IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO: 15113/2007

In the matter between:

THE CAMPS BAY RATEPAYERS' AND RESIDENTS' ASSOCIATION **First Applicant**

PS BOOKSELLERS (PTY) LTD **Second Applicant**

and

GERDA YVONNE ADA HARRISON **First Respondent**

THE MUNICIPALITY OF THE CITY OF CAPE TOWN **Second Respondent**

CLIVE GRIFFITHS **Third Respondent**

And

CASE NO: 9470/2006

In the matter between:

THE CAMPS BAY RATEPAYERS' AND RESIDENTS' ASSOCIATION **First Applicant**

PS BOOKSELLERS (PTY) LTD **Second Applicant**

and

GERDA YVONNE ADA HARRISON **First Respondent**

THE MUNICIPALITY OF THE CITY OF CAPE TOWN **Second Respondent**

INVESTEC BANK LTD **Third Respondent**

JUDGMENT DELIVERED ON 25 JULY 2008

HJ ERASMUS, J

Introduction

[1] On 18 September 2007 two applications were by agreement between the parties and by order of the Judge President postponed for hearing together in this Court. In the first ("the review application"), the applicants seek to review and set aside the approval by the second respondent of certain building plans in terms of section 7 of the National Building Regulations and Building Standards Act 103 of 1977 ("the National Building Act"). In the second ("the demolition application"), the applicants seek an order directing the demolition of all structures erected on Erf 590 in Camps Bay.

The parties

[2] The first applicant is the Camps Bay Ratepayers and Residents Association, a voluntary association having legal personality, which represents its members who are adult property owners and residents of Camps Bay, Bakoven and Clifton.

[3] The second applicant is PS Booksellers (Pty) Limited, a company with limited liability duly incorporated in terms of the Company Laws of the Republic of South Africa, and with principal place of business situated at 7 Blinkwater Road, Camps Bay, where it carries on business as the registered owner of Erf 594, Camps Bay.

[4] The first respondent is Gerda Yvonne Ada Harrison who is the registered owner of Erf 590, Camps Bay, situated at 17 Geneva Drive on the corner of Geneva Drive and Blinkwater Road, diagonally opposite second applicant's property.

[5] The second respondent is the Municipality of the City of Cape Town, the successor of the Municipality of Cape Town and a duly constituted municipality with jurisdiction *inter alia* over the Camps Bay area where the properties of first applicant and first respondent are situated.

[6] The third respondent is Mr Clive Griffiths who is cited in his official capacity as the second respondent's Manager: Building Development Management. No relief is sought against him personally.

[7] The parties to the demolition application are the same as in the review application, except that in the demolition application, Investec Bank Ltd as holder of the mortgage bond registered against the first respondent's property, is cited as the third respondent. In the demolition application, no relief is sought against the second and third respondents unless they oppose the relief sought in the demolition application. The third respondent, Investec Bank Ltd, filed a notice of intention to abide the decision of the court. The second respondent has not filed any papers in the demolition application.

The factual background[1]

[8] The first respondent took transfer of Erf 590, Camps Bay ("the property") on 13 September 2004. At the time there was a prefabricated cottage on the property. Early in 2005 the first respondent demolished the cottage and proceeded with earthworks on the property. Shortly afterwards she published an advertisement for the sale of her intended development on the property at a price of R12 750 000.

[9] Plans for the building to be constructed were approved by the second respondent on 24 February 2005 under approved plan number 480217 ("the February 2005 plan"). Construction of the building proceeded.

[10] From the outset, the first respondent's development of the property elicited strong opposition from the applicants. On 5 September 2005 the

[1] The factual background is set out in detail by Meer J in *PS Booksellers (Pty) Ltd and Another v Harrison and Others* 2008 (3) SA 633 (C); [2007] 3 All SA 552 (C) in paragraphs [23] to [61].

second respondent approved a rider plan under approved plan number 485042 ("the September 2005 plan").

[11] On 17 November 2005, the applicants brought an application (under case number 11841/2005) to stop all building work on the property ("the interdict application"). On 12 April 2006 Meer J granted an interdict restraining the first respondent from proceeding with any further building work on the property pending (i) the determination of the appeal in terms of section 62 of the Municipal Systems Act, (ii) an application to be brought for the demolition of all structures on the property and (iii) a review application that might be brought against the approval of the September 2005 plan or the decision in the section 62 appeal.[2]

[12] The applicants lodged an appeal under section 62 of the Local Government: Municipal Systems Act 32 of 2000 against the approval of the September 2005 plan. The appeal was upheld and the on 20 July 2006 the approval of the September 2005 plan was set aside.

[13] In both the appeal under section 62 and in the interdict application, it was found that retaining walls, provided for in the September 2005 plan, had been built on the property in contravention of a restrictive title deed condition which provides that no building or structure, except boundary walls and fences, shall be erected nearer than 3.15 metres to the street line which forms a boundary of the property.

In both the appeal and the interdict application it was contended that by means of the illegal retaining walls the "finished ground level", which

[2] Meer J's judgment is reported as set out in footnote 1 above.

serves as a reference point for purposes of measuring the height of the building, had been artificially raised.

[14] On 2 June 2006 and before the approval of the September 2005 plan had been set aside, the first respondent submitted a further plan for approval. The applicants in two letters dated 27 October 2006 and 15 January 2007 objected to the approval of the plan. On or about 4 September 2007 the second respondent's building control officer recommended approval of the plan and on 6 September 2007 Mr SN Holden, representing the second respondent, approved the plan under approved plan number 506011 ("the September 2007 plan").

[15] On 4 September 2006 the applicants brought the demolition application in which they seek an order directing the first respondent to demolish all structures on the property.

[16] On 23 October 2007 the applicants brought the review application in which they seek an order reviewing and setting aside the approval by the second respondent of the September 2007 plan under approved plan number 506011.

The hearing

[17] At the hearing of the matter, I acceded to the request of counsel for all the parties that the demolition application stands over until after judgment in the review application has been delivered. It was pointed out that the fate of the demolition application is interwoven with the fate of the review application. If the review application is dismissed, the demolition application also falls to be dismissed. If the review application

is successful, the basis for the Court's finding will be of crucial importance to consideration of the demolition application. In that event, supplementary papers and further heads of argument may need to be filed to deal with changed circumstances, especially in view of the fact that the applicants' papers deal with the situation that existed during September 2006, that first respondent's answering affidavit was filed eighteen months ago on 4 December 2006 and the applicant's replying affidavit on 3 May 2007.

[18] First respondent's counsel accordingly at the hearing addressed argument on one issue only; namely, the applicants' contention regarding contravention of section 98 of the Zoning Scheme Regulations[3]. In this regard, first and second respondent joined ranks and second respondent's counsel adopted the submissions advanced on behalf of the first respondent.

Preliminary remarks

[19] Although Mr Clive Griffiths ("Griffiths") has been cited as the third respondent in the review application as the person who approved the plans in issue, it is common cause that the impugned decision was taken by Mr SN Holden ("Holden").

[20] Mr Anthony Hyman Herman ("Herman") holds a controlling interest in the second applicant. He and his family occupy the house on Erf 594, at 7 Blinkwater Road, Camps Bay. Herman is the instructing attorney for the applicants in both the review and the demolition

[3] Regulations approved in terms of section 9(2) of the Land Use Planning Ordinance 15 of 1985 and published in Provincial Gazette 4684 of 1 March 1991.

application. He has deposed to a number of affidavits, including a replying affidavit.

[21] The applicants have in the review application belatedly (on 22 May 2008) filed lengthy replying affidavits. In doing so, the applicants have not had regard to what the Supreme Court of Appeal has recently stated as being the purpose of replying affidavits.[4] The replying affidavits also contain new matter, including two new review grounds. The first is that the building line prescribed in section 47(2) of the Zoning Scheme Regulations is being contravened. The second is that there is no provision in the National Building Act for the submission or concept of "rider" plans. Without derogating from their stance that it is not permissible to make out new grounds for review in replying affidavits, the second respondent has in the limited time available to it dealt with the new matter in further affidavits, and in argument. Whether the applicants should be permitted to raise these additional grounds of review will be considered in due course.

[22] There are numerous disputes of fact on the papers. The case involves review of a decision of a statutory body. The applicants therefore had no choice but to proceed by way of notice of motion.[5] In the circumstances, all the parties, including the applicants, were entitled to seek an order referring the disputed questions of fact for the hearing of oral evidence.[6] None of the parties requested the matter to be referred for

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[4] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd / Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at 439H (para [80]); *Van Zyl and Others v Government of the Republic of South Africa and Others* 2008 (3) ASA 294 (SCA) at 307E—308A (paras [45] and [46]).

[5] Rule of Court 53. See *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) at 51D (para [25]).

[6] *AECI Ltd and Another v Strand Municipality* 1991 (4) SA 688 (C) at 698J—699A; *Chief Molotlegi and Another v President of Bophuthatswana and Another* 1992 (2) SA 489 (B) at 488D—E).

the hearing of oral evidence. The well established approach (which is subject to certain exceptions) must accordingly be adopted, that final relief will only be granted if the facts averred in the applicants' affidavits which have been admitted by the respondents, together with the facts alleged by the respondents, justify such an order.[7]

[23] The following experts deposed to affidavits: Mr CN Willemse ("Willemse"), a civil engineer who is also the chairman of the first applicant; Mr TAS Turner ("Turner") a planning and development consultant; Messrs BJ Mellon ("Mellon"), RAC Lewis ("Lewis") and RC Abrahamse ("Abrahamse"), land surveyors; Mr D Maas ("Maas"), an architect, and Mr GST Lowden ("Lowden"), a civil engineer. Disputes of fact among the experts are to be dealt with in accordance with the approach set out above. The arguments, submissions and opinions contained in the affidavits of the experts are of course not facts.[8] In evaluating the evidence of expert witnesses, the Court has "to determine whether and to what extent their opinions advanced are founded on logical reasoning".[9] In a case such as the present, where the expert evidence is before the Court on affidavit, the assessment of the testimony is rendered rather more difficult because it has not been tested in cross-examination.

The grounds for review

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[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E—633C.

[8] See *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E—G.

[9] *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at 1200I.

[24] The only administrative action that is reviewed in these proceedings is the decision taken by Holden to approve the September 2007 plan. The grounds for review will be considered under the following heads:

I. The legality of the September 2007 plan:

(a) The competency of the approval of a rider plan.

(b) The alleged contravention of the height restriction imposed by section 98 of the Zoning Scheme Regulations.

(c) The alleged contravention of the building line prescribed in section 47(2) of the Zoning Scheme Regulations.

II. Whether the decision to approve the September 2007 plan was procedurally fair.

III. The delegated authority of Griffiths to approve the February 2005 plan:

IV. The discretion of the Court to decline review.

I. The legality of the September 2007 plan.

[25] Section 4 of the National Building Act provides that no person shall without the prior approval of the local authority in question erect any building in respect of which plans and specifications are to be drawn and submitted in terms of the Act. Section 6(1)(a) of the Act provides that a building control officer shall make recommendations to a local authority regarding any plans, specifications, documents and information submitted to the local authority in accordance with section 4(3) of the Act. Section 7(1)(a) of the Act provides that the local authority, having considered a recommendation referred to it, shall grant its approval of the application if it is satisfied that the application in question complies with the requirements of the Act and "any other applicable law". The phrase "any other applicable law" refers to statue law and does not include the common law.[10]

[26] The applicants in their objections to the building plans have relied on alleged non-compliance with certain development restrictions There is, firstly, the restrictive title deed condition already referred to. The restrictive condition which appears on the deed of transfer of the property as clause D(d) in favour of any erf in Camps Bay, provides that

> … no building or structure or any portion thereof, except boundary walls and fences, shall be erected nearer than 3.15 metres to the street line which forms a boundary on this erf.

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[10] Section 2 of the Interpretation Act 33 of 1957; and see *Schuurman and Another v Motor Insurers' Association of South Africa* 1960 (4) SA 316 (T) at 318A. The Zoning Scheme Regulations are "applicable law" for the purposes of the National Building Act (*Muller NO and Others v City of Cape Town* 2006 (5) SA 415 (C) at 428F (para [27]).

The title deed restriction featured prominently in the interdict application. Though the applicants allege in the founding papers of the review application that a number of elements that constitute contraventions of the applicable title deed conditions are still reflected on the September 2007 plan, these alleged contraventions were not dealt with in argument at the hearing before me. Second respondent's counsel dealt with the issues in their heads of argument, but not in argument at the hearing. The approach by counsel has no doubt been taken because any concerns that the applicants may have had in this regard have been addressed. I shall in due course deal with one issue relating to the title deed condition which featured at the hearing within the context of the alleged manipulation of ground levels to evade the height restrictions imposed by the zoning scheme; namely, the wall and embankment on the Blinkwater Road boundary of the property.

[27] Three alleged contraventions of the provisions of other applicable law which remain in issue in these proceedings are (a) the approval of a rider plan in contravention of the provisions of the National Building Act. (b) contravention of the height restriction imposed by section 98 of the Zoning Scheme Regulations, and (c) contravention of the building line prescribed in section 47(2) of the Zoning Scheme Regulations,These alleged contraventions are now considered in turn.

(a) The competency of the approval of a rider plan.

[28] The September 2007 plan was approved as a rider plan to the February 2005 plan. In a replying affidavit, Willemse says that the applicants have "consistently alleged" that there is no provision in the National Building Act for the submission or concept of "rider" plans.

However, in their founding papers the applicants seem to accept the concept of the approval of rider plans. Thus in a supplementary affidavit in terms of Rule 53(4) deposed to on 14 December 2007 Herman states:

> Given that the Plan No 506011, approved on 6 September 2007, was approved as a rider plan to the February 2005 Plan No 480217 it is accordingly necessary for the Second respondent to prove that Mr Griffiths (the Third Respondent) should have had the necessary delegated authority to approve that Plan No 580217 in February 2005.

He then submits that no proof of Griffith's authority has been forthcoming and –

> That being so, neither the February 2005 Plan no 480217 nor the rider Plan No 506011, approved on 6 September 2007, have been validly approved.

[29] A rider plan is an additional or supplementary plan which amends or qualifies an existing plan.[11] The National Building Act gives express recognition to the fact that plans can be amended or altered. Section 17(1) of the Act provides that the Minister may make regulations, to be known as National Building Regulations –

> (a) regarding the preparation, submission and approval of plans and specifications of buildings, including the approval of amendments or alterations to plans and specifications of buildings during the erection thereof.

The Legislature would not have given the Minister the power to make regulations which provide for the amendment or alteration of plans if in

[11] In the *Concise Oxford Dictionary* (8th ed) the meaning of "rider" in the present context is given as "an additional clause amending or supplementing a document."

terms of section 7 of the National Building Act a local authority did not have the power to approve amendments or alterations to already approved plans.

[30] Regulation A25(5) and (6) of the National Building Regulations made by the Minister provide as follows:

> (5) Any person who, having obtained approval in terms of the Act for the erection of any building, deviates in any material respect from any plan, drawing or particulars approved by the local authority shall, except where such deviation has been approved, be guilty of an offence.
>
> (6) The local authority may serve a notice on any person contemplated in section 4(4) of the Act or subregulation (4) or (5), ordering such person forthwith to stop the erection of the building concerned or to comply with such approval, as the case may be: Provided that where any deviation is found to be necessary during the course of construction of such building, the local authority may authorize the work to continue but shall require that an amended plan, drawing or particulars to cover such deviation is submitted and approved before a certificate of occupancy is issued.

[31] The two subregulations deal with different situations. Subregulation A25(5) makes deviation from an approved building plan a criminal offence, "except where such deviation has been approved". The subregulation clearly has in mind the possibility of obtaining prior approval of the deviation from the approved plan; that is, the subregulation envisages the submission for approval of an amended plan, drawing or particulars to cover the proposed deviation. Subregulation A25(6) deals with the situation where there is unauthorized deviation

from approved plans during the course of construction. The subregulation empowers the local authority concerned to put an immediate stop to the erection of the building, except where it is found that the deviation is "necessary" in which case it may authorize the work to continue subject to an amended plan being submitted for approval. The question whether or not a deviation is "necessary" only arises in the second situation: in the case of unauthorized deviation from approved plans during the course of construction, if the deviation is found to be "necessary", the local authority may, instead of taking the drastic step of ordering immediate cessation of the construction work, authorize the work to continue subject to an amended plan being submitted for approval.

[32] In my view, there is no merit in the submission that the approval of the September 2007 plan as a rider plan was *ultra vires* the provisions of the National Building Act.

(b) The height restriction.

[33] Section 98 of the Zoning Scheme Regulations provides as follows:

> 98. Camps Bay and Bakoven
>
> (1) No building within the area of Camps Bay and Bakoven bounded by the Municipal boundary to the South and Kloof Road to the North shall exceed three stories in height.
>
> (2) No point on the façade of any building within such area shall be more than 10 m above the level of the ground abutting such façade immediately below such point.

In the Zoning Scheme Regulations the term "level of the ground" is defined as "ground level" which in turn is defined as meaning –

> …. in relation to a building ….. the finished level of the surface of the ground surrounding and immediately adjoining the building when erected.[12]

In a supplementary affidavit, Abrahamse emphasises the words "when erected" and points out that the finished level can only be definitely ascertained on completion of the building and once the surface of the ground adjoining the building has been finished. At that stage, Abrahamse says, the finished level of the surface of the ground surrounding and immediately adjoining the building can be precisely measured.

[34] The applicants aver that the building envisaged by the September 2007 plan will infringe the height restriction imposed by section 98 of the Zoning Scheme Regulations.

[35] Mr Rose-Innes, who appeared for the second respondent with Ms Pillay, submitted that the simple and complete answer to this is that the second respondent contends and the applicants acknowledge that the February 2005 plan and the September 2007 plan reflect a dwelling that falls within the height restriction.

[36] On or about 7 September 2004 the first respondent engaged the services of Lewis to survey the property (in the papers this is sometimes

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[12] The definition was amended by PN 134/2007, Provincial Gazette 6438 of 18 May 2007 to read as follows: "the existing level of the surface of the finished ground level surrounding and immediately abutting the building as determined by reference to data in Council's record or by a land surveyor's certificate or, alternatively, through the interpolation of such data or by another method as determined by Council. (In the case of dispute Council's opinion shall prevail.

referred to as the Biff Lewis Geomatics survey). In an affidavit deposed to on 4 December 2006 (and which forms part of the applicants' founding papers) Lewis sets out the slope of the property as follows (the heights given are references for the second respondent's level datum system, which is above mean sea level ("msl")):

> From the survey map ….. the level of Geneva Drive, moving from the south western side to the north eastern side increases from 27 metres to 28,38 metres at the point closest to the northern side of the property. The level on the southern side of the property, on the Blinkwater side, is 32,37 metres. From here the property slopes downwards towards the northern point.

The nature of the slope from Blinkwater Road in the south to Geneva Drive in the west is also shown on Section B-B on the plan of the dwelling which is annexed to the founding papers in the review application as Annexure CW 4.1. In his report, Lewis says that a "rough check on the levels shown on X-section BB appear to be in order".

[37] It is apparent from the survey plan, and indeed is common cause, that the property is steeply sloping – in the founding affidavit Willemse refers to the "steeply sloping nature of the site".

[38] Lewis further superimposed his survey map prepared in September 2004 on the September 2007 plan. He confirms that the heights of the contour lines indicated on the September 2007 plan are correct and in accordance with his September 2004 survey. In a report dated 21 June 2007 Lewis again confirms these results. In this report, Lewis adds:

> Our survey dated December 2005, clearly shows levels taken on the upper parapet walls and on ground (whilst under construction) at that time. These

> results show consistently that the building façade is less than ten metres in height.

[39] Abrahamse undertook an independent survey of the property. In a report dated 18 December 2007, and confirmed on affidavit, he confirms the results of the survey done by Lewis. In his report, he states his findings as follows:

> The height (above mean sea level) of the building has been surveyed at 39,99 metres. The finished ground level (being the surface of the ground surrounding and immediately adjoining the building) have also been surveyed and from the measured (surveyed) heights it is evident that NO[13] point of the façade of this building is more than 10 metres above the level of the ground abutting such façade immediately below such point (section 98(2) of the City of Cape Town's Zoning Scheme Regulations).
>
> This is also evident from Annexure CW 13 (illustrative cross-section depicting levels and extent of fill) on which it is indicated that the finished level of the ground is 29,96 metres which is within the 10 metre allowable restriction.

The cross-section to which Abrahamse refers is Section B-B on the plan of the dwelling which features as Annexure CW 4.1 in the review papers and which depicts the levels and extent of fill from Blinkwater Road to Geneva Drive.

[40] On 8 June 2008 Abrahamse conducted a further survey and in a supplementary affidavit confirms that in his opinion "no point of the façade of the building will be more than 10 metres above the level of the ground abutting such façade immediately below such point".

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[13] The emphasis is that of Abrahamse in his report.

[41] Mr Rose-Innes submitted that from the foregoing it is apparent that the September 2007 plan does not reflect a dwelling which contravenes the height restriction, and that there can, accordingly, be no basis for the setting aside of the plan on the ground that the second respondent approved a plan contrary to the provisions of section 98 of the zoning scheme. In this regard he also refers to what Willemse states in a replying affidavit:

> It is not suggested and neither has it ever been suggested by Applicants that the height from the top of the parapet to the ground immediately abutting the façade as currently shown on the plan (my emphasis)[14] exceeds ten metres.

[42] The applicants say that the house which has been built exceeds the 10 metre height restriction. In this regard, as has been pointed out above, the second respondent obtained the view of Abrahamse, an independent professional land surveyor, who upon measurement found that that at no point of the façade of the above the level of the ground abutting the façade building is more than 10 metres above the level of the ground. To the extent that there may remain any dispute of fact in this regard, the second respondent's version is to be accepted. Moreover, the fact that the dwelling may have been built contrary to the building plan does not afford any basis for the setting aside of the building plan. That is a matter which would have to be addressed in terms of the provisions of the National Building Act and the National Building Regulations.

[43] The applicants' principal contention is that the ground level depicted on the September 2007 plan is fallacious, that fictitious ground

[14] That is, Willemse's emphasis.

levels have been used in the plan and that there are manifest differences between the levels shown on the survey and those shown on the architect's drawings in the final plan. The applicants' contentions in this regard are articulated as follows by Willemse:

> Thus in attempting, *inter alia,* to evade the intent of the zoning scheme one simply has to build up the level of the ground to form a platform, then build retaining walls to contain the soil and rubble of which the platform is constituted and then construct a building on top of this platform (which now constitutes your "finished ground level"). When the retaining walls are subsequently declared illegal, then you simply excavate the rubble and soil immediately abutting and retained by the illegal retaining walls which are then magically transformed into "boundary walls", bank up the soil and rubble against the façade at a steep and unsustainable slope and submit a plan reflecting this, which is then approved by the Second Respondent. This is the nature of the exercise upon which the First Respondent has embarked and which I respectfully submit evidences a clear and deliberate intention to evade the intent of the zoning scheme, especially taking into account the first respondent's declared intention under oath to have a <u>level</u> garden surrounding her dwelling.

[44] Willemse further says that what the first respondent sought to do –

> ….. was to conceal the fact that she had, through the device of the fill material compacted behind and retained by the retaining walls, artificially raised the ground level on the property so as to reconfigure the original steep slope on the property to an almost horizontal "platform". The western side of this "platform" is almost 2m higher than the ground level would have been, but for this device.

[45] Willemse avers that the Biff Lewis Geomatics survey plan dated 21 December 2005 demonstrates that the surveyed "spot heights" are materially different to the levels shown on the September 2007 plan. However, as has been pointed out above, Lewis in two reports confirms that the heights of the contour lines indicated on the September 2007 plan are correct and in accordance with his September 2004 survey.

[46] The applicants find support for their submissions concerning the manipulation of the ground level in the assessment of Turner. Willemse refers to and attaches a drawing by Turner (not drawn to scale) which he says represents the site with its pre-existing gradient, and which demonstrates the difference in result in measuring the proposed building's façade from a point at natural ground level and a point at the raised ground level. Turner's drawing depicts the former cottage on the property by way of a dotted line. In his evidence in the interdict application, Turner states:

> The ground floor of the previous building was raised by 14 steps (approximately 1,8 metres) above the finished ground level at the western side. The building was a single storey structure and the height of the façade

> measured from the finished ground level (1,8 metres below the floor level) would have been less than 10 metres.

[47] If one has regard to the Biff Lewis Geomatics survey plan, it appears that the contour at the foot of the stairs is 28,49 metres, and the height at the top of the stairs is 30,31 metres; that is, 1,82 metres higher. The nearest ground contour to the front of the cottage is 30,05 metres, 0,26 metres below the level of the house. In other words, the greater part of the rise from the bottom of the steps to the floor level of the cottage is taken up by the rise in the ground level itself. The contour line at the height of 30,05 metres runs along the front of the then existing cottage, from the north-western front corner to the north-eastern front corner. That the cottage was built at ground level is further evidenced by a comparison of the levels indicated at the cottage corners and the immediately adjacent contour levels. It follows, as Mr Viljoen, who appeared for the first respondent with Mr Marais, rightly submitted, that Turner's sketch is of no value in assessing the topography of the site.

[48] In regard to the boundary walls on the Blinkwater Road boundary, the applicants say that the ground drops away by between 1 and 1.5 metres between the Blinkwater Road and the outer wall of the building in the area and accordingly, it is contended that "there is no question that these walls function as retaining wall along the Blinkwater Road boundary". In a replying affidavit in the demolition application, Herman states the following in regard to the wall:

> The retaining wall built along the Blinkwater Road boundary to the east of erf 590 was constructed to enable the First Respondent to raise the level of the ground of her erf by some 3 to 4 metres so as to provide her with a platform on which to construct her dwelling which, at the eastern façade, would then be

> level with Blinkwater Road. This would give her level access to the house and garage / carport in Blinkwater Road and enable the evasion of the zoning scheme provisions as described in the affidavits of Turner and Willemse.
>
> Whilst currently the level of the ground abutting the eastern façade of First Respondent's building is indeed lower than the level of Blinkwater Road, this level (having been excavated to its current extent by the First Respondent after the launch of the interdict proceedings) is still approximately 2 metres higher than the original level on the ground at that point prior to First Respondent backfilling it.

[49] In a report dated 13 December 2007, Lowden points out that the ground level at the edge of Blinkwater Road varies from about 31.50m to 32.40m, and that the survey plan of the site prepared in 2004 shows that the ground sloped steeply, at approximately 1 in 1 (45°) from the road edge onto the site. According to the Lewis survey of September 2004 the (original) ground level on the eastern border of the property abutting Blinkwater Road varied from 32,03 metres in the south, through 29,9 metres in the middle to 29,78 metres in the north. Abrahamse in his survey conducted in December 2007 found the level of the property abutting Blinkwater Road to range from 32,37 metres through 30,75 metres to 30,85 metres from south to north. He found the level of the ground immediately abutting the building to be 30,69 and 30,66 metres on the Blinkwater Road side. Comparison of the levels taken in 2004 and 2007 do not show that the ground levels have been raised by "approximately 2 metres" as the applicants aver.

[50] In his report, Lowden further points out that Section B-B "implies that the ground between the road edge and the site boundary was to be raised so as to form a level sidewalk". This will result in the 30 degree

embankment shown on Section B-B. Lowden is of the opinion that it is possible and practical to construct a fill embankment at 30 degrees, though it would be necessary to protect the embankment from erosion by appropriate planting and landscaping.

[51] The applicants contend that the wall on the boundary of Blinkwater Road contravenes the title deed restrictions because "retaining walls" are to be built within the 3.12m set back area in which only boundary walls can be located. In *BEF (Pty) Ltd v Cape Town Municipality and Others*[15] it was alleged that there had been a contravention of a building regulation limiting the height of "a boundary wall or fence". The Court *inter alia* held:[16]

> The whole regulation is concerned with constructions which serve to mark or protect the boundaries of sites, and not constructions which happen to be on the boundary but were erected for different purposes. In ordinary parlance also "boundary wall" means, in my view, a wall which encloses an open area. In particular I do not consider that a wall which forms the side of a building, or a retaining wall, would be described as a boundary wall even if such walls happen to be positioned on the boundary of the site.

In that case, the Court was concerned with a factual situation which differs materially from that at present in issue. In that case, the purpose of the contested wall differed from point to point; it served as the outer wall of a garage, as the side of a filled in area in which a swimming pool was constructed, and as the boundary wall for the forecourt and swimming pool area.[17]

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[15] 1983 (2) SA 387 (C).

[16] At 396F—G.

[17] See at 391H—392A.

[52] In her judgment in the interdict application, Meer J referred to the passage cited above and concludes:[18]

> The situation which pertains on the property in question is that the infringing walls do not enclose an open area. They are positioned on the boundary of the property and they abut an area filled with soil and a swimming pool. They are, in short, retaining walls within the title deed restriction.

Mr C J Moir ("Moir"), the second respondent's building control officer, points out that on the September 2007 plan the purpose of the wall on the Blinkwater Road boundary is the enclosure of an open area. Although the wall will abut a small quantity of soil, the soil supported is that of the footway on Council property. This is apparent on the photograph annexed to the founding papers as Annexure CW 19. The wall does not serve to retain soil on the property, and the soil retained does not support any structure on the property, but rather on Council property which at that point is above the level of the property. In the circumstances, the wall on the Blinkwater Road boundary is not a retaining wall which falls within the title deed restriction.

[53] Further surveys carried out by Mellon on behalf of the applicants during February and April 2008 to establish ground levels along Geneva Road, do not take the applicants' case any further. He reports that at two points within an area where the first respondent has caused soil and rubble to be excavated thereby exposing "the lower façade of the building", he found that the top of the façade above the excavated area to be respectively 12,31 and 11,29 metres above the "excavated ground level". As is pointed out by Abrahamse in a supplementary affidavit, a

[18] *PS Booksellers (Pty) Ltd and Another v Harrison and Others* 2008 (3) SA 633 (C); [2007] 3 All SA 552 (C) at 648B (para [73]).

comparison between the level of the contour line in that area as established in 2004, namely 29,39 metres, and the levels of the points identified by Mellon, shows that the two points, at 28,67 metres and 27,65 metres, are respectively 0,72 and 1,74 metres below the natural ground level. If regard is had to the plans, the purpose of the excavation is apparent; namely, to provide a cavity in which to build a swimming pool, the bottom of which would be below the natural surface area.

[54] In his replying affidavit, Willemse accepts that the artificial raising of the ground level on the property would not have been prohibited provided: (i) it was not achieved through the use of illegal structures such as the retaining wall constructed on the property; and (ii) it did not constitute an evasion of the intent of the provisions of the zoning scheme, which the raising on the property does.

[55] The second respondent's attitude is that the raising of ground level on property is not prohibited by the Zoning Scheme Regulations, and that it is common practice on sloping sites throughout the City, including Camps Bay. In its answering affidavit, deposed to by Moir, the second respondent's stance in regard to building on sloping ground is explained:

1. The starting point is a recognition that "finished ground level" is different from "natural ground level";

2. Many properties in the Camps Bay area are situated on sloping ground where it is necessary to excavate a portion of the property to a level below the natural ground level and to fill a portion of the property to a level above the natural ground level

> in order to create a building platform. The level thus created will then constitute the finished ground level.

[56] Mr Irish, who appeared for the applicants with Mr Bremridge, submitted, if I understood him correctly, that the zoning scheme allows no fill whatsoever in the Camps Bay area. This means, in effect, that "finished ground level" is to be equated with "natural" or "existing" ground level. This is an untenable proposition, and it does not accord with the views of Willemse in his replying affidavit. The phrase "finished level of the ground" is used in the Zoning Scheme Regulations to convey something different from the "natural" or "existing" level of the ground; the phrase denotes a ground level which has come into being, has been "finished", as a result of some form of human endeavour or intervention.

[57] In his founding affidavit Willemse states that where the ground level below any point on the façade is given as being less than 29,430 msl, that will demonstrate a contravention of the height restriction since the concomitant façade of the uniformly high building will exceed 10 metres. Willemse identified three points on the roof and site plan (Annexure CW 4.2 to the founding papers) where this is the case. As Moir points out in the answering affidavit, if the heights are measured, as they should be, in accordance with section 98(2) from the finished ground level, they will be compliant with the requisites of the Zoning Scheme Regulations.

[58] From a practical point of view, as indicated by Moir in his answering affidavit, building on a slope of necessity involves some manipulation of ground levels by cutting or filling or both. This fact is recognised in an amendment of the Zoning Scheme Regulations in May

2007[19] by the insertion of the following new section after Chapter I, Section 10:

> Any unsupported earth bank, soil retaining structure, column, suspended floor or any other device which exceeds 2.1 m in height or enable a ground floor or platform to be more than 2.1 m above the existing ground level shall require the Council's consent. Where a series or number of such structures or devices are used to achieve a raised floor or platform, these shall require the Council's consent where the cumulative height of these structures or devices exceeds 2.1 m when measured horizontally over a distance of 3 m or less.

Mr Irish submitted that the amendment does not override the specific provisions of section 98(2) of the Zoning Scheme Regulations. The answer, in my view, is that section 98(2) deals with finished ground levels and does not preclude manipulation of ground levels by cutting or filling or both.

[59] The raising of ground levels is, therefore, not inconsistent with the zoning scheme regulations, unless it results in an evasion of the intent of the scheme in terms of section 6 of the Zoning Scheme Regulations which provides:

> The Council shall refuse its consent to anything requiring such consent which in its opinion constitutes or facilitates an evasion of the intent of the Scheme or any of its provisions.

It is for the second respondent to decide whether or not, in its opinion, there has been an evasion of the intent of the zoning scheme.

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[19] By PN 134/2007, Provincial Gazette 6438 of 18 May 2007.

[60] In view of the steeply sloping nature of the property, a raising of ground levels would be warranted and would not *per se* amount to or result in an evasion of the intent of the zoning scheme. Moir makes it clear that the second respondent is of the opinion that in these proceedings section 6 of the Zoning Scheme Regulations finds no application.

[61] The applicants' contentions in regard to infringement of the height restriction imposed by section 98(2) cannot be sustained. The evidence, moreover, does not support the allegation that the first applicant and her professional advisers embarked on an exercise of which the intention was deliberately to evade the intent of the zoning scheme by concealing the fact that by a devious "device" the ground level on the property was artificially raised.[20]

(c) The building line.

[62] In replying affidavits filed on 22 May 2008 Willemse, Herman and Turner raise as a further ground of review the contention that the September 2007 plan contravenes the provisions of section 47 of the Zoning Scheme Regulations and that the plan could not lawfully have been approved. They acknowledge that this is an issue which was not dealt with the founding papers. The regulation deals with prescribed building lines and provides as follows –

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[20] See, for example, the passages cited from Willemse's founding affidavit in paragraphs [43] and [44] above. In the letter of objection, dated 27 October 2006 and authored by Herman, it is stated that Section B-B "continues to perpetuate a blatant misrepresentation of the factual situation on the ground" and that the Section is "fraudulently attempting to disguise" certain facts.

Prescribed Building Lines for Dwelling Houses etc

47(1) Except as provided in subsection (2), no building which is a Dwelling House, Double Dwelling House, Group of Dwelling Houses or an Outbuilding to any of the foregoing shall be erected nearer than 4.5m to any street boundary of the site of such building provided that:

(a) ……

(b) ……

(2) Where the average depth of the site of any building referred to in subsection (1) measured at right angles to a street boundary of such site does not exceed 20m, such building may be erected nearer than 4.5m but not nearer than 3m to the street boundary concerned.

(3) Where the boundaries of a site are so irregular that doubt or uncertainty exists as to the correct value of the average depth of the site, the Council shall define such average depth in accordance with the intent of this section.

[63] The question arises whether the applicants should be permitted to raise the new ground of review in reply? The established principle is that an applicant stands or falls by the founding papers and the facts therein alleged and that it is not permissible to make out new grounds in replying affidavits.[21] The applicants are seeking an indulgence and should give an explanation for their failure to raise the ground of review in question in the founding papers. Herman gives a three-fold explanation: (i) it was only in the course of investigation and preparation for compiling the replying affidavits that the applicants were apprised of the provisions of

[21] *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H—636B.

the regulation; (ii) the respondents had more than sufficient time to deal with the new ground and to respond thereto, and (iii) the new ground raised is entirely dependant upon mere measurement and comparison with the detailed plan.

[64] The first contention, that it was only in the course of preparation of the replying affidavits that the applicants were apprised of the provisions of the regulation, is not acceptable. It is, indeed, a rather surprising statement. The February 2005 plans depicted the position of the dwelling on the property in relation to the street boundaries in a manner that has remained unchanged. The "footprint" of the building remains unchanged in all subsequent plans, including the September 2005 and September 2007 plans. The applicants from the outset objected to the February 2005 plan; they objected to the September 2005 plan and lodged an appeal against the approval of the plan; they brought the interdict application, the demolition application and the current review application without raising (except belatedly in their replying papers in the review application) the alleged contravention of the provisions of section 47 of the Zoning Scheme Regulations.

[65] Herman says that the respondents had "more than sufficient time" to deal with the new ground of review and to "respond thereto if necessary". This is not so. The applicants' lengthy replying affidavits (more than 150 pages) were filed on 22 May 2008, twelve Court days before 10 June 2008 when the hearing was scheduled to commence. On 18 September 2007 the matter was postponed for hearing on 12 and 13 March 2008. In terms of the time-table included in the Court Order of 18 September 2007, replying papers had to be filed within two weeks of the date of delivery of answering papers. Answering papers were filed during

February 2008. The matter was not ripe for hearing on 12 and 13 March 2008 and was postponed for hearing on 10 and 11 June 2008. The applicants had "more than sufficient time" to prepare and file their replying papers in good time. The fact that that the second respondent has been able in the limited time available to it to deal with the new matter in further affidavits and in argument does not necessarily mean that the new ground of review should be considered on the basis that it has been fully canvassed on the papers. Moir, the second respondent's building control officer, makes it clear that the supplementary answering affidavits filed in response to the applicants' replying affidavits were produced under pressure, having been prepared "as expeditiously as the circumstances permit".

[66] The new ground of review is not, as Herman contends, "entirely dependant upon mere measurement and comparison with the detailed plan". As is apparent from the replying affidavits of Turner and Mellon, and the supplementary answering affidavits of Moir, Abrahamse and Maas, the interpretation of section 47 is highly controversial. The measurement of the "average depth of the site" depends upon, and is vitally affected by, the way the regulation is interpreted. It is undesirable that an issue which affects not only a structure which has been in existence for several years, but also has wider import, should be decided in the circumstances in which it has been raised in these proceedings. Moreover, I am not sure what relationship, if any, there is between

section 47 and restrictive title condition D(d).[22] This is an issue which was not addressed in the affidavits nor by counsel in argument.

[67] I am accordingly of the view that the applicants should not be permitted to raise the alleged contravention of section 47 of the Zoning Scheme Regulations.

II. <u>The approval of the September 2007 plan.</u>

[68] The applicants aver that –

> ….. it appears that the Second Respondent's officials, when considering the application for plan approval, did not have regard to the objections submitted by the applicants.

and that –

> ….. it would appear that the Second Respondent's officials misconceived the nature of the Applicant's objections, probably because they did not have the actual letter or letters of objection as submitted by the Applicants before them, and were thus not able to follows the detailed analysis provided in substantiation of the various grounds of objection when considering the application for approval.

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[22] If there is a conflict between a zoning scheme and title deed conditions, the latter take precedence (*Kleyn v Theron* 1966 (3) SA 264 (T) at 270H—272C; *Shell South Africa (Pty) Ltd v Alexene Investments (Pty) Ltd and Others* 1980 (1) SA 683 (W) at 689H; *Malan and Another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) at 40E; *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape, and Others* 2001 (4) SA 294 (C) at 324H—325A).

It is further alleged that Moir's memorandum to Holden, who was the final decision-maker, contains only a summary of the applicants' objections which does not correctly reflect the nature of the objections.

[69] The process followed in respect of the approval of the plan is set out by Moir in the answering affidavit. After the plans had been submitted for approval, they were sent to various departments for specific clearance for the ultimate scrutiny of the plans. The Land Information Property Management Department cleared the plans on 2 June 2006. The function of this department is to confirm cadastral boundary measurements, ensuring the correctness of site boundaries and erf dimensions, to verify the locality of the site, and servitude and road widening information.

[70] The Land Use Management Department, represented by Messsrs Michael Napoli and Gegory September, granted clearance on 30 July 2007 and 3 September 2007 respectively. The role of this department is to verify and confirm that the plans are consistent with the Zoning Scheme Regulations, applicable title deeds, including height restrictions and building lines. Messrs Napoli and September cleared the plans after having read and considered the letters of objection and the responses thereto.

[71] The structural engineering acceptance by the Plans Examiner occurred on 2 June 2006, indicating that structural certification was in order.

[72] After the Plans Examiner had assessed the application in terms of the National Building Act and other applicable laws, the application was

submitted to Moir for consideration. Moir says that prior to making his recommendation in terms of section 6(1)(a) of the National Building Act on 4 September 2007, he gave particular consideration to the applicants' letters of objection dated 27 October 2006 and 15 January 2007. He requested the first respondent and/or her specialists to address him on the merits of the objections received. He requested further information from the first respondent, in response to which correspondence was received from Lewis and Mr Labrum (a structural engineer). He then referred the plans to Mr Peter Henshall-Howard, who is the second respondent's Head of Building Development Management, to consider the certificate from Mr Labrum for further verification and clearance. Moir says that having considered the applicants' objections in the light of all the information before him, he concluded that the objections had no merit and accordingly recommended approval of the plans.

[73] From the foregoing it is clear that the second respondent's officials did have regard to the applicants' actual letters of objection and that they applied their minds to the objections raised by the applicants.

[74] On 4 September 2007 Moir submitted a memorandum to Holden. Moir says that in order to facilitate informed decision-making, more particularly in the light of the objections that were received, he endeavoured in his memorandum to provide "some insight, background and basis for my recommendation". The operative part of the memorandum reads as follows:

> The owner of Erf 594 has objected to the proposal. The objections to the proposal were the following:

1. The proposal contravenes the title conditions.
2. The level provided by the land surveyor are incorrect.
3. The earth embankment around the building will become unstable.

The application has been revised in order to comply with the title conditions and the Zoning Scheme.

The Structural Engineer (Mr Labrum) has informed the following:

1. The house was founded at the undisturbed ground level.
2. The house does not rely on any fill against the boundary for support.
3. The boundary wall and any encroaching right angle wall that contravene the interpretation of the title deeds can be removed as the house does not rely on these for support.
4. Landscaping in a responsible manner will not affect the structure.

The registered Land Surveyor (Biff Lewis) has confirmed that the levels are correct and that no point on the building will exceed 10m in height above the finished ground level.

The application complies with the National Building Regulations and other applicable laws. In terms of the Act if the application complies with the National Building Regulations and other applicable law, Council shall grant it's approval.

Having considered the other concerns regarding the proposed alterations to the site and having visited the property, I am satisfied that the proposed building will not be erected in such manner or will be of such nature or appearance that

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- The area in which it is to be erected will probably or in fact be disfigured thereby;
- It will probably or in fact be unsightly or objectionable;
- It will probably or in fact derogate from the value of adjoining or neighbouring properties;
- Will probably or in fact be dangerous to life and property.

Therefore the application is recommended for approval.

[75] There is no invariable requirement that the actual letters of objection be considered by the decision-maker. In terms of section 3(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") a fair administrative procedure depends upon the circumstances of each case.[23] It is permissible for a decision-maker to rely on the expertise and advice of officials in the department, provided the final decision is that of the decision-maker.[24]

[76] Although Holden did not have the actual letters of objection before him, he was entitled to rely on the fact that several departmental officials had independently considered the objections. Section 7(1) of the National Building Act provides that on "having considered a recommendation

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[23] *Premier, Province of Mpumalanga v Executive Committee Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at 109C (para [39]); *Ehlers and Another v MEC: Department of Environmental Affairs & Development Planning and Others* [2008] 1 All SA 576 (C) at 582f (para [28]).

[24] *President of the Republic of South Africa and Others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) at 29A and 30A (paras [40] and [43]); *Hayes v Minister of Finance and Development Planning, Western Cape and Others* 2003 (4) SA 598 (C) at 623H; *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C) at 176F—177A (para [76]); *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) at 199C—I (para 20]); *Ehlers and Another v MEC: Department of Environmental Affairs & Development Planning and Others, supra,* at 583b (para [30]).

referred to in section 6(1)(a)" (that is, of the building control officer), the decision-maker may grant a plan approval. While this does not entitle a decision-maker to a complete abdication of responsibility regarding proper consideration of the relevant documentation, it does permit him to place reliance on the information provided to him by those who have considered the actual letters of objection.

[77] Holden had before him a memorandum in which the relevant objections and submissions were summarised. What is in this regard required, as a minimum, is that the summary will contain "a fair synopsis of all the points raised by the parties so that the repository of the power can consider them in order to come to a decision".[25] In his memorandum, Moir summarised the objections to the plan as being (i) contravention of title deed conditions; (ii) incorrect levels provided by the land surveyor, and (iii) instability of the earth embankment around the building. He further refers to the fact that the application has been revised in order to comply with the title conditions and the zoning scheme, to the conclusions of the structural engineer, and to the finding of Lewis that no point on the building will exceed 10m in height above the finished ground level.

[78] Mr Rose-Innes submitted Moir's summary, though not as detailed as it could have been, nevertheless captures the essence of the applicants' objections. The question whether, in the exercise of its discretion, the Court should review and set aside the September 2007 plan on this

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[25] *Olthaver & List Finance and Trading Corporation Ltd and Others v Minister of Regional Government and Housing and Others* 1996 NR 213 (SC) at 234G as cited in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another, supra,* at 176H—177A (para 76]).

ground, is considered below under the heading *The discretion of the Court to decline review.*

III. The authority of Griffiths.

[79] In a supplementary affidavit, the applicants adopt the view that the September 2007 plan was a rider to the February 2005 plan and that it is accordingly necessary for the second respondent to prove that Griffiths had the requisite authority to approve the February 2005 plan.[26] What the applicants seek to do is to rely on Griffith's alleged lack of authority to approve the February 2005 plan as a review ground for attacking the September 2007 plan.

[80] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[27] it is stated that –

> ….. the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of the consequent acts. If the validity of the consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.

[26] The relevant paragraphs in the affidavit are cited above in para [28].

[27] 2004 (6) SA 222 (SCA) at 243H—244A (para [31]).

The February 2005 plan exists as a fact and has been acted upon.[28] The consequent act, the approval of the September 2007 plan as a rider plan to the February 2005 plan, is dependent on no more than the factual existence of the February 2005 plan which has not been set aside by a competent Court.

[81] The only administrative action that the applicants seek to review in these proceedings is the approval of the September 2007 plan. They do not seek to review the February 2005 plan. The applicants' attack on the February 2005 plan is an impermissible collateral challenge – a challenge to the validity of an administrative act (the February 2005 plan) that is raised in proceedings that are not designed directly to impeach the validity of that administrative act. Even assuming that the approval of the February 2005 plan was flawed, the present proceedings are not apt to serve as a test for that.[29] A collateral challenge to the validity of an administrative act is available only "if the right remedy is sought by the right person in the right proceedings".[30]

[82] There is a further consideration. Objections were from the outset raised to the February 2005 plan; the plan has been acted upon;

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[28] Mr Irish submitted that the first respondent had "abandoned" the February 2005 plan. This is an issue which was not canvassed on the papers and which was raised for the first time in argument. I am not sure what the effect of the "abandonment" of an approved plan is: does the plan cease to exist? The approval of the February 2005 plan has certainly not lapsed under the provisions of section 7(4) of the National Building Act. In the text, I have proceeded on the basis that the February 2005 plan, not having been set aside by a competent Court, is still in existence.

[29] In *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory)* 1991 (2) SA 527 (C) 530B Conradie J (as he then was) remarked: "even assuming the proceedings before the industrial council had been flawed, the present proceedings were not apt to serve as a test for that".

[30] Words of Wade *Administrative Law* (7th ed by Forsyth) at 331, cited with approval in *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory), supra,* at 530C; *National Industrial Council for the Iron, Steel and Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and Others* 1993 (2) SA 245 (C) at 253E; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at 245H—246A (para [35]).

objections were raised to the September 2005 plan which was approved as a rider plan to the February 2005 plan, and an appeal with successful outcome was lodged against the September 2005 plan. At no time was Griffith's alleged lack of authority to approve the February 2005 put in issue; it was raised for the first time in December 2007 in a supplementary affidavit in these proceedings. One reason why the complaint against the February 2005 plan should be raised by way of review and not collaterally in other proceedings is[31] –

> ….. that the Court can control the time within which the attack on the proceedings or decision may be launched by implementing the time-honoured rule that an applicant for review who fails to present his case within a reasonable time, the assessment of which will in part depend upon prejudice caused to his opponent by the delay, loses his right to complain of the irregularity *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 44D—E; *Setsokane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n Ander* 1986 (2) SA 57 (A) at 82G—83D.

[83] Despite its contention that the applicants have raised an impermissible collateral challenge, second respondent's counsel, no doubt *ex abundanti cautela*, dealt with the merits of the challenge. I am not seized with a review of the February 2005 plan. If I were to pronounce on the merits of the challenge, I would in effect review the approval of the February 2005 plan. For the reasons set out above, I am of the view that I should not entertain, and pronounce upon the validity, of the collateral challenge.

IV. <u>The discretion of the Court to decline review.</u>

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[31] In the words of Conradie J (as he then was) in *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory), supra,* at 531F—H.

[84] Both at common law and in terms of PAJA, a Court has a wide discretion to withhold the review remedy, even where the substantive grounds for the grant of the remedy have been made out.[32] The position is entrenched in the provisions of section 8(1) of PAJA which authorise the Court, in wide and general terms, to grant "any order that is just and equitable". The discretion of the Court in proceedings for judicial review is stressed in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[33] where it is stated that –

> ….. a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.[34]

[85] Mr Rose-Innes submitted that in the event of any of the applicants' review grounds being sustained, apart from error of law relating to compliance with the National Building Act and the applicable law, the Court should decline to set aside the approval of the September 2007 plan.

[86] It has been held above that the applicants' contentions to the effect that the September 2007 plan does not comply with the zoning scheme

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[32] *Ehlers and Another v MEC: Department of Environmental Affairs & Development Planning and Others, supra,* at 583d—f (paras [32] and [33]).

[33] 2004 (6) SA 222 (SCA) at 246D (para [36]).

[34] This view is again endorsed in *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) at 649J (para [28]).

and other applicable law cannot be sustained. It has further been held that the process of approval of the September 2007 plan has been fair in so far as the second respondent's officials did have regard to the applicants' actual letters of objection and that they applied their minds to the objections raised by the applicants.

[87] If the process of approval was not fair in so far as the applicants' objections were not adequately reflected in Moir's memorandum, I am of the view that it would not be just and equitable to set aside the approval of the September 2007 plan on that ground alone. No purpose would be served by remitting the matter back for fresh consideration by the second respondent. The second respondent having already correctly satisfied itself that the September 2007 plans comply with the National Building Act and other applicable law, the second respondent is obliged in terms of section 7(1) of the Act to grant approval.

[88] The review application accordingly falls to be dismissed. In the circumstances, I shall postpone the demolition application to a date to be arranged in consultation between counsel and myself. Costs must follow the result.

[89] I make the following order:

1. The review application (case number 15113/2007) is dismissed with costs, including the costs occasioned by the employment of two counsel by both the first respondent and the second respondent.

2. The costs are to include the costs occasioned by the postponement of the hearing on 12 and 13 March 2008.

3. The demolition application (case number 9470/2006) is postponed to a date to be arranged in consultation between counsel and myself.

HJ ERASMUS, J