part to perform a statutory duty. Secondly, so the argument went, if the developer was ordered to comply with a particular condition by the Court, then it would not be necessary to order the Municipality to enforce compliance. In this regard reliance was had on a statement in the majority judgment in *Continental Landgoed (Pty) Ltd v Bethalrand* 1977 (3) SA 169 (T) where it was said that *"[d]it sou inderdaad 'n vreemde toestand wees as A 'n mandamus teen B moet verkry waardeur B verplig word om aksie teen C in te stel ten einde reg te laat geskied teenoor A. Die normale manier is dat die reghebbende dit self doen en nie eers "n agent dwing om dit namens home te doen nie."* (at 170H – 171A).

[55] The *Continental Landgoed* case referred to was an appeal to a full bench of a Provincial Division against a refusal by the Court *a quo* to order a township owner to comply with conditions imposed in respect of the development of that township. The applicant in the Court *a quo*, the purchaser of subdivided land in the township, had not sought any relief against the local authority in that matter. In this matter relief is sought against the local authority and the statement relied upon by counsel for the Municipality is thus not binding authority, in my view, for the proposition that a Court lacks the power to order the developer to comply with

the conditions imposed by the Council and simultaneously to order the Municipality to enforce compliance with such conditions.

[56] LUPO confers upon the Municipality weapons to enforce compliance with conditions imposed by the Council which are not at the disposal of a Court. Section 31 (1) of LUPO, edited of unnecessary verbiage, provides that before registration of subdivided land by the Registrar of Deeds is effected *"the transferor shall furnish proof to the local authority concerned that any condition on which the application for subdivision concerned was granted, has been complied with and no written authority under section 96 (1) of the Municipal Ordinance, 1974 (Ordinance No. 20 of 1974), or section 96 (1) of the Divisional Councils Ordinance, 1976 (Ordinance No. 18 of 1976) shall be issued unless such proof has been furnished."* The *"written authority"* contemplated in the Ordinance are the so-called rates clearance certificates now governed by the provisions of section 118 of the successor to the Ordinances referred to, the Local Government: Municipal Systems Act, 32 of 2000.

[57] The provisions of section 36 (1) of LUPO were repeated in civil condition 8 which was imposed by the Council when it granted approval to the developer for the rezoning and subdivision of Oliphantskop. The pertinent part of this condition provided that *"Before any application for clearance certificates may be considered ... all conditions as stipulated by...Council...must already have been completed and/or provided."* It is thus within the power of the Municipality to

prevent the developer from transferring subdivided land until it has complied with all conditions imposed by the Council by not issuing clearance certificates until such conditions have been complied with. Indeed, it is its duty to do this. Plainly, the coercive measure afforded to the Municipality is an effective and practical tool by which compliance with conditions imposed by the Council must be enforced. It is a measure which has not been employed, with the result that notwithstanding non-compliance by the developer with condition (c) of the phase 1 and phase 2 approvals, the Langebaan Country Estate, a significant housing development on the outskirts of Langebaan, now exists.

[58] In the circumstances I do not think that is an unnecessary or undesirable duplication of a remedy if I were to order the Municipality to do what LUPO, and the conditions imposed by its Council, require of it. The Municipality is obliged to enforce compliance with the conditions, and it has available to it unique and effective tools to achieve such compliance, which go beyond the powers of the Court.

[59] Before concluding it is necessary to deal with a number of preliminary matters which engaged the parties and the Court when the matter was heard on 6 and 7 June 2007. At that hearing CML made application for condonation of the late filing of its replying affidavits (this was done because the Municipality insisted that it do so and would not agree to receive the replying affidavits out of time) and for leave to amend the relief it originally sought. The condonation application

was opposed only by the Municipality. The application for leave to amend the relief sought was inextricably linked to applications made by both the developer and the Municipality to strike out much of the material contained in the replying affidavits', principally on the ground that new matter had been introduced in reply to support a new case not made out in the founding affidavit.

[60] I shall first deal with the condonation application. In terms of an order made by agreement between the parties on 11 October 2006 the developer and the Municipality were to file answering affidavits by 10 November 2006, and replying affidavits were to be filed by 11 December 2006. The matter was postponed for hearing on the semi-urgent roll to 13 February 2007. In the event, the Municipality filed its answering affidavits on 22 November 2006, and the developer filed its answering affidavits on 7 December 2006. On 12 January 2007 an order was made by the agreement of the parties which required, *inter alia*, that the replying affidavits be filed by 13 March 2007 and postponing the matter for hearing until June 2007. The replying affidavits were eventually filed on 30 April 2007.

[61] CML contended that it had been impossible to reply to the answering affidavits by 11 December 2007, because these had been filed late. It was not in dispute that CML's expert witness had not been available over the December/January holiday period; that responses to Rule 35 notices requiring the production of documents had not been timeously complied with; that CML

had had to engage other counsel as the counsel initially briefed was unavailable; and that it had underestimated the amount of work required to finalise the reply. In an answering affidavit the Municipal Engineer: Civil Services in the employ of the Municipality stated that *"[a]ny person with any experience in property development and the building and closing of public roads knows that they are involved processes"*. I do not think that he can be accused of having understated the position. It is quite apparent that considerable work went into the production of the replying affidavits and I am satisfied that good cause has been shown and that there was no prejudice to the Municipality should the late filing of the replying affidavits be permitted. I therefore permitted the late filing of the replying affidavits. In my view it was unreasonable for the Municipality to have opposed the application.

[62] The application for leave to amend the relief sought constituted a substantial shift away from CML's original assertion that the conditions imposed upon the developer and the Municipality an obligation to construct the link road. The amendment was CML's response to the thrust of the primary opposition to the original relief, namely that the conditions did not impose such an obligation but it was also precipitated by the second leg of the opposition to the original relief, namely that other legislative obstacles stood in the path of the granting of the original relief. Thus, it was argued, the provisions of the Roads Ordinance and the Environment Conservation Act 73 of 1989 also played a role in determining whether the link road should be constructed, and because provisions

of these enactments had not been complied with any attempt to obtain an order mandating the construction of the road was doomed.

[63] But the two central issues between the parties, squarely raised in the founding papers, were and remained throughout, firstly, what phase 1 condition (c) and phase 2 condition (c) required of the developer and, secondly, whether or not these conditions had been complied with. To have refused the application for leave to amend would have taken matters no further, because of the flexible nature of the declaratory remedy to which I have adverted above, and the fact that it would nonetheless have been within the discretion of Court, after having considered all of the relevant factors, to make an appropriate declaratory order, with a view to resolving a *"real and live"* dispute between the parties.

[64] To this I must add that counsel for the developer conceded, correctly in my view, that no prejudice not remediable by an order for costs, a postponement and an opportunity to file further affidavits would result if the amendment was allowed. Although a similar concession was not forthcoming from the Municipality I could not see that any such prejudice would eventuate. The developer and the Municipality have had every opportunity to deal with the content of CML's replying affidavit. In the end, the papers comprised more than one thousand pages of reading material. It can hardly be suggested that the real issue, namely the meaning of the relevant conditions, was not fully canvassed in the evidence, or in argument over a period of five days.

[65] Having decided that the application for leave to amend should be granted, and that the respondents would be afforded, as they had indicated they would require, an opportunity to deal further with the CML's reply the striking out applications became of lesser consequence. The content of the replying affidavit was, as I see it, relevant to a determination of the real issue between the parties, namely the meaning to be given to the conditions. In any event, at the stage of the application at which the striking out applications were made they were prematurely brought, because the matter was not at that point before the court on its merits, counsel for the developer and the Municipality having indicated at the commencement of the first hearing that if the application for leave to amend was granted a postponement would be sought to enable the filing of further affidavits (see: *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* (1) 1978 (1) SA 173 (WLD) at 177 D, Herbstein and Van Winsen, *The Civil practice of the Supreme Court of South Africa*, 4th edition at 372 -373). It was for these reasons that I ordered that the striking out applications be dismissed.

[66] I must now turn to the question of costs. This matter has been called in Court on four occasions. It first came up on 11 October 2006 when it was postponed until 13 February 2007. On 12 February 2007 it was again postponed, for hearing to 6 and 7 June 2007, when the preliminary applications for condonation for the late filing of replying affidavits, for leave to amend the relief

sought, and to strike out material contained in the replying affidavits were dealt with. The merits of the application were argued on 17, 18 and 19 June 2008.

[67] I do not think that the developer and the Municipality could be faulted for having resisted what CML originally sought, namely an order compelling either or both of them to build the link road. But I do not think that they were justified in opposing the application for leave to amend, or in bringing the striking out applications. These issues took up most of the first two days of the hearing, save for about one fifth of one day taken up by the opposed application for condonation. I think that it is fair that they should each pay one half of the costs of opposition of the application for leave to amend and each should pay one half of CML's costs of the striking out applications.

[68] Before dealing with the costs of the hearing on the merits mention must be made of the first two occasions on which the matter came before court. The application was issued on 21 September 2006. Service on the developer was effected on 27 September 2006 and the Municipality was served on 28 September 2006. The matter was set down for hearing on 11 October 2006 for the purposes of obtaining an order regulating the filing of opposing papers, and postponing the hearing on the merits to 24 November 2006, that being a date determined in advance by the Registrar of the Court. On 11 October 2006 the matter was postponed to 13 February 2007, and again postponed on that day. The matter was regarded by CML to be semi-urgent, as is apparent from the

manner in which proceedings were initiated, but it cannot escape attention that it was not dealt with by it with any discernable expedition, replying affidavits being filed some months later, and the exchange of further affidavits taking up much of the year which has passed since the preliminary points were argued. In the circumstances I think that it should pay the costs of the developer and the Municipality in connection with the first two court appearances, which would not have been incurred had the matter not been brought before Court with such haste.

[69] In regard to the merits of the matter CML has been successful to a large degree, but not entirely. Much of the argument and material was devoted to the enforcement of generic conditions bearing no particular connection with the link road, and to the Leentjiesklip Road issue which was to all intents and purposes abandoned by CML and in respect of which, ultimately, no relief was sought or required. In addition, because of CML's shift in approach in regard to the remedy it sought, some time and effort was wasted. However, it was successful to a sufficiently material degree (as both the developer and the Municipality disputed that the conditions imposed an obligation to reflect the entire length of the link road on the diagram) for it to be just that a portion of its costs be recovered. In the circumstances I think it is fair that it should recover two thirds of its costs, such costs to include the costs of two counsel, and the qualifying expenses of witnesses Brummer and Abrahamse.

[70] I therefore make the following order:

(1) It is declared that condition (c) of the rezoning and subdivision approvals granted by the 4th respondent on 29 April 2003, and 27 May 2004 require the subdivision plans referred to therein to reflect the whole length of a road connecting the Main Road 233 from the Golf Club House Intersection with Minor Road 45 to the east of Club Mykonos;

(2) the 1st to 3rd respondents are directed to comply with the aforesaid conditions;

(3) the 4th respondent is directed to enforce compliance with the obligation imposed in this order on the 1st to 3rd respondents in the manner contemplated in section 31 (1) of the Land Use Planning Ordinance No. 15 of 1985 and in conditions (s) and (r), respectively, of the approvals dated 29 April 2003 and 27 May 2004;

(4) Save as set forth in paragraphs 5, 6 and 7 below the 1st to 3rd respondents are ordered to pay two thirds of the Applicant's costs and the 4th respondent is ordered to pay two thirds of such costs, which include the costs of two counsel and the qualifying expenses of witnesses Brummer and Abrahamse;

(5) The 1st to 4th respondent's are ordered to pay the costs of opposition to the application for leave to amend and of the costs of the applications to strike out, such costs to include the costs of two counsel;

(6) The 4th respondent is ordered to pay the costs of opposition of the application for condonation in respect of the late filing of the applicant's replying affidavits, including the costs of two counsel. The court time portion of these costs is to be calculated as being one fifth of the court time costs incurred on 6 June 2006 (it being recorded for the sake of clarity that the remaining 4/5ths of the court time costs incurred on that day relate to the applications for leave to amend and the striking out applications);

(7) The applicant shall pay the costs of the 1st to 4th respondents incurred in connection with the obtaining of the orders dated 11 October 2006 and 12 February 2007, such costs to include the costs of two counsel where two counsel were employed.

KOEN, AJ