Republic of South Africa

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

CASE NO: 3430/2010

In the matter between:

THE CAMPS BAY RESIDENTS' & RATEPAYERS' ASSOCIATION	**1st Applicant**
HENDRIK STEVEN NEETHLING	**2nd Applicant**
TAKU INVESTMENTS SA (PTY) LTD	**3rd Applicant**
VERNON LIONEL CHORN	**4th Applicant**

and

DAVID ANTHONY HARTLEY	**1st Respondent**
SUSAN DENISE HARTLEY	**2nd Respondent**
THE CITY OF CAPE TOWN	**3rd Respondent**

JUDGMENT DELIVERED: 16 NOVEMBER 2010

BINNS-WARD, J:

1]By the time the matter was argued, nearly nine months after the institution of the proceedings, the only matter remaining in dispute in this application for the judicial review and setting aside of the approval by the local authority of building plans for a double dwelling on Erf 530, Camps Bay, was the issue of costs. Some of the circumstances relied upon by the first and second respondents (to

whom I shall refer simply as 'the respondents') to argue that despite their last minute withdrawal of their opposition to the review and the abandonment of their counter-application they should nevertheless not be liable for all of the applicants' costs of suit highlight an unsatisfactory state of affairs in relation to the administration of the zoning scheme and to the local authority's management of access to relevant information. The papers in this matter - excluding any administrative record - run to nearly 700 pages; a building project has been in a state of suspension for months pending the determination of the litigation; and significant costs and wasted expenses have been incurred on all sides. Most, if not all, of these unwholesome circumstances could have been avoided if a more efficient and effective system of zoning and building plan administration been in place.

2]In terms of the Land Use Planning Ordinance 15 of 1985 (Cape) - more commonly referred to by the acronym, LUPO - the use and development of all land in the Western Cape Province is subject to restrictions defined in terms of zoning scheme regulations. These regulations, which are area specific in their application, have been made in terms of ss 8 or 9 of the Ordinance, or, in respect of some areas, comprise of the provisions of pre-existing town planning schemes approved under the Townships Ordinance 33 of 1934, which are deemed in terms of s 7 of LUPO to be zoning scheme regulations. The use and development of Erf 530 is thus regulated by the provisions of the Municipality of the City of Cape Town Zoning Scheme Regulations published in Provincial Gazette No. 4649, dated 29 June 1990, as subsequently corrected and

amended.

3]Erf 530 is zoned ‘Single Dwelling Residential’. ‘Single Dwelling Residential’ is one of the use zones established in terms of reg. 11(1) of the zoning scheme regulations. A ‘use zone’, as defined, denotes ‘an area of land represented on the Map in a distinctive manner for the purpose of controlling the purposes for which buildings may be erected and used and for which land may be used’; see reg. 2 of the scheme regulations.

4]The building which the respondents were in the course of erecting on Erf 530, in general accordance with the impugned building plans, is a ‘double dwelling’ within the meaning of the zoning scheme regulations.[1] In terms of reg. 15, the erection of a double dwelling on land within the Single Dwelling Residential use zone is permitted only with the consent of the municipal council.

5]Regulation 10(1) of the scheme regulations provides that when granting any consent required in terms of the scheme regulations, the municipal council may impose any condition contemplated by s 42 of LUPO. Altered land use restrictions imposed by means of conditions in terms of LUPO, and which, by their nature, define the authorised land use more finitely than the generally applicable provisions pertaining to the zoning in question, fall within the concept of ‘departures’ from the scheme regulations, in the sense defined in s 2 of the

1 In an affidavit filed in support of their contentions why costs should not completely follow the result, the respondents indicated their intention to convert the current partly completed structure for use as a single dwelling instead of as a double dwelling.

Ordinance.

6]The concept of 'departures' relates to authorised deviations from the limitations imposed in terms of the land use restrictions applicable in a particular use zone. The concept is defined to include an altered land use restriction imposed in terms of a condition by virtue of any provision of the Ordinance. Section 42 of the Ordinance, in particular, authorises the imposition of conditions in conjunction with various types of land use and development related authorisations. It falls to be noted in this connection that 'zoning', when used as a noun in both the Ordinance and the scheme regulations, means a category of directions setting out the purpose for which land may be used and the land use restrictions applicable in respect of the said category of directions, as determined by relevant scheme regulations. 'Land use restriction' in turn is defined as 'a restriction, in terms of a zoning, on the extent of the improvement of land'.[2] Departures are therefore *pro tanto* amendments to the zoning provisions of the zoning scheme regulations.

7]When it granted consent for the erection of a double dwelling on Erf 530, the committee of the municipal council that dealt with the matter under delegated authority imposed a number of conditions which quite strictly limited the spatial characteristics and positioning of the structure that could be erected pursuant thereto. The formulation of these restrictions was closely linked to the characteristics of the proposed building, as depicted in the sketch plans drawn by

2 See s 2 of LUPO and reg. 2 of the scheme regulations.

Mr Geh, who was the architect employed by the respondents at that stage. These plans had been used in the achievement of agreement between the applicants and the respondents and were also referred to in the municipal officials' report on the item before the committee. As explained, those conditions constituted 'departures' within the meaning of the Ordinance. As such, they became part and parcel of the applicable land use restrictions pertaining to Erf 530 in terms of the Cape Town zoning scheme.[3]

8]By reason of the provisions of s 39 of LUPO[4], that in turn gave rise to an obligation on the municipality to comply and enforce compliance with the conditions; as well as an attendant obligation on all persons not to contravene or fail to comply with them. A failure to comply with the obligations imposed in terms of s 39 of the Ordinance gives rise to potential criminal liability; see s 46 of

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3 Thus the differentiation by counsel in argument of the alleged infringement of the generally applicable provisions of the zoning scheme and the alleged infringement of s 42 conditions as if these afforded two independent grounds of review was not strictly speaking correct. They actually constitute a single ground of review; that is the approval of the building plans in respect of a proposed building that if erected would infringe the zoning scheme was unlawful because it would breach the local authority's statutory obligations in terms of s 39 of LUPO and s 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 ('the Building Act')..

4 Section 39 of LUPO provides, insofar as currently relevant:

(1) Every local authority shall comply and enforce compliance with-

(a) the provisions of this Ordinance or, in so far as they may apply in terms of this Ordinance, the provisions of the Townships Ordinance, 1934 (Ordinance 33 of 1934);

(b) the provisions incorporated in a zoning scheme in terms of this Ordinance, or

(c) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934,

and shall not do anything, the effect of which is in conflict with the intention of this subsection.

(2) No person shall-

(a) contravene or fail to comply with-

(i) the provisions incorporated in a zoning scheme in terms of this Ordinance, or

(ii) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934

the Ordinance.

9]It follows that the imposition of conditions qualifying as 'departures' as defined in s 2 of the Ordinance is a form of administrative legislation by a municipal council or any functionary representing the council under delegated authority. Furthermore, because the conditions are subsumed in the applicable land use restrictions provided in terms of the zoning scheme, they constitute the provisions of 'any other applicable law' within the meaning of s 7(1)(a) of the National Buildings Regulations and Building Standards Act 103 of 1977 ('the Building Act') - and a local authority is prohibited by that Act from approving any building plan application not compliant with such other applicable law.[5]

10]Regulation 1 of the zoning scheme regulations provides that the scheme regulations fall to be read 'in conjunction with the Register and the Map'. 'Register' in this context means 'the register of departures required to be maintained by the Council in terms of section 12' of LUPO; see reg. 2 of the scheme regulations s.v. '*Register*'.

11]Since the inception of the Ordinance in July 1986, every local authority has been required, in terms of s 12(1) thereof, to maintain a register. The special definition of the noun 'register' in s 2 of the Ordinance highlights how abstruse the concept of such a register is in reality. It provides that '"register", when used

5 Cf. *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another [2010] ZACC 19 (4 November 2010)* at para. [14]. The judgment, which is not yet reported in the law reports, may be accessed at http://www.saflii.org/za/cases/ZACC/2010/19.pdf .

as a noun, means documents held by a local authority in connection with all departures concerned'. Particularly in the case of a metropolitan municipality such as Cape Town, the 'register' in terms of s 12 of LUPO may thus comprise the contents of literally thousands of files stored or held in diverse places and, depending on the organisational structure of the local authority, kept by any number of different functionaries. It is therefore not a register in the ordinary sense of the word; that is an official list or an official record collected in a single volume or series of volumes, and conveniently accessible.

12]'*Map*' is defined in reg. 2 of the scheme regulations as meaning 'zoning map' as defined in LUPO; that is a map framed in terms of s 10 of LUPO. On a proper reading of the Ordinance, such a map is part of the zoning scheme to which it relates. Such a map should depict the different use zones in existence under the particular scheme in a suitably distinguishing manner and, with reference thereto, identify any land unit within the scheme area in respect of which departures are contained in the register concerned.[6]

13]That the register and the map, as defined, did not fulfil the purpose of informing the public, or even the local authority's building control officer, of the existence and content of the departures in the current case is evident from the fact that the existence of these departures as applicable land use restrictions was in dispute on the papers and was one of the principal issues in contention between the parties until the filing, shortly before the hearing, of an 'explanatory

6 See s 10 of LUPO, read with s 12(3) thereof.

affidavit' by the local authority, which had been cited as the third respondent in the review application and which had previously delivered a notice of intention to abide the judgment of the court. It was the belated clarification of the existence of the departures and of the authority of the committee of the municipal council which had imposed them that resulted in the concession by the respondents of the review and their abandonment of the counter-application. It was also that feature that in large measure gave rise to the argument about how liability for the costs of the litigation should be determined. That the facts should afford scope for such a dispute to arise is a matter for concern and indicative of a need for relevant reform. I shall direct that a copy of this judgment be forwarded to the Provincial Minister responsible for development planning and to the City Manager of the City of Cape Town in the hope that the matters for concern might receive constructive attention. I turn now to describe the relevant facts.

14]The applicants averred that the conditions had been imposed by the Spatial Planning, Environment and Land Use Management committee of the municipal council ('SPELUM') at a meeting in August 2005,[7] at which the respondents and their then architect, Mr Geh, had been present. In their founding papers the applicants further averred that confirmation of the decision had been conveyed by the local authority to Mr Geh in his capacity as the respondents' authorised agent by letter dated 16 January 2007. The letter came from the local authority's Director: Planning & Building Development Management. (The delay between

7 SPELUM is a committee of councillors established in terms of s 79 of the Local Government: Municipal Structures Act 117 of 1998, to which the relevant powers had been delegated by the council in terms of the system of delegations adopted in terms of s 59 of the Local Government: Municipal Systems Act 32 of 2000.

August 2005 and January 2007 is explained by the fact that SPELUM's consent to the erection of a double dwelling was contingent upon the agreement by the provincial authority to remove or amend certain title deed conditions which had stood in the way of the erection of a double dwelling, as proposed, on Erf 530. The provincial authority authorised the removal of the relevant title deed conditions by way of a decision in terms of the Removal of Restrictions Act 84 of 1967, which was notified in the Provincial Gazette only on 15 September 2006.)

15]The content of the letter of 16 January 2007 is set out below:

> Dear Mr Geh
>
> **SKETCH PLANS OF PROPOSED NEW DOUBLE DWELLING FOR ERF 530, CAMPS BAY, THE MEADWAY** 21 HARTLEY [the words 21 HARTLEY were inserted by hand on the otherwise typewritten letter]
>
> I refer to your submission dated 12-02-2004 under reference Application Number LM1481 (59944) showing the abovementioned proposal, and have to advise that in so far as the Zoning Scheme is concerned, the following departures from the scheme regulations have been granted.
>
> Section 15 (3)
>
> - for a double dwelling in a single dwelling use zone.
>
> It must be clearly understood that this proposal in principle is given merely in terms of the existing provisions of the Zoning Scheme. These provisions may be amended from time to time and should final building plans drawn in accordance with these sketch plans be found to be in conflict with any lawfully amended provision of the Zoning Scheme Regulations such final plans may not be approved by the Executive Director (Strategy & Development) except with the consent of Council.
>
> **Please ensure that a copy of the approval sketch plan as well as this sketch plan letter is attached to the final building plan submission.**

> It must be clearly understood that work must not commence until such time as working drawings have been submitted to and approved by the Council, and furthermore that nothing in this letter is to be understood as departing from any legal provisions which the sketch plans may contravene, except to the extent (if any) specifically stated above.
>
> One set of plans is being returned; the other is being retained in this office for record purposes.
>
> Yours faithfully
>
> [signed]
>
> for **DIRECTOR: PLANNING & BUILDING DEVELOPMENT MANAGEMENT**
>
> Sketch plans given to David Harley 05 Nov2007

16]The applicants averred that the 16 January 2007 letter was accompanied by an annexure ('annexure B') setting out (albeit erroneously in certain respects) the conditions to which the consent had been given. The respondents, however, contended that there were no annexures to the 16 January 2007 letter. They also emphasised that the body of the letter contained no reference to any conditions attached to the consent. The respondents avoided dealing with the content of the letter which implied that the final building plans submitted by them should concur with the sketch plans drawn by Mr Geh, taking the position instead that 'The City has never formally notified [us] that its consent was subject to the conditions contained in annexure B, or any conditions'. In making these averments, the respondents were dependent on the advice of Mr Geh, as their representative at the time in respect of all communications with the municipality on the matter. The respondents had apparently also raised this point in their answering papers in the interim interdict proceedings launched to prevent the

completion of the building pending the determination of the application for judicial review. The effect of the point taken by the respondents was that, notwithstanding the provisions of s 39 of LUPO, they were not bound by the conditions - assuming they had been validly imposed - because the imposition of the departures had not been effectively communicated to them.

17]Mr Geh deposed to an affidavit confirming the respondents' averments. He added that, in his experience, in matters in which the municipality intended to impose conditions under s 42 of LUPO it did so by announcing its decision by means of a 'final notification letter' to the affected property owner, an example of which, in connection with another matter, he annexed to his affidavit. He said that had there been such a letter, of which he had no recollection, it would be contained in his file. The file was with the respondents' attorney of record and Geh stated that he had been informed by the attorney that no such letter was contained in it. Mr Geh did not explain what he considered to the status and effect of the conditions resolved upon by SPELUM at the meeting of that committee which he had attended, accompanied by his then clients, the respondents, nor did he deal with the restrictive implications of the content of the 16 January letter. It may, however, be inferred from his evidence that he failed to inform the respondents of the imposition of any binding conditions. In the result his successor as the respondents architect designed for the respondents' intended double dwelling a quite different building from that contemplated in the sketch plans referred to in the 16 January 2007 letter. It was the local authority's approval of the plans for that quite different building that gave rise to the current

litigation.

18]When the matter became litigious, the respondents engaged the services of Mr Timothy Turner, a town planner with more than 30 years experience in urban planning in Cape Town, including a number of years' service as an official of the City – a period that culminated with his service there as Assistant Director of Building Survey. Mr Turner described himself, without contradiction from any quarter, as an expert in the field of statutory planning, including applications for rezoning, departures, special consents, subdivisions of land and the removal of restrictive conditions of title. It appears from Mr Turner's evidence that part of his mandate was to look into the existence of the allegedly imposed conditions. To this end, and accompanied by the respondents, he attended at a meeting with the City's District Manager: Planning & Building Development on 10 March 2010. This functionary was unable to produce the City's file on the matter at the meeting because it was not available. The functionary undertook to obtain it and to advise Mr Turner if the conditions had indeed been imposed and if so, whether and by what means the respondents had been informed thereof. Despite two reminders by telephone from Mr Turner, the functionary did not revert on these matters as promised.

19]On 12 May 2010, Mr Turner therefore addressed a letter to the functionary requesting the information. No reply was ever given to the letter, but on 3 June 2010 a second meeting was had with the functionary. At that meeting what is described as 'the City's file' was available. On the basis of their perusal thereof

the relevant officials of the municipality conceded that it did not appear that the conditions had been attached to the 16 January letter. Mr Turner's understanding at the conclusion of the June meeting was that the City would thereafter attend to formally notify the respondents of the imposition of the conditions. However, no such notification followed. It would therefore appear that at the time of Mr Turner's perusal of the file neither he, nor the attending officials were able to identify that a final notification letter in respect of the imposition of the conditions had in fact been sent in December 2006 to the respondents' agent, Mr Geh.

20]Following on the delivery of the answering papers in the interim interdict proceedings, in which it was reportedly averred that they had not been formally informed of the imposition of the conditions, the applicants engaged the services of another professional town planner, Mr Brümmer. This witness says that he inspected 'the LUPO file' in May 2010. From what he saw there he was able to infer that a 'final notification' had been sent to the respondents' agent on 18 December 2010. Through a misunderstanding this observation had not been set out in the replying papers in the interim interdict application and was only clearly stated for the first time in the applicants' replying papers in the review. The replying papers also served as the applicants' answering papers in the counter-application by the respondents for (i) a declaration that no conditions had been validly imposed in terms of s 42 of LUPO and (ii) an order substituting the local authority's refusal to approve certain revised building plans submitted by the respondents with an approval of such plans.

21]As mentioned, the City delivered an 'explanatory affidavit' shortly before the hearing of the application. The stated purpose of this affidavit was to assist the court by apprising it of the relevant facts. It was proper and commendable of the City to present this evidence; although it was unfortunate that it was produced so late, barely a day before the matter was due to be argued.[8] It was confirmed in the explanatory affidavit of the City that the conditions in contention had indeed been imposed and that Mr Geh had been notified thereof in a so-called 'final notification' letter, dated 18 December 2006.

22]It was argued on behalf of the respondents that if the information contained in the City's explanatory affidavit had been available to them earlier they would not have opposed the review or instituted the counter-application. In a supplementary affidavit submitted in response to the City's explanatory affidavit, the respondents averred that they had opposed the review application on the basis of their assessment of the facts alleged in the founding papers. In this regard they contended that it had not been established in the founding papers that conditions had been validly imposed, or that the respondents had been duly notified thereof. The respondents averred that their opposition on these grounds

8 Much of the information put before the court in this affidavit should have been available in the administrative record had the respondents availed of the procedures in terms of uniform rule of court 53 in their attack on the allegedly imposed s 42 conditions. Had those procedures been used, the administrative record in respect of the decision to impose the conditions would have been put in. In this regard the respondents argued with reference to *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) that they were not bound to use rule 53. The applicants however contended that in the peculiar circumstances they were prejudiced by the respondents' failure to avail of the procedures provided in terms of the rule in what was essentially, at least in part, an application to review the imposition of the conditions. In this regard the applicants relied on *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* 2003 (3) SA 313 (A) ([2003] 1 All SA 274) at para.s [4]-[5]. Had it been necessary to determine the issue, I would have been inclined to hold in favour of the applicants' argument. The proper course, however, would have been for the applicants to use rule 30 to force the respondents to use the appropriate procedure.

as well as their counter-application were 'bona fide and reasonable in the light of the content of the founding affidavit and the facts available at the time of attesting our answering affidavits and launching of the counter-review. Before adopting this position we made concerted efforts to obtain the relevant information …from the City (without success) and this is already on record.' The respondents also suggested that their treatment by the City had been less than even-handed when compared with the co-operation allegedly given to the applicants. This latter suggestion was quite correctly abandoned by the respondents' counsel when the applicants' counsel convincingly demonstrated from the bar that it was ill-founded. The respondents argued that in the circumstances it would be unfair for them to be made liable for all of the applicants' costs of suit in the proceedings and it was submitted on their behalf by counsel that it would be appropriate to make the respondents liable for only one half of the applicants' costs in the review. In advancing those submissions respondents' counsel purported to reserve their position with regard to seeking a costs order against the City. I made it clear, however, that if costs were to be sought against the City, the determination of costs would have to stand over until the City had been given notice and an opportunity to submit argument. In the face of that indication counsel requested me to determine costs as between the actively participating parties in the litigation; that is excluding the City.

23]Before making that determination, I consider it to be appropriate, in the sorry circumstances of this matter described thus far, to highlight some of the pertinent shortcomings in the administrative process and draw to the attention of the

relevant organs of state certain measures which require attention if cases similar to this are to be avoided. Problems such as those that have characterised the current case are to be expected if the provisions of the applicable zoning restrictions are not sufficiently clear and accessible to the public. As already mentioned, the provisions of the zoning scheme, including any applicable departures or conditions, are generally obligationary by reason of s 39 of LUPO. They are therefore plainly intended to have the effect of law in a legislative sense, albeit administratively made. Zoning scheme provisions are intended to regulate land use and development so as to promote the co-ordinated and harmonious use of land; cf. e.g. *Esterhuyse v Jan Jooste Family Trust* 1998 (4) SA 241 (C) at 253H-I.[9] The public, and most certainly the owners and occupiers of land in the close proximity of other land which is to be the subject of altered land use or development, for example, by the erection thereon of new or extended building structures, have a cognisable legal interest in compliance with and the enforcement by the local authority with the provisions of the applicable zoning scheme. This much has been recognised in many judgments over the years handed down by courts throughout the country. The seminal judgment on point in this jurisdiction is generally recognised to be that of Grosskopf J in *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C), at 400-401.[10] The provisions of s 36 of LUPO, which require a local authority, when deciding any application under LUPO, to have regard to the preservation of the natural and developed environment concerned or the effect of the application on

9 Cf. also *Broadway Mansions (Pty) Ltd v Pretoria City Council* 1955 (1) SA 517 (A) at 523B
10 See also *Esterhuyse*, supra, at 253J-254C.

existing rights concerned, amongst other matters, afford statutory confirmation of the existence of that legal interest.

24]It is a basic tenet of the rule of law that law cannot be effective if its content is not clear and readily accessible. So, for instance, as Mokgoro J observed in *President of the RSA v Hugo* 1997 (4) SA 1 (CC) (1997 (1) SACR 567; 1997 (6) BCLR 708) at para. [102], in the context of addressing the content of the concept of 'law of general application' in s 33 of the interim Constitution[11], 'The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law. Further, laws should apply generally rather than targeting specific individuals'; or, as De Villiers J put it in *Bareki NO and Another v Gencor Ltd and Others* 2006 (1) SA 432 (T) at 439 C-D, in the context of discussing the presumption against retrospective effect of legislation, 'The ability to arrange one's affairs in the shadow of the law is an essential requirement to the rule of law. The point was made as follows by the American Supreme Court in *Papachristou v City of Jacksonville* 405 US 156 (1972) at 162:

> 'Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids" *Lanzetta v New Jersey* 306 US 451, 453.'.'

25]The provisions of LUPO indicate that 'departures' should be recorded in a local authority's register (as defined). I have already highlighted the abstruse nature of such a register. The facts of this case illustrate just how illusive the

11 Act 200 of 1993.

contents of the register, as defined, can be – not only to the public, but also to professionals engaged in the field of land use and development and even the local authority's own officials. Although one cannot be certain on the papers, this probably explains why the building control officer failed to advise the local authority in his recommendation in terms of s 6 of the Building Act that a building constructed as proposed in the building plan application would contravene the land use restrictions imposed in terms of the s 42 conditions.

26]It was remarkable that none of the witnesses, whether they be municipal officials or professional town planners or architects, made any mention of having had reference to the zoning map. I think it may safely be inferred from this common omission that the map also does not fulfil an effective role in informing anyone of the existence or the nature of departures applicable to any land unit. It is furthermore not clear how accessible the zoning map is to the public. The map would not serve the purpose of informing the public of the applicable legal restrictions if it is not readily available for inspection without the need to make formal application in terms of the Promotion of Access to Information Act 3 of 2000 ('PAIA').

27]The method of advising the applicant-owner of the affected land unit of the imposition of the altered land use restrictions by means of a 'final notification' letter might afford a generally effective basis of making the relevant departures binding on the owner, but it does not afford an effective means of making the departures generally binding on the public in the manner that s 39 of LUPO

requires for the purpose of achieving the wider objective of zoning provisions in principle. Altered land use restrictions affecting what may be built on particular land units will rarely be intended only to be personal or individual in effect; they are determined with regard to the criterion of 'desirability' within the meaning of s 36 of LUPO[12] and are intended to govern the future development of the land unit, regardless of who the current or succeeding owners of the subject property might be, or the identity of the successive owners of surrounding properties who have a legal interest in the enforcement of compliance with the applicable zoning scheme, including all duly granted departures. That is the characteristic of such restrictions which has led to them being described as essentially servitutal in nature; cf. *Provisional Trustees, Alan Doggett Family Trust v Karakondis and Others* 1992 (1) SA 33 (A) ([1992] 1 All SA 242 (A)) at 37B-D (SALR).

28]The facts and the result of the *Alan Doggett Family Trust* case are illustrative of how the use of the imposition of conditions for land use planning purposes can be negated if proper attention is not given to making the conditions generally binding. Ironically, the litigation in that matter also arose from a dispute between neighbouring landowners in Camps Bay. The background facts to the *Alan Doggett Family Trust* case were as follows: A landowner applied in terms of

12 Section 36 of LUPO provides:

> (1) Any application under Chapter II or III shall be refused solely on the basis of a lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability, or on the basis of its effect on existing rights concerned (except any alleged right to protection against trade competition).

(2) Where an application under Chapter II or III is not refused by virtue of the matters referred to in subsection (1) of this section, regard shall be had, in considering relevant particulars, to only the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned or the effect of the application on existing rights concerned (with the exception of any alleged right to protection against trade competition).

the then applicable Townships Ordinance (the statutory predecessor of LUPO) to subdivide his property into two erven. A neighbour objected to the application on the grounds that the use and development of the applicant's property for the construction of a dwelling house on each of the two units to be created in terms of the proposed subdivision would obstruct the sea view enjoyed from the neighbour's property. The Administrator approved the subdivision, but – plainly in order to protect the amenities of neighbouring property – imposed a condition that 'development on the subdivisional portions be restricted to one storey above the street level of Upper Francolin Road'. The Administrator also imposed a number of other conditions in respect of his approval of the subdivision. He directed that some of the resultant restrictions on the development of the subdivided portions be registered against the title deeds. He omitted however to make such a direction in respect of the aforementioned height restriction. The result was that the protection sought to be afforded to the amenity of the neighbour's property was rendered nugatory when, as an obviously foreseeable consequence of the subdivision, the divided portions were subsequently sold off to purchasers who acquired them ignorant of the existence of the unregistered conditions. One of these purchasers commenced with erection of a double storey dwelling.

29]The Appeal Court upheld the dismissal by the Cape High Court of the interdict sought by the neighbour to prohibit the erection of a double storey building on one of the subdivided portions. It did so on two bases. The court found that the Administrator's decision not to require the registration of the condition indicated

that the specific condition was deliberately not intended to be servitutal in nature, and had been intended to be binding only on the applicant for subdivision, and not his successors in title. This finding was premised on the court's view of the peculiar facts of that case, which, although it might be amenable to criticism, is self-evidently not of any relevance for present purposes. The second basis, which is relevant to the matter currently under consideration, was given in the alternative to the first. It arose from the argument by the neighbour's counsel that the imposition of building height restriction condition was an administrative act having the force of law and was binding on the subsequent purchaser despite the fact that the building restriction was not registered in the title deed of the subdivided portion and that she had no knowledge of its existence when she bought and obtained transfer of the property. Counsel's argument was advanced with regard to judgments in two other cases,[13] which it was contended were analogous. The court rejected the contention, holding the other matters to be distinguishable. Judged by the absence of any mention thereof in the judgment, it would appear, however, that the court's attention was not directed to the obligationary provisions of s 39 of LUPO. The provisions of s 39 of LUPO apply also to all conditions imposed in terms the Townships Ordinance.[14]

30]Joubert JA addressed the argument that the subsequent purchaser was bound by the unregistered condition by reason of the effect of administrative lawmaking as follows (at 39J-40B SALR):

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13 *Duze v Eastern Cape Administration Board and Another* 1981(1) SA 827 (A) at p 841 C-E and *Thompson v Port Elizabeth City Council* 1989(4) SA 765 (A)
14 See s 39(1)(c) of LUPO. The relevant part of s 39 has been set out in fn.4, above.

> On the assumption that the imposition of the building restriction by the Administrator as a condition of subdivision was an administrative act intended to have the force of law but which was not required by the Administrator to be registered, then the imposition thereof had to be brought to the knowledge of the First Respondent in order to render it binding on her. See *Byers v Chinn and Another* 1928 AD 322 at p 329-331. To hold otherwise would seriously imperil the position of *bona fide* purchasers and owners of land who buy and own land by virtue of a clean title deed without any reference to the existence of an unregistered restrictive condition which would diminish the ownership of the land. I accordingly find that there is no substance in the contention of Mr *Rosenthal*.

(I respectfully venture that had the Appeal Court's attention been drawn to the provisions of s 39 of LUPO and had the court been alerted to the provisions of the Ordinance which suggest that the object of zoning is the co-ordinated and harmonious use of land, it might not have distinguished the *ratio* in *Thompson v Port Elizabeth City Council* 1989(4) SA 765 (A). The issue identified in *Byers v Chinn and Another*, *loc cit*, would nevertheless have remained a consideration in assessing the efficacious of the imposed condition as a provision with generally binding effect.)

31]The obligation imposed by s 39(1) of LUPO on every local authority to comply with and enforce compliance with the provisions incorporated in a zoning scheme and any conditions imposed in terms of the Ordinance brings with it, if the obligation is to be effectively discharged, a duty by such authorities to ensure that any such conditions are made accessible to the public in a manner consistent with the requirements of effective lawmaking. That duty is not discharged merely by sending a final notification letter to the owner of the subject property and filing a copy in a folder that is not always readily available. The duty could be carried

out by publishing the conditions in the Provincial Gazette, or, even more effectively, by requiring them to be registered against the title deed of the affected land unit. There is no reason why the wording of such conditions could not be suitably worded to reserve the right to the planning authority to waive or vary their effect as contemplated by s 42(3) of LUPO. Had the conditions been registered in the current case, the unlawful and invalid approval of building plans would in all likelihood not have occurred and the adverse financial and logistical consequences of that decision thereby avoided. To the extent that the currently extant legislation[15] is inadequate to facilitate the registration or proclamation of such conditions, appropriate measures should be considered to redress the deficiency. In the interim, local authorities might usefully consider making the grant of departures conditional upon the execution by applicant owners of appropriate non-revocable powers of attorney for the registration of appropriately worded servitutal conditions as a means of achieving the required effectiveness and public notification.

32]While I therefore have some sympathy for the respondents if they were indeed unaware of the imposition of the conditions because of the difficulties they encountered in trying to verify the actual position, the fact remains that it has been established that their agent, Mr Geh, was informed about the conditions. Geh's knowledge, even though he might genuinely have overlooked receipt of the 'final notification' letter, falls to be imputed to the respondents as his

15 I have in mind the provisions of the Deeds Registries Act 47 of 1937, the Interpretation Act 33 of 1957 (which is serious need of updating and revision to address the requirements of the modern constitutional framework) and the Provincial Powers Extension Act 10 of 1944.

principals. No proper basis has been established in this respect on which the respondents should be in any degree exempted from the consequences of the general rule in litigation that costs follow the result.

33]One of the other issues that were debated in the context of the argument on costs was that of access to the record of the delegation of authority by the municipal council of its functions under LUPO to SPELUM. The respondents contended that it behoved the applicants to prove SPELUM's authority in their founding papers. They objected to the production of the record of the City's applicable system of delegations as an annexure to the applicants' replying papers. They also pointed to the difficulties they and their representatives had had in trying to obtain a copy of the record of delegations for the purposes of their counter-application, in which, it will be recalled, they sought a declaration that the imposition of the conditions had been outside the authority of SPELUM. They averred that they had been pushed from pillar to post by various officials of the municipality during their endeavours to obtain the relevant information. They had eventually been informed that they were required to make a formal application for the information in terms of PAIA. The eventual provision of a copy of the system of delegations by the City was raised by the respondents as one of the examples of the City's alleged lack of even-handedness in its treatment of the protagonists in the litigation. As pointed out by the applicants' counsel, there was no substance in this allegation as the record in question had been provided to both sides in the dispute at the same time as an attachment to a single email from the City addressed to them both.

34]In my judgment there was no merit in the respondents' contentions on this issue. It was not incumbent on the applicants to prove the authority of SPELUM. It was sufficient for the applicants in their founding papers to allege the fact of the imposition of the conditions by SPELUM and on the effect, *prima facie*, of the presumption *omnia praesumuntur rite esse acta*. The applicants were entitled to accept that the respondents would be aware of the committee system of municipal government and the fact that the municipal council was empowered by statute to devolve the relevant function to a committee such as SPELUM. If the respondents disputed the authority of the committee in their answering papers, it was open to the applicants to address the challenge in their replying papers, as they did. By contrast, the respondents were required by the nature of the relief they sought in terms of their counter-application to allege and prove their contention of a lack of authority by SPELUM to impose the conditions and the applicants were entitled to traverse the issue in their response to the counter-application. The length and content of the applicants' replying papers were affected by the dual nature of the reply in the context of the counter-application. Although, as too often the case with replying affidavits, they were characterised by an amount of unnecessarily argumentative content, I do not consider that there was otherwise anything else materially objectionable about them.

35]The record of the City's system of delegations would be a most relevant piece of evidence in this regard. Apart from the opportunity that would have been afforded had the respondents used the procedure afforded by uniform rule 53, I consider that a local authority's system of delegations is a something that, by its

nature, should be available to the public without the formality of a request, as defined in PAIA. In terms of s 14(1) of PAIA, the City, being a 'public body' within the meaning of the Act, is required to compile and make available a manual describing, amongst other matters, its structure and functions. An adequate description of the City's structure and functions would include a description of its political structures, of which the SPELUM committee is one, and an indication of the functions delegated to such structures in terms of s 59 of the Local Government: Municipal Systems Act. It is evident in reg. 4 of the Promotion of Access to Information Regulations, 2002, made in terms of s 92 of PAIA, that a public body's information manual is meant to be easily accessible, without charge. The existence or content of the City's information manual was not traversed in the evidence. Suffice it to say, however, that it should not have been necessary for any of the parties to have to apply for the particulars of the framework of delegations by the municipal council to its committees established in terms of s 79 of the Local Government: Municipal Structures Act 117 of 1998 by way of a formal request in terms of PAIA.

36]In related vein I consider it appropriate to observe that the unwholesome situation of a partly completed building standing unattended for months while litigation took its course could also have been avoided if the local authority had heeded the advice given in the majority judgment of the Constitutional Court in *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC), at para. [71], that notwithstanding the absence of a statutory requirement to that effect, it would be 'helpful and enhancing to the

process [of considering building plan applications] if the Building Control Officer, at the stage of compiling the recommendation invite[d], from owners of neighbouring properties, representations about the impact the proposed building might have on their properties. Such approach would help in dealing with issues relating to disqualifying factors. This would significantly reduce chances of approval of plans in cases where some of the disqualifying factors exist but were not discovered by a local authority. As we now know, the existence of such factors, if proved, constitutes a valid ground for setting aside the approval after it had been acted upon and at high cost to all parties concerned'.

37]Implementation of that advice would assist in the fulfilment of local government's objects in terms of s 152 of the Constitution. There is no reason why the logistical and financial burden of giving notice of building plan applications to neighbouring property owners as part of the process should not be borne by the building plan applicants, and it is therefore beyond understanding why the City has apparently not heeded the advice given them by the highest court in the land on constitutional matters.[16] There were rumblings during the argument of the current case about delictual liability on the part of the municipality. While expressing no opinion on the cogency of these on the facts of the current case, local authorities might do well to consider in principle whether an unreasonable manner of dealing with their obligations under s 39 of LUPO, s 7 of the Building Act, or s 152(2) of the Constitution might not indeed expose

16 The recent judgment in *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another*, supra, as well as that in *Walele* itself, confirm that a local authority's non compliance with its obligations in terms of s 7 of the Building Act gives rise to a constitutional issue.

them to the risk of liability in this regard.[17]

38]That the litigation might have been avoided had the imposition of the relevant conditions been more effectively implemented and communicated does not, however, afford a basis for the respondents to avoid the usual consequences of the result of the litigation in respect of liability for costs. In the result the following orders are made:

a) The purported approval by the third respondent of the building plan application submitted by the respondents in terms of s 4 of the National Buildings Regulations and Building Standards Act 103 of 1977 on 4 June 2009 is reviewed and set aside.

b) Insofar as might remain necessary, the counter-application is dismissed.

c) The first and second respondents shall be liable to pay the applicants' costs of suit in the application and the counter-application; such costs to include the costs of two counsel and the qualifying fees of Mr Thomas Brümmer.

d) The Registrar is directed to forward a copy of this judgment to the Provincial Minister responsible for Development Planning and to the

17 Cf. *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para.s [19]-[20].

City Manager, City of Cape Town.

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

Date of Hearing:	10 November 2010
Date of Judgment	16 November 2010
Applicants' counsel:	D.F. Irish SC D. Baguley
First and second respondents' counsel	J.G. Dickerson SC G.A. Leslie
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