THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 22026/2015

ALLEN TARGHI TAVAKOLI	**FIRST APPLICANT**
DLX PROPERTY (PTY) LTD	**SECOND APPLICANT**
JENNIFER LYNN HARIS	**THIRD APPLICANT**
RICHARD NEIL HARRIS	**FOURTH APPLICANT**

and

PHASE III DEVELOPMENT COMPANY (PTY) LTD	**FIRST RESPONDENT**
THE CITY OF CAPE TOWN	**SECOND RESPONDENT**

Coram: ROGERS J

Heard: **1 DECEMBER 2015**

Delivered: **11 DECEMBER 2015**

JUDGMENT

ROGERS J:

Introduction

[1] This is an urgent application for an interim interdict pending the determination of an application to review and set aside the approval of building plans. The applicants are neighbours of the property to which the building plans relate. The first respondent ('PDC') is the owner and developer of the property. The second respondent ('the City') is the municipality which approved the plans.

[2] The case came before me on 1 December 2015. Mr Baguley appeared for the applicants and Mr Dickerson SC leading Ms Reynolds for PDC. The City abides. Urgency is not in issue.

[3] The property, Erf 118 Fresnaye, is situated on the corner of Kloof Street (which runs east/west along the property's southern boundary) and Kings Road (a one-way street running south to north along the property's western boundary). PDC has demolished the previous structure on the property and is in the course of erecting a building which on completion will contain six units.

[4] On 28 April 2015 Nuku AJ granted an interim interdict pending a review of the approval of an earlier set of plans. When the applicants learnt in September 2015 that revised plans had been submitted, they lodged comments through their attorneys. The new plans were approved on 2 October 2015. PDC resumed building operations at the end of October 2015. The present application followed on 16 November 2015.

[5] The grounds on which the applicants say the latest approval is unlawful and susceptible to review relate to the entrance to the underground parking. According to the plans as approved, the entrance will be off Kings Road at a point about two-thirds along the property's western boundary (measured from the Kloof Street corner).

The By-Law and DMS

[6] Although neither side mentioned the National Building Regulations and Building Standards Act 103 of 1977 ('the NBR Act'), it can be assumed that the review is directed at an approval of building plans granted pursuant to s 7 of the said Act. In terms of s 7(1) the City could not approve PDC's application for the approval of the plans unless the City was satisfied that the plans complied with the Act 'and any other applicable law'.

[7] The applicants allege that the plans failed to comply with the City's Municipal Planning By-law of 2015 ('the By-Law') and the Development Management Scheme ('DMS') constituting Schedule 3 to the By-Law. The property is zoned General Residential 4 ('GR4'). Item 40(c) of the DMS provides that the following use restrictions apply inter alia to properties so zoned:

'(c) Notwithstanding the primary and consent uses specified in paragraphs (a) and (b), if the only vehicle access to the property is from an adjacent road reserve that is less than 9 m wide, no building is permitted other than a dwelling house or second dwelling.'

[8] The building which PDC is erecting involves use for group housing. The approval of the plans would thus be unlawful if item 40(c) is of application.

[9] The term 'road reserve' is defined in s 1 of the By-Law as meaning (my emphasis)

'a designated area of land that contains or is able to contain a public street or public road, including the road and associated verge, which land may or may not be defined by cadastral boundaries.'

[10] The terms 'public street' and 'public road' are defined thus in s 1 of the By-Law and again in item 1 of the DMS:

'public street' – 'any land indicated on an approved general plan, diagram or map as having been set aside as a public right of way, whether for vehicles or pedestrians or public or urban squares, of which ownership is registered in favour of or vests in the City in terms of this By-Law or any other law;'

'public road' – 'any highway, thoroughfare, lane, footpath, sidewalk, alley, passage, bridge or any other place of a similar nature or any portion thereof serving as a public right of way, whether for vehicles or pedestrians, established or proclaimed in terms of the former Municipal Ordinance, 1974 (Ordinance 20 of 1974) or any equivalent current municipal by-law and/or national legislation and includes a public street'.

[11] Item 41(e), which deals with building lines, provides that no building shall be erected so that any point on the building 'is nearer to a street boundary or a common boundary' than the distances specified in the table forming part of the item. The relevant distance applicable to the property in relation to Kings Road is 4,5 m.

[12] The term 'street boundary' is defined in the DMS as meaning

'the boundary between a land unit and an abutting public street or private road; provided that the boundary of a pedestrian way or service lane that cannot or will never be used by motor vehicles, shall be deemed to be a common boundary for the purpose of determining building lines, street centreline setbacks and site access requirements'.

The servitude

[13] Subject to the implications of the servitude mentioned below, the part of Kings Road which lies adjacent to the property is between 7 m and 7,8 m wide (this includes the pavements). The applicants objected to the current plans inter alia on this basis, ie that the development contravened item 40(c).

[14] In an attempt to meet the objection, PDC on 1 October 2015 executed a notarial deed of servitude by which it granted the City a servitude right of way over an area depicted in an attached diagram. The servitude has been registered in the deeds office. The servitude is declared to give the City

'the right to the unlimited exclusive use of the servitude area for public road purposes or any matter related thereto'.

[15] The servitude runs along the property's western boundary with Kings Road from the vehicular entrance southward to the corner of Kloof Street (a length of about 22/23 m). If its width (which varies from 1,52 m to 2,26 m) is to be included in

the ‘road reserve’, the said road reserve would (over that stretch of Kings Road) comply with the 9 m width specified in item 40(c). The boundary wall of the property will lie on the eastern side of the servitude, ie there will be no physical barrier between the eastern edge of Kings Road and the servitude strip. What the City will actually do with the servitude strip is unclear. PDC says the City could make it part of the road surface or a pavement or street parking.

The subdivision

[16] PDC’s deponent attached to his answering affidavit a letter from the City to PDC dated 9 September 2015. The letter refers to an attached servitude plan, being the plan subsequently incorporated into the notarially executed servitude. The letter reads in relevant part:

‘I wish to confirm that the above proposed subdivision, as illustrated on attached servitude plan… is exempted in terms of section 67(3) of the [By-Law] for the following reasons:

- land required for public road purposes or any matter related thereto;
- registration of a servitude or lease areas.’

[17] Subdivisions are dealt with in ss 52-60 of the By-Law. Section 52(1) states that no land may be ‘subdivided’ without the City’s approval granted in terms of the By-Law unless the subdivision is exempt in terms of s 67.

[18] The term ‘subdivision’ is defined in s 1 of the By-Law as meaning, in relation to land,

‘the division of a land unit into more land units and includes any physical activity on the land to prepare the land for subdivision but does not include the surveying of land for the preparation of a subdivision plan and “subdivide” has the same meaning’.

[19] Section 1 defines the term ‘land unit’ as including ‘a portion of land to which a registered servitude right or registered lease relates’. It thus seems that the registration of a servitude is an act of subdivision. It is used in this sense in s 67(1)(g).

[20] Section 67(1) sets out various forms of subdivision which do not require approval in terms of the By-Law. Section 67(3) provides that the City may, on application, exempt a subdivision from the need for approval

'if exceptional circumstances exist and if the exemption does not adversely affect the rights or legitimate expectations of any person'.

[21] The City's letter reflects an understanding that the proposed servitude was a subdivision of PDC's property. As indicated, I think this is correct. A subdivision as contemplated in the By-Law does not necessarily result in an alteration of the cadastral boundaries of the subdivided property.

[22] In their replying papers the applicants alleged that the City's granting of PDC's exemption application in terms of item 67(3) was, like the approval of the building plans, unlawful and liable to be set aside on review.

The main grounds of proposed review

[23] The applicants contend that the execution and registration of the servitude have not in law had the result of increasing the width of the relevant road reserve or at least not in a way that overcomes item 40(c). This contention is advanced on several different grounds, namely (i) that there can only be a public road or public street on land owned by the City, a servitude being insufficient, with the result that the servitude area is not as matters now stand able to contain a public road or public street; (ii) alternatively, that because the servitude area is still zoned GR4 it is not currently able to be used for road purposes (this point was only raised in the replying affidavit); (iii) that item 40(c) requires a road reserve width of 9 m for the entire length of the adjacent boundary and not merely (as here) the half from the access point to the corner of Kloof Street.

[24] The applicants contend, further, that the supposed solution of a servitude constitutes an evasion of item 40(c) because it will not in fact lead to a wider road.

[25] The applicants also contend that, if Kings Road's width were to be increased to 9 m, the building on the property would contravene the 4,5 m building line

specified in item 41(e). In the applicant's heads of argument this contention was advanced with reference to the supposed subdivision, the submission being that a subdivision would shift the street boundary eastwards. The contention may also be relevant, so it seems to me, to the complaint of evasion, in the sense that PDC and the City could arguably not have intended that the servitude would ever actually be used as a public road or public street, since to do so would cause the building to contravene the 4,5 m building line in circumstances where no departure has been sought or approved.

Deciding law points at interim stage

[26] The issues in the present case are primarily legal. Different views have been expressed as whether the concept of a prima facie right is apposite in this setting (see the discussion in Herbstein & Van Winsen *The Civil Practice of the High Court of South Africa* 5th Ed at 1462-1463; *LAWSA* 2nd Ed Vol 11 para 404 footnote 3). I was referred to the judgment of Blignault J in *Ward v Cape Peninsular Ice Skating Club* 1998 (2) SA 487 (C) where the learned judge distinguished between 'difficult questions of law', which are not appropriate for final decision in an application for an interim interdict, and simpler questions of law, which could be decided at the interim stage (at 497E-498H).

[27] On my understanding of the (broadly) two lines of authority, the question is whether, despite the interim form of the proceedings, the court should finally decide a law point and thus dispose of the case, the judge's decision being res judicata. One view is that the court is bound finally to decide any question of law which would dispose of the case. The other view is that the court should do so only if the issue is not a difficult question of law. This approach, which was espoused in *Ward*, appears to have commended itself to Malan J in *Johannesburg Municipal Pension Fund & Others v City of Johannesburg & Others* 2005 (6) SA 673 (W) paras 8-9.

[28] In *Geyser v Nedbank Ltd & Others: In re Nedbank Ltd v Geyser* 2006 (5) SA 355 (W) Van Oosten J seems to have deprecated the expression by a judge, at the interim stage, of a 'half-hearted' assessment of a law point (para 8-9). If by this he meant that a judge at the interim stage should either finally decide a law point or say

nothing about its merits, I cannot agree. The apparent strengths and weaknesses of the competing arguments must surely be relevant in assessing the inter-related aspects of a prima facie right, balance of convenience and discretion (see *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T) at 55F-G). Furthermore, if justice is to be seen to be done, the judge needs to demonstrate to the litigants that he or she has understood and engaged with the main arguments.

[29] Neither side has invited me finally to decide any questions of law. At least some of them are difficult. There is no direct authority on any of them. They must all be finally decided in the review proceedings. I shall, however, provide an assessment of the competing merits on each point.

The nature of the prima facie right

[30] Both sides accepted that the applicants' prima facie right was based on the proposed review, even though the approval of the plans will stand until set aside. The prospects of success in the review proceedings represent the measure of the strength or otherwise of the alleged right that the applicants must prima facie establish in order to obtain interim relief (*Searle v Mossel Bay Municipality & Others* [2009] ZAWCHC 9 paras 6-7 and authorities there cited; *Camps Bay Residents & Ratepayers Association & Others v Augoustides & Others* 2009 (6) 190 (WCC) para 10).

[31] PDC's counsel submitted in their heads that the prospects of success in the review required one to consider not only the merits of the grounds of review but whether the review court would exercise its discretion to set aside the approval of the plans. I accept this proposition but PDC did not in its answering papers allege facts to support a conclusion that the review court would not grant the normal remedy of setting aside the administrative action. Mr Dickerson did not press the point in oral argument.

The two-street access argument

[32] The first point advanced on behalf of PDC in opposition to the application is that Kings Road does not provide the 'only vehicle access to the property' within the meaning of item 40(c). Kloof Street, which is wider than 9 m, runs adjacent to the property's southern boundary. Both Kings Road and Kloof Street, so the argument goes, allow vehicles to access the property, ie to get to its boundary. Mr Dickerson submitted that item 40(c) is not concerned with the peculiarities of a particular building plan but with the property's physical characteristics. One must be able to determine the permissible uses of a property before submitting plans. It is thus irrelevant, for purposes of item 40(c), that PDC chose to make Kings Road the only entrance for vehicular ingress to the property. (For convenience, I shall refer to this as the two-street access argument.)

[33] Mr Dickerson added that the non-applicability of item 40(c) would not mean that the City could not refuse to approve plans if it thought the vehicle access onto the property was undesirable from a safety or traffic-flow perspective. However, unless item 40(c) applies, there would be no absolute bar to the approval of such plans.

[34] The provisions of the DMS relating to each zoning follow a standard pattern: 'use restrictions' for the zoning are stated first, followed by 'development rules' and ending with 'conditions' applicable to certain types of use. Item 40 sets out the 'use restrictions' for zonings GR2 to GR6.

[35] The use restrictions in general partake of the character for which Mr Dickerson argues, namely restrictions which are not a function of specific plans proposed by the owner. I accept also, as a matter of language, that a road could be regarded as giving vehicular access to a property even though there is no vehicular ingress onto the property from that road. For example, one could say that a particular road provides vehicle access to a property even though the property has no garage or off-street parking.

[36] Legislation must be interpreted purposively. The precise purpose of the restriction in item 40(c) is open to debate. One view, which might support Mr Dickerson's argument, is that the lawmaker's concern was with parking congestion in adjacent roads. A group housing development would attract more visitors than a property containing only one or two dwellings. Another view, which would militate against Mr Dickerson's argument, is that the lawmaker was concerned with the frequent ingress and egress off narrow roads to and from the property. There would be more frequent vehicular ingress and egress where the property is developed for multiple dwelling units than where it is used for only one or two dwellings. What might favour this latter view of the purpose is that Chapter 15 of the DMS contains detailed provisions for off-street parking, including parking for visitors. Parking congestion on the road is thus not likely to have been the lawmaker's concern.

[37] The more natural reading of the phrase 'vehicle access to the property' is access which allows a vehicle to get onto the property. Important in this regard is the phrase '<u>from</u> an adjacent road reserve' (my emphasis). The access contemplated in item 40(c) is not access by way of a road to the property but access from a road reserve to a property. This implies movement from the road to the property.

[38] There are some indications in the other provisions of the DMS that the word 'access' is used in this sense. Item 41(f) says that 'parking and access' must be provided on a land unit in accordance with Chapter 15. Parking and access in this sense are not pre-existing features of the area (such as surrounding roads) but facilities created by the owner. In terms of Chapter 15 (items 137-145) an owner is required to provide off-street parking in accordance with the table specified in item 138. Where land is used for 'group dwelling' purposes, for example, there must be 1,75 bays per dwelling plus 0,25 bays per dwelling unit for visitors. Item 140 is headed 'site access and exits'. Item 140(1) sets out the 'access requirements' that apply, including that 'vehicular ingress or egress' must not be closer than 10 m from an intersection. The City may restrict or prohibit 'access' if a pedestrian or traffic hazard is created or likely to be created. Item 140(2) sets out further requirements in respect of 'vehicle entrances and exit ways to and from the property'. Ordinarily only one 'carriageway crossing' is permitted 'per site per public street or road abutting the site'. (The term 'carriageway crossing' is defined in item 1 as meaning 'an entrance

or exit way, or a combined entrance and exit way, from a land unit to an abutting road'.) In these provisions access appears to be equated with ingress/egress and entrances/exit ways.[1]

[39] If Mr Dickerson's argument were rejected, one would have to find that item 40(c) is a use restriction which flows from the particulars of the plans submitted by the owner rather than from the objective characteristics of the property. I do not regard this as a strong objection. Item 40(c) is on any reckoning a unique type of use restriction. I have not found any analogous use restrictions (as distinct from development rules and conditions) in the rest of the DMS. Item 40(c) must be interpreted on its own terms. I have no particular difficulty in viewing it as a use restriction flowing from the particular access proposed by the owner as part of his plans.

[40] Accordingly, and while PDC's two-street access contention is arguable, my assessment is that the applicants have distinctly the better side of the argument.

[41] To this I may add the following. There is nothing in the papers to suggest that PDC and the City, when the plans were under consideration, understood item 40(c) to have the meaning for which PDC now argues. On the contrary, the servitude process was followed precisely because item 40(c) was seen as creating an obstacle to the approval of the plans. Accordingly, the City cannot be said to have approved the plans in the exercise of the discretion which Mr Dickerson now argues it had. The City thought that item 40(c) applied and apparently concluded that the problem had been overcome by means of the servitude.

The ownership point

[42] On the assumption that item 40(c) is applicable, the applicants contend that the registered servitude has not had the effect in law of widening the 'road reserve' to 9 m. In order to constitute part of a 'road reserve', there must be a designated area of land which actually contains 'or is able to contain' a 'public street or public road'. Both sides, as I understood counsel, accept that the land does not yet have to

[1] The word 'access' is used in the same sense in s 18(1) of the Roads Ordinance 19 of 1976 (C).

be a public street or public road in order to be part of the road reserve. I also understood both sides to accept that land cannot be said to be able to contain a public street or public road merely by virtue of the fact that it would be possible, as a matter of engineering, to construct a street or road on it. The land must be such that the City has the right to develop it as a public street or public road.

[43] Mr Baguley for the applicants argued that the servitude area does not have this quality because the City would have to own the land before it could develop it as a public street or public road. In support of that contention he referred me to the Roads Ordinance 19 of 1976 and argued that it was necessarily implicit from s 3 (the declaration of roads) and s 27 (expropriation of property for road purposes) that a road could only be created on land owned by the road authority. To this might be added a reference to s 22 of the Roads Ordinance which provides that the ownership of all public roads and public paths shall vest in the road authority concerned.

[44] However, and as Mr Dickerson pointed out, the definition of 'public road' in the By-Law refers not to the Roads Ordinance 19 of 1976 but to the Municipal Ordinance 20 of 1974. I was not fully addressed on the possible applicability of the Roads Ordinance. It is probable that Fresnaye is located within an 'inner municipal area' for purposes of the Roads Ordinance. The only type of road which can be proclaimed under the Roads Ordinance in an inner municipal area is a main road (s 3(1)(c)(ii) read with s 4(b)). No one suggests that Kings Road is, or is intended to become, a main road. The Roads Ordinance thus does not determine the question whether land could become part of the road reserve of Kings Road by way of servitude.

[45] The definition of 'public road' in the By-Law refers to a public right of way, whether for vehicles or pedestrians, established or proclaimed in terms of the Municipal Ordinance or any equivalent current municipal by-law and/or national legislation. Many of the provisions of the Municipal Ordinance have been repealed. These include s 129 (the power of a council inter alia to construct and alter streets) and s 136 (the power of a council, after compliance with certain procedures, to declare any street or portion thereof as a public street). I was not referred to the

legislation under which municipalities in general or the City in particular now has the power to declare and construct public streets.

[46] Section 122 of the Municipal Ordinance, which is still in force, reads as follows:

'(1) The ownership of all immovable property to which the inhabitants of a municipal area have or may acquire a common right and of all public places and public streets and the land comprised in such places and streets shall vest in the municipality; provided that the ownership of the land comprised in a public street referred to in paragraph (a) of the definition of "public street" in section 2 shall not vest and shall not be deemed to have vested in the municipality where the owner of such land and the council by written agreement approved by the Administrator expressly agree and declare that such vesting shall not take place or shall be deemed not to have taken place.

(2) The Registrar of Deeds shall, whenever he is notified by the Administrator of the existence of an agreement contemplated by the proviso to subsection (1), record in his registers the fact that such agreement exists and make a suitable endorsement against the title deeds of the land concerned.'

[47] The term 'public street' is defined in s 2 of the Municipal Ordinance (another provision still in force) as meaning

'(a) any street which has at any time been –

(i) dedicated to the public;

(ii) used without interruption by the public for a period of at least thirty years;

(iii) declared or rendered such by a council or other competent authority, or

(iv) constructed by a local authority, and

(b) any land, with or without buildings or structures thereon, which is shown as a street on –

(i) any plan of subdivision or diagram approved by a Council or other competent authority and acted upon, or

(ii) any general plan as defined in section 49 of the Land Survey Act, 1927 (Act 9 of 1927), registered or filed in a deeds registry or the Surveyor-General's office,

unless such land is on such plan or diagram described as a private street.'

[48] Section 2 contains a definition of ‘owner’. Its provisions are somewhat convoluted. For purposes of Chapter IX (in which s 122 falls), the definition does not appear to extend the ordinary meaning of ownership to include the beneficiary of a servitude.

[49] As I have said, counsel did not refer me to the legislation under which the City currently has the power to declare public streets though I assume the power still exists. Be that as it may, s 122 specifically authorises an arrangement between the owner of land and a municipality in terms whereof land constituting a public street of the kind contemplated in para (a) of the definition of ‘public street’ will not vest in the municipality. One such arrangement would be a servitude, which by definition reserves bare dominium in the grantor. The servitude would enable the City, without acquiring ownership, to declare the servitude area a public street as contemplated in para (a)(iii) of the definition.

[50] Mr Dickerson went further and argued that, by virtue of the provisions of s 122(1), the City was by operation of law already the owner (in the full sense) of the servitude area. He made this submission on the basis that full ownership of public streets vests in the municipality unless there is a written agreement to the contrary between the owner and the municipality. There was no such agreement in this case because the servitude was a unilateral act by PDC.

[51] It is true that the servitude was executed only by PDC. However, the servitude records that its execution was a condition for the approval of PDC’s development. The City’s letter of 9 September 2015 and its subsequent approval of the plans necessarily imply acceptance of the benefit of the servitude. The nature of a servitude is such that bare dominium vests in the grantor. By accepting the servitude, the City must have accepted that PDC would retain ownership.

[52] Furthermore, s 122(1) only applies to land which is in fact a public street. The granting of the servitude does not itself make the servitude area a public street. The servitude area would only become part of a public street if the City made such declaration under a power equivalent to the repealed s 136 of the Municipal Ordinance.

[53] Section 122(1) requires the approval of the 'administrator' (now to be read as a reference to the Premier[2]) in order for there to be an arrangement by which ownership does not vest in the municipality. Whether this requirement remains valid in the light of the Constitution's distribution of powers among the various spheres of government was not discussed in argument.[3] (The further requirement for an endorsement by the Registrar of Deeds is simply a matter of record-keeping.) If the arrangement by which PDC retains ownership of the servitude area is one which requires the approval of the Premier before the area can be made part of a public street, it is arguable that the servitude area does not yet constitute land which is able to contain a public street, since the City and PDC will need an external approval (that of the MEC) before the area can actually become a public street.

[54] Thus far I have been addressing the question whether the servitude area is, in the absence of ownership thereof by the City, 'able to contain' a 'public road' (it is the definition of 'public road' in the By-Law that takes one to the Municipal Ordinance, though confusingly the Municipal Ordinance uses the expression 'public street' rather than 'public road'). Land might also be included in the 'road reserve' if it is able to contain a 'public street' as defined in the By-Law. The definition of 'public street' appears to require ownership by the City.

[55] These are murky waters and extend to issues which were not touched on in argument. While the applicants may have an arguable case on the ownership point, I am left with considerable uncertainty about the strength of their case, since it is not clear to me that land on which a 'public road' (as distinct from a 'public street') is located has to be owned by the City.

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[2] See item 3(2)(b)(ii) of Schedule 6 to the Constitution, the administration of the Municipal Ordinance having been assigned to the Province of the Western Cape in terms of s 235(8) of the interim Constitution Act 200 of 1993.

[3] 'Municipal roads', like 'municipal planning', is a local government matter (see s 156 of the Constitution read with Part B of Schedule 5) and may thus be susceptible to a challenge of the kind which succeeded in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council & Others* 2014 (4) SA 437 (CC) paras 11-15.

The rezoning point

[56] Mr Baguley submitted that because the servitude area was zoned GR4 it could not, without a rezoning, be used as a public street. The servitude area was thus not, he argued, able at the present time to contain a public street or public road. The zoning that would be required would be Transport Zoning 2 (see item 20 of the DMS read with items 87-92). As previously mentioned, this point was not taken on the papers but Mr Baguley said it was a purely legal issue.

[57] Mr Dickerson submitted that the answer to this argument was to be found in item 16(3) of the DMS which reads as follows:

'Any public road and public street and any portion of land proclaimed or reserved under any law as public road or public street or the widening or improvement of any such existing public road or street or specified on a General Plan of a registered township as a public road or public street, shall be deemed to be zoned as Transport Zoning 2: Public Street and Public Parking.'

[58] This item may well have the effect that, provided the City follows the required procedures for declaring a public street (formerly s 136 of the Municipal Ordinance), the land so proclaimed will automatically be rezoned as Transport Zoning 2. Quite what those procedures now are is not a matter on which I was addressed.

[59] Accordingly, and at least in the absence of fuller argument, I cannot conclude that this argument by the applicants is particularly strong.

The whole-boundary point

[60] The applicants contend that, even if a servitude could notionally solve the problem of the road reserve's width for purposes of item 40(c), the servitude in the present case did not do so because it only extends over about half the length of the property's boundary with Kings Street. The 'adjacent road reserve' contemplated in item 40(c) is the full length of the adjacent road reserve.

[61] Mr Dickerson argued that, because Kings Road is a one-way street running northwards, it sufficed for the road reserve to be widened to 9 m from the northern edge of the vehicle entrance down to Kloof Street. Since vehicles could only approach the entrance from the Kloof Street end of Kings Road, there would be no point in widening the road reserve on the part of Kings Road to the north of the entrance. It was only the part of Kings Road running from Kloof Street to the entrance that was a road reserve giving access to the property.

[62] I have a ready explained my reasons for favouring the view that 'access' in item 40(c) means the vehicular entrance to the property. It is that entrance, and not the 22/23 meters of Kings Road running from the corner of Kloof Street to the entrance point, that constitutes the 'access' contemplated in item 40(c). Mr Dickerson accepted in argument that it would not be sufficient, for purposes of item 40(c), for the road reserve to be widened to 9 m only for the couple of metres constituting the width of the vehicular entrance to the property. The road reserve contemplated in item 40(c) is the road reserve 'adjacent' to the 'property'. On the face of it, this means the whole of the property which is adjacent to the road reserve.

[63] Mr Dickerson's submission thus appears to me to involve reading words into item 40(c). In *Rennie NO v Gordon & Another NNO* 1988 (1) SA 1 (A) Corbett JA, with reference to a plethora of earlier cases, said that our courts have consistently adopted the view that words cannot be read into a statute by implication 'unless the implication is a necessary one in the sense that without it effect cannot given to the statute as it stands' (22E-H). This view has been repeated in subsequent decisions of the Supreme Court of Appeal (see, for example, *American Natural Soda Ash Corporation & Another v Competition Commission of South Africa* [2005] 3 All SA 1 (SCA) para 27).[4]

[64] I doubt whether it is necessary to imply into item 40(c) a qualification that, in the case of a one-way street, the road reserve need only be 9 m wide for so much of the length of the property as is adjacent to the entrance and adjacent to the part of the road running towards the entrance. Apart from other considerations, a one-way

[4] I discussed these and other cases in *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) paras 27-29.

traffic flow is not necessarily a permanent feature of a road. Item 40(c) is not unworkable as it stands. If the road reserve is narrower than 9 m the owner (if he cannot get a departure) must either limit his use to single dwelling/two dwellings or set his building further back so as enable the road reserve to be widened.

[65] Accordingly, I think the applicants' argument on this issue is distinctly preferable to DPC's.

The evasion and building line points

[66] I intend to take together the grounds of review based on evasion of the DMS and potential violation of the 4,5 m building line.

[67] Mr Dickerson, in the course of his submissions regarding the Municipal Ordinance, submitted that the servitude area was now owned by the City and was already a 'public street' pursuant to s 122(1) of the Ordinance. If that submission were correct, PDC would in my view face great difficulty in warding off the review. Item 41(c) provides that the 4,5 m building line must be measured from the 'street boundary'. If the servitude area is part of the Kings Road public street, the building line would have to be measured from the eastern border of the servitude area. The uncontested evidence of the applicants' town planner, Mr Saunders, is that the current building would materially encroach upon the 4,5 m building line measured from the eastern boundary of the servitude.[5]

[68] PDC did not, in its initial answering papers, deal with Mr Saunders' evidence. Although on my reading of the founding papers the point about the building line was clearly taken, Mr Dickerson said in argument that his client had not so understood the application. I thus allowed PDC an opportunity to file supplementary affidavits regarding the building line. Those affidavits did not dispute Mr Saunders' evidence but rather asserted that the cadastral boundaries of Kings Road and Erf 118 remained unaltered, that there had been no subdivision, that PDC was still the owner of the servitude area and that the 4,5 m building line should be measured from the pre-existing eastern boundary of Kings Road.

[5] See his marked-up diagram at p 46.

[69] The assertion that PDC is still the owner of the servitude area is at odds with Mr Dickerson's submission based on s 122 of the Municipal Ordinance. It so happens, however, that PDC's assertion strikes me as correct, for reasons I have explained in dealing with the Municipal Ordinance. And I also think that the servitude is not yet a 'public street' because it has not been so declared by the City, even though it arguably could be so declared by virtue of the servitude. On this basis the servitude area could arguably form part of the 'road reserve' without in fact yet being part of the Kings Road public street. If this is right, the proposed development could currently be regarded as complying with item 40(c) without contravening item 41(e)(i).

[70] However, this apparent compliance exists only because the definition of 'road reserve', which is relevant to item 40(c), includes an area which for convenience I shall call a potential street (because the land is able to be used as a public street), whereas the 'street boundary', which is relevant to item 41(e)(i), refers to the boundary of an actual street. I have some difficulty, however, in seeing how this apparent compliance could satisfy a rational decision-maker. The purpose of item 40(c) is not merely to have a road reserve on paper but to have a road reserve which could in truth result in a public street (inclusive of its associated verge) having a width of 9 m. In the present case, the conversion of the potential street into an actual street would immediately bring the development into conflict with item 41(e)(i). The ostensible compliance with item 41(e)(i) would exist only for so long as the City has no intention of using the apparent rights which the servitude confers on it.

[71] It thus seems to me that in the review proceedings PDC and the City will find themselves on the horns of a dilemma. If they contend that the servitude area now forms part of the Kings Road public street, PDC's approved plans are in violation of item 41(1)(e). If they contend that the servitude area does not currently form part of the Kings Road public street, the City would need to explain how it could rationally have regarded the servitude as an acceptable basis for approving the plans, given that any exercise by it of its supposed rights under the servitude would result in a violation of the building line.

[72] Item 6 of the DMS stipulates, perhaps unnecessarily, that the City may refuse any application in terms of the By-Law if it considers such application 'to constitute or facilitate an evasion of the intent of this development management scheme or any of its provisions'. In the present case it seems to me that the applicants have strong grounds for contending in the review that the supposed servitude is an evasion of the intent of the DMS and that neither PDC nor the City had any real intention that the servitude should ever be acted upon by declaring the servitude area a public street. Item 6 would be directly implicated in relation to the proposed review of the exemption granted in terms of item 67(3), because such exemption required an application in terms of the By-Law. The same considerations would, however, also taint the approval of the building plans in terms of the NBR Act.

[73] For present purposes it seems to me not to matter much how one categorises the ground of review. One could say that the servitude is a sham and that the servitude area thus does not form part of the 'road reserve'. One could say that to have regard to the servitude, given that it cannot not be acted upon without violating item 41(e)(i), was to take into account an irrelevant consideration. Or one could simply say that to approve the plans on the basis of an ostensible reconciliation of items 40(c) and 41(1)(e), when the purpose of the one provision could never be realised without frustrating the purpose of the other, was irrational.

[74] I should add, for the sake of completeness, that the words 'and associated verge' in the By-Law's definition of 'road reserve' do not in my view mean that the associated verge can exist as something apart from the public street or public road which the area of land is able to contain. The definition merely recognises that a public street or public road is not limited to the surface on which vehicles can travel but may include pavements and other types of verges not intended for vehicular traffic. Unless the City decides to incorporate the servitude area into Kings Road by making it part of the public road, the servitude area would not be part of Kings Road's 'associated verge'.[6] And if the servitude area were made part of the public road, it would shift the 4,5 m building line eastwards.

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[6] Although 'verge' is not defined in the By-Law, PDC's counsel referred to the City's By-Law relating to Streets, Public Places and the Prevention of Noise Nuisance, where 'verge' is defined as meaning

[75] Accordingly, on the evasion/building line point the applicants seem to me to have a strong case.

Irreparable harm, balance of convenience and discretion

[76] Drawing the threads together, I consider that the applicants have a reasonably strong case for resisting DPC's attempt to take itself outside of item 40(c) by way of the two-street access argument. As to the applicants' proposed grounds of review, the ownership point and the rezoning point are arguable but of doubtful merit whereas the whole-boundary point and the evasion/building line point are strong. The applicants would only need to come home on one of their grounds in order to succeed in the review.

[77] The applicants thus have a strong prima facie right. I therefore turn to the other requirements for an interim interdict, namely a reasonable apprehension of irreparable harm and balance of convenience and the related aspect of the court's discretion.

[78] The applicants alleged that they faced irreparable harm of two kinds: (i) If an interim interdict were refused but the review ultimately succeeded, the completed state of the building would disincline a court to order demolition, thus rendering the purported vindication of their rights nugatory. (ii) Following a successful review, the avoidance of demolition of a completed building would exercise unhealthy influence on the minds of the City's officials in relation to possible remedial action to save the structure, such as the granting of a departure from item 40(c).

[79] In answer to the first of these points, Mr Dickerson submitted that, if the building plans were set aside and the building was not in accordance with any other plans which might thereafter be approved, a court would be bound to order demolition. He referred in that regard to *Lester v Ndlambe Municipality & Another* 2015 (6) SA 283 (SCA). DPC also undertook in its answering affidavit that it would

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'that portion of a road, street or thoroughfare, including the sidewalk, which is not the roadway or the shoulder'. This is, I think, the usual sense of the word.

not, in response to any future demolition application, rely on prejudice flowing from future building work.

[80] Mr Baguley argued that a distinction was drawn in *Lester* between the position of a municipality seeking demolition in terms of s 21 read with s 4(4) of the NBR Act (where the principle of legality requires that an unlawful structure be demolished) and relief sought by private parties on neighbour law principles (where the court has a discretion). However, I do not think the applicants in the present case are invoking neighbour law principles any more than the second respondent in *Lester* (Haslam) did (see paras 21-22). Although the applicants' locus standi flows from the fact that they own neighbouring properties, their cause of action is squarely based on non-compliance with the By-Law, non-compliance which in turn renders the approval of building plans unlawful in terms of s 7 of the NBR Act.

[81] The present type of case is nevertheless distinguishable from *Lester*. Lester erected, or continued to erect his house, without approved plans. By the time demolition was ordered his attempts to obtain municipal approval for the house as built had failed. Here, by contrast, PDC is erecting the building in accordance with plans which have as a fact been approved. On the assumption that a successful review would retrospectively implicate s 21 of the NBR Act, that statutory remedy would only be reached if the review court exercised its discretion to set aside the approval of the plans. If the court declined to set aside the approval, the plans would stand and thus in effect be validated (*Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 27; *Chairperson, Standing Committee & Others v JFE Sapela Electronics (Pty) Ltd & Others* 2008 (2) SA 638 (SCA) para 28). The completed building would not in these circumstances be liable to demolition (see *Du Toit v Knysna Municipality & Another* [2015] ZAWCHC 98 para 94). This discretion was not available in *Lester* because the municipality had not in fact approved the plans and the court's discretionary review jurisdiction was thus not implicated.

[82] If the review were sound on its merits, PDC's statement in the present proceedings that it will not rely on further building work as a factor weighing against demolition would certainly militate against the exercise in its favour of a discretion

against setting aside the approval of the plans. It can nevertheless be anticipated that a review court would be reluctant to make an order which would have as a necessary consequence that a completed multi-storey building has to be demolished. This might operate either at the stage of the review presently proposed or at the stage of a later review of any decision taken in an attempt to remedy the current problems. And on the assumption that PDC would not be entitled to repudiate its deponent's undertaking (he is its managing director), there might be others (the City, future owners of units) who would be entitled to urge the court not to make any decision which would result in demolition (cf *PS Booksellers Pty Ltd & Another v Harrison & Others* 2008 (3) SA 633 (C) para 106).

[83] The other form of harm relied on by the applicants is the one mentioned by Binns-Ward AJ (as he then was) in *Seale* supra para 11, namely

'… the incentive the completed state of the building might afford for functionaries to go out of their way to determine regularisation applications favourably and thereby permit a result that would not have been permitted if the factor of a fait accompli had not been present. This potential could in a given case necessitate the applicant's involvement in a succession of further review applications in order to obtain effective redress.'

This consideration and the proposition that prejudice to the respondents was subordinate to the applicant's entitlement to enforce the principle of legality (para 26) seem to have been regarded by Binns-Ward AJ as decisive in a case where he assessed the applicant's prima facie right as quite strong. (See also *Augoustides* supra paras 26-27).

[84] The applicants gave, as an example of remedial action in relation to which this incentive might apply, a future application by PDC for a departure from the requirements of item 40(c). PDC did not allege in its answering papers or argue through counsel that a departure application could not in principle be made. I was not addressed on the law relating to departures. Permanent departures were permissible in terms of s 15 of the Land Use Planning Ordinance 15 of 1985. The said Ordinance was, in relation to the City, repealed by the Western Cape Land Use Planning Act 3 of 2014 with effect from 1 July 2015. The definition of 'departure' in s 1 of Act 3 of 2014 as read with s 35 thereof appears to assume that a municipality

has the power to grant permanent departures. Section 45 of the By-Law, however, seems only to permit temporary departures not exceeding five years. Whether rolling five-year departures would be permissible when in substance a permanent exemption is intended may be open to question.[7] But unless permanent departures or rolling five-year departures were permissible, the City would not be able permanently to relax any of the provisions of the By-Law, including building lines. This is an unpalatable conclusion. If this really were the effect of the By-Law as it now stands, it would surprise me if the City did not amend the By-Law.

[85] PDC did not argue that a departure could not in principle be sought, even if by way of rolling five-year departures. The papers reflect that PDC has sought other departures in respect of its plans.

[86] If an interim interdict is refused and the building is completed, PDC will, quite understandably, pursue every remedy to try to save the building from demolition, including appeals through the courts and administrative applications to the City. Apart from the influence which the completion of the building may have on City (and I would expect such influence to grow the longer the building stands), the applicants, if they wish to prevail, will probably be drawn into further legal proceedings and in the meanwhile have to tolerate a building the plans for which, on my provisional assessment, should not have been approved.

[87] A final aspect relevant to the balance of convenience and discretion is that the applicants have not tendered damages if the interim interdict is granted but the review ultimately fails. PDC alleges that, if an interim interdict were granted but the review were to be disposed of against the applicants by the end of February 2016, PDC's damages would exceed R2 million because of additional preliminary and general costs and cost escalations. If the review were decided later, the damages would increase with each passing week.

[88] In appropriate cases a court might, in the absence of an undertaking to pay damages, regard the balance of convenience as favouring the respondent; or the

[7] The exemption provisions in ss 67 and 140 would not seem to be germane.

court might grant an interim interdict on condition that an undertaking to pay damages (with or without security) be furnished (see *Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd & Others* 1994 (2) SA 172 (C) at 184G-H; *Cronshaw & Another v Fidelity Guards Holdings (Pty) Ltd* 1996 (3) SA 686 (A) at 690H-691A; *Hix Networking Technologies v System Publishers (Pty) Ltd & Another* 1997 (1) SA 391 (A) at 403E-F). However, it is certainly not the law that an application for an interim interdict will always be refused unless such an undertaking is furnished.

[89] The present case is not a commercial dispute. The applicants are not seeking to protect business interests. If neighbours in such circumstances were refused interim relief unless they tendered damages, I would expect very few neighbours to be willing to take the risk of litigation. Even a small risk of defeat in the review would, if it entailed a potentially large liability for damages, deter all but wealthiest or most foolhardy individuals. The applicants appear to me to have quite strong prospects in the review.

[90] In the circumstances, I do not think I should withhold relief because of the refusal to tender damages. But potential harm to PDC must be kept to a minimum by expediting the determination of the review application. Since the City did not participate in the hearing before me, I cannot now set a timetable for the furnishing of the record and the filing of further papers. However, the review appears to raise mainly legal points. PDC should be in a position forthwith to furnish to the applicants the documents it submitted to the City in relation to the approval for the building plans and the subdivision approval. PDC and the applicants should cooperate in prevailing upon the City promptly to furnish any internal documents relevant to the decisions in issue and to agree to an expedited timetable. The parties and their legal teams will if necessary have to work during recess. I see no reason why, with sensible cooperation, the review should not be capable of being heard by the middle of February 2016. Dates are currently available on the semi-urgent roll as from 9 February 2016. My order will authorise the enrolment of the case on the semi-urgent roll and will grant leave to the parties to approach the court for directions if they cannot agree on a timetable.

Conclusion and order

[91] DPC applied to strike out certain matter from the replying affidavit. There was an objection to paras 13-15 which contained what I have called the rezoning point. Since this was a purely legal issue I do not think the objection is well-founded. In any event, this proposed ground of review is not one which has impressed me for purposes of interim relief.

[92] Paras 33-45 were also said to contain new matter. These paragraphs arose from the disclosure in the answering papers regarding the subdivision exemption. Since the applicants did not know about the subdivision application or subdivision exemption until receipt of the answering papers, they were entitled to deal with it as they did. PDC subsequently canvassed these matters in their supplementary papers. Once again, however, the subdivision issue has not featured significantly in my assessment of the applicants' prospects of success.

[93] The remaining objections were to matter which was allegedly argumentative or vexatious. I doubt whether any of the matter in question rose to the level of vexatiousness. The inclusion of the material has not occasioned prejudice as I have not relied on any imputations directed at PDC or the City in reply.

[94] I thus do not intend to make any order on the striking-out application. It did not take up significant time in argument.

[95] I make the following order:

(a) The applicants' non-compliance with the time periods, forms and processes set out in the Uniform Rules of Court is condoned and the hearing of the Part A relief on an urgent basis is authorized.

(b) The first respondent is interdicted from carrying out any further building work on its property at Erf 118 Fresnaye, Cape Town, pending the final determination of the relief set out in Part B.

(c) The costs of the Part A application will stand over for determination at the hearing of the Part B application.

(d) The parties (including the second respondent) are directed to use their best endeavours to reach agreement, by not later than Thursday 17 December 2015, on an expedited timetable for the filing of papers with a view to the hearing of the Part B application on the semi-urgent roll in the second half of February 2016.

(e) If the parties reach agreement as aforesaid, they are authorized to cause the matter to be enrolled on the semi-urgent roll.

(f) If the parties cannot reach agreement as aforesaid, any of them may, on 48 hours' notice, approach the court (including the duty judge during recess) for directions in regard to the filing of further papers and the fixing of the date on the semi-urgent roll.

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ROGERS J

APPEARANCES

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