IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 17991/2016

In the matter between:

ALLEN TARGHI TAVAKOLI	First Applicant
DLX PROPERTY (PTY) LTD	Second Applicant
and	
BANTRY HILLS (PTY) LTD	First Respondent
THE CITY OF CAPE TOWN	Second Respondent

JUDGMENT DELIVERED ON 3 NOVEMBER 2016

GAMBLE, J:

INTRODUCTION

[1] On Friday, 21 October 2016 the applicants approached this court as a matter of urgency for interim relief in the form of a temporary interdict halting certain building works pending a review of the relevant building plans to be heard on the semi-urgent roll. The application is of a kind which this court regularly hears - often on Fridays - involving uncompleted construction work along, inter alia, the Atlantic Seaboard, from Sea Point through Bantry Bay and Clifton to Camps Bay.[1] The applicable priciples are accordingly well established and I shall refer thereto only to the extent strictly necessary later. Although urgency was disputed on the papers as being self-created, this was not seriously challenged in argument and the parties now appear to be *ad idem* in that regard.

[2] In this instance the first respondent, Bantry Hills (Pty) Ltd ("Bantry Hills") commenced construction of a large block of luxury apartments in Sea Point during May 2016. It did so, it says, in terms of a set of plans eventually approved by the second respondent, the City of Cape Town, in July 2016. The first and second applicants are residents of Sea Point and immediate neighbours of each other. Their

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[1] See, for example, BEF (Pty) Ltd v Cape Town Municipality and Others 1983(2) SA 387(C); Camps Bay Ratepayers and Residents Association and Othersv Minister of Planning, Western Cape and Others 2001(4) SA 294 (C); PS Booksellers (Pty) Ltd v Harris and Others 2008(3) SA 633 (C); Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others 2009(6) SA 190 (WCC); Searle v Mossel Bay Municipality and Others [2009] ZAWCHC 9 (12 February 2009);Camps Bay Residents' and ratepayers' Association and Others v Hartley and Others [2010} ZAWCHC 198 (2 September 2010); Tavakoli and Others v Phase III Development Company (Pty) Ltd and Another [2015] ZAWCHC 188 (11 December 2015)

homes are in the immediate vicinity of Bantry Hills but they are not neighbours to the development.

[3] The first applicant began asking questions about the development in about June 2016 and initially appears to have encountered some difficulty in acquiring a set of plans. He was eventually helped out by the architects appointed by Bantry Hills as also the City which gave him access to electronic copies thereof late in July 2016.The first applicant says that he then consulted a firm of land surveyors and took legal advice during August 2016. During September 2016 he was informed that the plans did not comply with the relevant zoning provisions applicable to the development in question and he gave his attorneys instructions to launch urgent proceedings to review the City's approval of the plans. He also instructed his attorneys to take the necessary steps to bring the development to a halt pending the hearing of the review application, the latter application to be heard as soon as possible on the semi-urgent roll.

[4] Pursuant to those instructions the present application was launched on 10 October 2016. In the circumstances, Bantry Hills was effectively given nine working days to deal with the application for interim relief and they were able to prepare an adequate set of papers in opposition thereto. At the hearing the applicants were represented by Mr A.M. Smalberger SC and Bantry Hills by Mr I Jamie SC (assisted by Mr R.D.E.Gordon). The court is indebted to counsel for the useful submissions made in their heads of argument which have facilitated the preparation of this judgement.

[5] A couple of days after the hearing the court requested counsel for Bantry Hills to furnish a further short affidavit dealing with certain aspects of the building works which

the court considered necessary for a just decision in the matter. The applicants were afforded an opportunity to file a brief response thereto. In the result, a further affidavit was filed by Bantry Hills on Thursday 27 October 2016, to which the first respondent replied on Friday 28 October 2016. The parties also provided the court with an agreed draft order referring the review for hearing on the semi-urgent roll on Monday, 20 February 2017, directing the City to make available its record of proceedings and fixing a timetable for the further exchange of affidavits and heads of argument.

THE LAYOUT OF THE PROPERTY IN RELATION TO THE NEIGHBOURHOOD

[6] The Bantry Hills development is located on Erf …5 Sea Point West, a property which acquired notoriety as the subject of an extensive land claim by families who had been forcibly removed from the area by the apartheid government under the Group Areas Act. In 2001 the property was awarded to the Tramway Trust by the City as part of a land distribution claim, and in April 2014 it was sold for R51m to the current developers who proudly proclaim the benefits of the deal, alleging in their promotional material that each beneficiary family evidently received more than R2m from the proceeds of the sale[2]. The development, said to measure some 14 000 sq metres, is further described in the developer's media release (Annexure ATT 11) as *"a R750 million ultra-luxury development, which will be unlike any other property in Cape Town'* and which will consist of "*60 uniquely designed apartments already being sold to international buyers, with an average value of R12 million. "*It will evidently consist of four curved blocks each 11 floors high surrounding a green space, with any number

[2] www.sapropertynews.com/bantry-bay-land-claim-to-become-biggest-atlantic-seaboard-residential-development/.See also annexure ATT 11 to the founding affidavit and generally www.bantryhills.com

of luxury facilities, including a heated swimming pool and a spa, available to the residents.

[7] The Tramway Trust probably acquired its name from the fact that part of Erf …5 abuts Tramway Road which is located at the so-called “lower (or western) end” of Sea Point. The urban geography of the Atlantic Seaboard in that area is such that there are initially four main arterial routes running roughly east to west (i.e. from the direction of the City and Green Point towards Bantry Bay and beyond) which convey the bulk of vehicular traffic in either direction. These routes (traversing from north to south) are Beach Road, which, as the name suggests, hugs the Atlantic coastline, Main Road (which traverses the central business districts of Green Point, Three Anchor Bay and Sea Point), High Level Road (which traverses the residential areas of Green Point, Three Anchor Bay, Sea Point and Fresnaye) and Ocean View Drive (which hugs the contours of Signal Hill and Lion’s Head, also passing through those residential areas.)

[8] As these roads move westward they gradually begin to converge into each other. Beach Road and Main Road converge at a traffic circle just beyond the latter’s intersection with Tramway Road and become Victoria Road which proceeds through Bantry Bay and Clifton towards Camps Bay. High Level Road and Ocean View Drive peter out in the avenues of Fresnaye and traffic travelling westwards along those roads is effectively diverted to a lower arterial route known as Kloof Road, which follows the countour of the mountain above Victoria Road and carries traffic through Bantry Bay and Clifton to Camps Bay, where it converges with Victoria Road. The purpose of this description of the road network in the general vicinity of Bantry Hills is

to draw attention to the fact that four main arterial routes carrying traffic to the area progressively converge into two routes and then into a single road as they move westward.[3]

[9] Erf 1225 is located mid way between Main and Kloof Roads. From the photographs placed before the court in the supplementary affidavit of the developer one can see that the property is hemmed in by a number of adjoining properties (including private dwellings, apartment blocks and a school) to the west, east and north, and abuts 2 one-way streets. The court was informed by counsel that the property measures some 7500 sq meters, giving it an enormous foot print in comparison to the size of residential erven (other than apartment blocks) along the Atlantic seaboard which probably vary between 500 and 700 sq meters.[4]

[10] According to the maps and plans placed before the court, access to the property from Main Road is obtained by turning into Tramway Road which is a one-way street travelling in a southerly direction (or upwards from Main Road towards Kloof Road and the slopes of Lion's Head beyond). As Tramway Road approaches the property it turns sharply to the right (the west) where, a little further on, it runs into Kings Road. Kings Road links Kloof Road with Main Road and is a one-way street running in a northerly direction down towards Main Road. Queens Road is located one street further to the west and runs parallel to Kings Road. Queens Road carries traffic in a one-way direction to the south, from Victoria Road up to Kloof Road.

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[3] In other litigation involving the applicant referred to in footnote 1 above ("*the Phase III matter"),* Rogers J also gives a description of the road network in the neighbourhood.

[4] From the photographs one can see, for example, that on its western boundary the property abuts at least 5 residential erven.

[11] Vehicles wishing to enter Bantry Hills from Kloof Road will be required to turn into Kings Road, travel a short distance down towards Main Road and then turn sharp right into Ilford Street, which is itself a short one-way street in the shape of a right-angle which turns to the right and carries traffic back up towards Kloof Road. Part of the property abuts Ilford Street and the plans envisage vehicle access[5] to the property into Ilford Street. Alternatively, vehicles could travel all the way down Kings Road, turn right into Main Road (if permitted to do so) and immediately right again into Tramway Road so as to access the property through a second entrance that is reflected on the plans. In summary then, the plans envisage two access points to the property: on the southern side of the bend in Tramway Road and on the northern side of the bend in Ilford Street.

[12] The applicants' adjoining properties[6] are situated on the southern (or mountain) side of Kloof Road and are located more or less between its intersections with Kings Road and Ilford Street.[7] The court was informed by counsel that these properties are approximately 80m (as the proverbial crow flies) from the access point to Erf …5 in Ilford Street and that they will have direct line of sight to the Bantry Hills complex.

THE RIGHT ASSERTED BY THE APPLICANTS : NON-COMPLIANCE WITH THE APPLICABLE PLANNING BY-LAW

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[5] The term is used loosely and is intended to include egress from the property.

[6] Given their location, and judging from certain of the photographs before court, it is fair to assume that they are fairly comfortable private residences.

[7] These roads terminate at their intersection with Kloof Road.

[13] It is common cause that Erf …5 is zoned "GR4" in terms of the City's Municipal Planning By-law of 2015 ("the By-law) [8]. GR4 is part of the so-called "General Residential Subzonings" traversed in items 40 – 45 of the By-law. Those items are introduced with the following preamble –

> "*The GR zonings promote higher-density residential development, including blocks of flats. Different development rules apply to different subzonings, particularly with regard to height and floor space, in order to accommodate variations of built form. GR2 accommodates flats of relatively low height and floor space, GR3 and GR4 for cater for flats of medium height and floorspace, while GR5 and GR6 accommodate high-rise flats. The dominant use is intended to be residential, but limited mixed-use development is possible."*

[14] Item 40 of the By-law deals with the permissible use of a property located in a GR4 subzoning –

> *"40.* ***Use of the Property***
>
> *The following use restrictions apply to property in these subzonings**:***
>
> *(a) Primary uses subject to paragraph (c) are dwelling house, second dwelling, group housing, boarding house, guest house, flats, private road and open space.*

[8] As promulgated in Provincial Notice 206 and published in the Provincial Gazette Extraordinary No 7414 of 29 June 2015.

(b) Consent uses subject to paragraph (c) are utility service, place of instruction, place of worship, institution, hospital, place of assembly, home occupation, shops, hotels, conference facility and rooftop base telecommunications station.

(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 9m wide, no building is permitted other than a dwelling house or second dwelling."

[15] The applicants rely on the provisions of item 40 (c) for the alleged non-compliance on the part of Bantry Hills with the By-law. They contend that at the points of access to the property in Ilford Street and Tramway Road, the *"adjacent road reserve"* is less than 9m wide. In support of this allegation they rely on a report by Tritan Survey (Pty) Ltd dated 12 September 2016.[9] The report is authored by a certain Mr Paul Higgins (whose exact association with Tritan is not specified) and contains annotated photographs with data and measurements compiled by Messers Mark Shreiber, a Professional Land Surveyor, and Clayton Mitchell a Professional Land Surveyor in Training, both of whom are said to be in the employ of Tritan. The methodology employed by the land surveyors is set out in detail in the report and is not disputed.

[16] Figures 7 and 8 in the Tritan report are entitled *"City Council Ortho Photos with SG GIS Cadstral Data".* They reflect aerial photographs (ostensibly provided by the

[9] While the report is entitled "*Line of Sight Survey. 69 Kloof Road, Fresnaye"*, its relevance in these papers is only in relation to the width of Tramway Road and Ilford Street.

City) of Ilford Street and Tramway Road respectively at the points of access referred to above, with the measured width of the road reserve overlaid on each. In the founding affidavit the first applicant says that he has examined the approved plans which confirm that these two points are the envisaged access points to the development. He goes on to assert that the width of the Ilford Street road reserve at that point of access to the property is less than 9 metres: according to figure 7 it varies between 7,85m and 7,98m as the road bends to the right. During argument Mr Jamie conceded that the first applicant was correct in relation to the width of the road reserve in Ilford Street.

[17] In relation to Tramway Road, the first applicant says the following in the founding affidavit:

> *"27.3 [The Tritan report indicates that]...(t)he width of the (sic) Tramway Road (including the road reserve) is less than 9 metres (figure 8)…."*

[18] In the answering affidavit Mr Quinton Rossi, a director of Bantry Hills, deals with this allegation as follows:

> *"35.**AD PARAGRAPH 27.2 & 27.3 THEREOF***
>
> *As is apparent from a plan annexed hereto and to marked "**BH 7**" which has been drawn up by Andries Samuel (Bantry Hills' architect) and whose confirmatory affidavit is filed herewith, where access to the property is adjacent to Tramway Road, the road reserve is not less than 9m as is apparently contended for by the applicants. The road reserve is in fact,*

10,070m wide as demonstrated. Accordingly and on this basis too, item 40 (c) of the DMS would not apply so as to prevent the development."

[19] In the replying affidavit, the first applicant responds as follows:

"***AD PARAGRAPH 35***

43. The content of this paragraph is noted. I point out, however, that the measurement of Annexure "BH7" refers to a portion of the (sic) Tramway Road and not the portion ***adjacent*** *to the property which leads to Kings Road. The road reserve of the portion* ***adjacent*** *to Tramway Road is less than 9m and this is not disputed. (Emphasis added)*

44. Moreover, the evidence presented relating to the width of Tramway Road by the applicants (Record page 47) is to be preferred, being a report conducted by land surveyors. Had the first respondent wished to challenge the findings of the applicants' land surveyors I would have expected it to have filed a report from a land surveyor."

[20] The operative adjective in item 40(c) for present purposes is "*adjacent"* which is defined in the Oxford Advanced Online Dictionary as –

"*1. nearest in space or position; immediately adjoining without intervening space; 2. having a common boundary or edge; abutting;touching."*

[21] If regard be had to Annexure BH7, it will be observed that the architect has reflected the width of the road reserve as 10,07m at a point in Tramway Road which lies some distance to the north of the contemplated access point to the development (i.e down towards Main Road). However, that point in the street is not "*adjacent*" to Erf …5, but seemingly to Erf ..4 (or possibly Erf …1) – that much appears from the *"Surveys (sic) General Office Noting Sheets"* filed at p8 of the Tritan report.[10] The point of measurement is confirmed in a Google Earth photograph attached to the answering affidavit (Annexure BH 7) on which the alleged extent of the road reserve has been superimposed with a red arrow. In that photograph one can see a building on the left which resembles a municipal store of some sort, possibly an electricity substation, which appears to be situated on either of erven ..4 and/or …1, as per the said "Noting Sheets".

[22] The only aspect of Erf …5 which is adjacent to Tramway Road and has a *"common boundary"* with it lies on the southern boundary of the road along the section running east to west and which leads to Kings Road[11]. On the Google Earth photograph the fence located on that boundary consisting of pallisade fencing and a

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[10] On the photographs attached to the supplementary affidavit there is a large building (possibly a warehouse or storage facility) with a red tiled roof on the erf to the east of the road and a similar large building (possibly a school) directly opposite that property in Tramway Road to the west.

[11] That boundary is depicted as Points A, B and C on the Surveyor General's diagram incorporated in Annexure ATT 10 to the founding affidavit. On the latest photographs it is located where a gravel ramp into the development has been constructed.

double gate is clearly visible. It is common cause that the width of the road reserve in Tramway Road along this boundary is less than 9m.

[23] In argument Mr Smalberger SC pointed out that the only evidence put up by the developer was that of an architect whose evidence stood in stark contrast to that of the land surveyors, who were better qualified than an architect to perform the exercise in question. There is much to be said for that argument, but in light of my finding that the architect's measurement was not made at a point adjacent to Erf ..25 as required for the application of item 40(c), it is not necessary to comment further on that argument at this stage. It can be dealt with, if necessary, when final relief is sought.

[24] There was a further dispute between the parties as regards the import of the phrase *"the only vehicle access"* as it appears in item 40(c). The first applicant argued that if any one of the access points was adjacent to a road reserve less than 9m wide that was sufficient to restrict the use of the property to a dwelling house or second dwelling. Bantry Hills on the other hand argued that if one access point was adjacent to a road reserve which was more than 9 m in width, while another fell short of the measurement, this was sufficient to save the day.

[25] The *"dual access"* issue was dealt with extensively by Rogers J in para's 32 – 41 of his judgment in the *Phase III* case and I associate myself with my Colleague's comments in that regard. Like Rogers J, I express reluctance to determine legal issues at this stage: that is pre-eminently the function of the court hearing the review where far more detail is likely to be available for consideration, and where there will be time for more comprehensive argument.

[26] While it is arguable, as contended by the first applicant in the founding affidavit and by Mr Smalberger SC in argument, that the applicants may have established a clear right to relief, I am disinclined to go that far at this stage. To be sure, the applicants have adduced compelling evidence from professional people duly qualified to express expert opinion on the question of the measurement of land that at both proposed access points the adjacent road reserve is less than 9m wide. As against that there is evidence of a measurement taken at a point in Tramway Road which appears to be irrelevant for the application of item 40(c).

[27] *Prest*, in his seminal work on interdicts[12], observes that courts have sometimes confused the level of proof required to establish a right for purposes of obtaining a temporary interdict. In the case of a clear right, it is axiomatic that this must be established on a balance of probabilities. But what is the position where the applicant cannot, at the interim stage, reach that threshold? *Prest* with particular reliance on *Webster v Mitchell*[13] suggests the following solution at 55-6:

> *"The proper manner of approach is to take the facts set up by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant*

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[12] CB Prest, The Law and Practice of Interdicts at 52 *et seq*

[13] Webster v Mitchell 1948(1) SA 1186 (W)

he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt' ".

Applying that approach, I am more than satisfied that the applicants have established a right which should afford them final relief on review.

LOCUS STANDI

[28] In argument Mr Jamie SC challenged the applicants' *locus standi*. In the first place he suggested that the lack of physical proximity of their properties to the development deprived them of the requisite interest to enforce the provisions of the City's Development Management Scheme ("the DMS"), which forms part of the By-law. Had they been immediate neighbours to the development, said counsel, there could have been no objection. The submission was based on the cases referred to in footnote 1 above, all of which demonstrated a close degree of proximity to the offending property.

[29] In para 21 of the founding affidavit, the first applicant asserts *locus standi* as follows:

"*The applicants have standing to bring this application because they are entitled to enforce the DMS against Bantry Hills and because their*

constitutional rights to just administrative action have been infringed by the purported approval by the City of the (sic) Bantry Hills's (sic) unlawful plans."

There is a bald denial of this allegation by Bantry Hills and a reliance on argument to be advanced at court, in the answering affidavit.

[30] In relation to the *locus* point, Mr Smalberger SC noted that the applicants had voiced their concerns about the proposed development as early as 23 May 2016 when their attorney delivered a request to Bantry Hills for access to the plans, citing his clients' interest in the development as follows:

> *"3.1 the properties which they own are in close proximity to the aforesaid development,*
>
> *3.2 the proposed development would dramatically increase the traffic congestion in the area,*
>
> *3.3 the proposed building may potentially decrease the value of our client's (sic) properties…"*

[31] From the outset, therefore, there could have been little doubt on the part of the developers (and the City for that matter) that the applicants' cause for complaint as a consequence of the alleged unlawful approval of the plans was directed primarily at increased traffic flow in the neighbourhood. In addition, the first applicant recorded in the founding affidavit that upon initial inspection of the plans he observed that there was only one access point onto the property from Ilford Street.

[32] In introducing the Tritan Report into the founding affidavit, the first applicant makes the following comments –

> "*27.1 [The report indicates] (t)hat there will be significant loss of the views currently enjoyed from my property and the properties belonging to the second applicant…*
>
> *27.2 That the width of the (sic) Ilford Road (sic) (including the road reserve) is less than 9 metres (figure 7). It is important to note that Ilford Road (sic) is a one-way street with traffic flowing into it from Kings Road, rounding the corner and exiting into Kloof Road.*
>
> *27.3 that the width of the (sic) Tramway road (including the road reserve) is less than 9 metres (figure 8), except for a portion of the road leading up from Main Road. It is important to note that Tramway Road is a one-way street with traffic flowing into it from Main Road, rounding the corner and exiting into Kings Road."*

[33] In paragraph 36 of the founding affidavit the first applicant contextualises his understanding of the By-law as follows:

> "*36. I respectfully submit that the purpose of item 40(c) is to ensure that only one or two dwelling units are allowed on properties which abut narrow roads to avoid the problem of too many cars entering and leaving the property into a dangerously narrow road.*

Tramway and Ilford Roads are very narrow roads and this is why they are one way roads."

[34] In the replying affidavit the first applicant takes up this point again –

"*20. I respectfully submit that the provision of item 40 (c) in the DMS was enacted not only to deal with possible congestion, but also for other reasons. I verily believe that the provision was also enacted to ensure that the (sic) large buildings (such as the building which the First Respondent intends to erect) are not built on properties surrounded by narrow roads. I respectfully submit that the reason for this would be to prevent a situation where large buildings are constructed along narrow roads causing a narrow corridor and an overshadowing of other properties which can only be built in accordance with the use restrictions. I furthermore submit that the other considerations would be privacy of neighbouring properties and the negative effect on the streetscape."*

[35] The test for the standing of the applicants to review a set of building plans in a matter such as this was dealt with comprehensively by the Supreme Court of Appeal in *JDJ Properties*, [14] where Plaskett AJA described the approach thus:

"[27] Whether a litigant's interest is sufficient to clothe him or her with standing involves a consideration of the facts, the statutory

[14] JDJ Properties CC v Umngeni Local Municipality and Another 2013(2) SA 395 (SCA) at 406 - 410

> *scheme involved (in public law disputes, a statutory power is almost inevitably involved) and its purpose: the issue must, in other words, be determined in the light of the* ***factual*** *and* ***legal context****."* (Emphasis added)

The mandated approach requires the court therefore to consider the purpose of the statutory enactment and the extent to which an applicant is benefited or affected thereby. In *JDJ Properties*, the Supreme Court of Appeal referred with approval to *BEF* in relation to standing.

[36] In *BEF,* Grosskopf J was asked to review a decision of the City to approve plans for the construction of a boundary wall which impacted on the public's use of communal steps between two streets, fortuitously just a couple of blocks away from the applicants' properties. The judgment traverses a number of issues not relevant to the present matter but the *dictum* in relation to standing is directly in point and merits repetition here.

[37] In dealing with the law the learned judge first referred (at 400 G) to the *dictum* of Stratford JA in the *Roodepoort-Maraisburg matter*[15] -

> *"Where it appears either from a reading of the enactment itself or from that plus a regard to surrounding circumstances that the Legislature has prohibited the doing of an act in the interest of any person or class of persons, the intervention of the Court can be sought by any such person to enforce the prohibition without proof of special damage."*

His Lordship went on to point out that –

> *"(t)o apply this test one must examine whether the [town planning] scheme was introduced for the benefit of the general public or of persons falling within a particular class (of which the applicant is a member) or both. In terms of s35 (1) of the Townships Ordinance, every town planning scheme shall have for its general-purpose a co-coordinated and harmonious development of the area of the local authority to which it relates in such a way as most effectively tend to promote health, safety, order, amenity, convenience and general welfare as well as the efficiency and economy in the process of such development. Subsection (2) provides that due consideration should be given in*

[15] Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd 1933 AD 87 at 96

the preparation of a scheme to matters referred to in the Second Schedule to the Ordinance….

The purposes to be pursued in the preparation of the scheme suggests to me that the scheme is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by the scheme, or at any rate those inhabitants who would be affected by a particular provision. And by 'affected' I do not mean mean damnified in a financial sense. 'Health, safety, order, amenity, convenience and general welfare' are not usually measurable in financial terms. Buildings which do not comply with the scheme may have no financial effect on neighbouring properties, or may even enhance their value, but may nevertheless detract from the amenity of the neighbourhood and, if allowed to proliferate, may change the whole character of the area. This is, of course, a purely subjective judgement, but in my view this is the type of value which the ordinance, and schemes created thereunder, are designed to promote and protect. In my view a person is entitled to take up the attitude that he lives in a particular area in which the scheme provides certain amenities which he would like to see maintained. I also consider that he may take appropriate legal steps to ensure that nobody diminishes the amenities unlawfully. I would not like to assert dogmatically that such a remedy would be available to all persons living in the area covered by a scheme as large as that of Cape

> *Town. In the present case, however, the applicant is an immediate neighbour to the property on which the non-conforming garage was built."*

[38] In light of the fact that the applicant in ***BEF*** was an immediate neighbour to the offending property, it is apparent that the judgment is essentially an *obiter dictum* on the degree of proximity that an objector who is not an immediate neighbor to the development must establish before standing can be found to exist. I agree with Mr Smalberger SC's suggestion that a resident, for instance, of the southern suburbs of the Peninsula (such as Rondebosch, Wynberg or Lavender Hill) would not easily establish a basis for intervention in regard to a development on the Atlantic Seaboard – the proximity simply being too remote to complain of being affected thereby. But the judgment in ***BEF*** does contain reference to useful criteria which may be considered by a court called upon to determine *locus standi* in circumstances where the applicant is not an immediate neighbor to the development.

[39] In my considered view, there can be little doubt that a resident in the neighbourhood who is not an immediate neighbour to the property but whose use and enjoyment of the surrounding road network might well be impacted upon by a building which is likely to bring a significant amount of additional traffic into the neighbourhood would have the requisite *locus standi* to attack the City's approval of the plans[16]. This is the logical implication of the *obiter dictum* in ***BEF.***

[16] In argument Mr Jamie SC cautioned that the court had no traffic impact assessment report before it to assess the anticipated traffic flow occasioned by the development and assured the court that there is

[40] The location of the applicants' homes, in the immediate vicinity of the public roads which are designed to afford access to the development (Kings Road and Ilford Street), will potentially expose them to increased traffic flow, literally on their doorsteps. But it does not end there. Should the applicants wish to travel down to Main Road they might ordinarily use Kings Road. That street will now be required to carry increased traffic, firstly, in respect of vehicles accessing the complex via the Ilford Street entrance, and secondly, further down Kings Road beyond the intersection with Tramway Road, where additional traffic exiting the complex via that entrance will enter Kings Road. And then there is the potential problem occasioned by visitors to the complex who cannot find parking on the property. They will in all probability have to park in the narrow side streets which one sees on the photographs, thereby causing further inconvenience to members of the immediate neighbourhood.

[41] Traffic flow in Cape Town in general has become very problematic in the last number of years. One regularly sees articles in the media bemoaning the logistical delays which motorists face on a daily basis, with some reports suggesting that the Mother City's traffic congestion is the worst in the country.[17] But, one does not even need to resort to media reports to establish this – a trip to the office, the airport, the doctor or the supermarket by car will suffice. Given that the applicants reside on a busy arterial route carrying traffic of all shapes and sizes to and from Camps Bay and

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such a document prepared by Bantry Hills' consultants. While the court does not know what provision has been made in such assessment for additional vehicles entering the area, having been told in the promotional material that 60 units are to be built on the property, it seems fait to assume that there will be increased traffic to the extent of at least one vehicle per unit.

[17] Independent Online news report of 18 August 2016 located at www.iol.co.za/motoring/industry-news/cape-town-has-sas-worst-traffic-says-tomtom-2058579

beyond, their apprehension regarding the possibility that the Bantry Hills development will "*dramatically increase the traffic congestion in the area"* is a genuine concern fairly held.

[42] In *PS Booksellers*[18] Meer J acknowledged, with reference to, *inter alia, BEF 'the recognised standing of residents and property owners, in a community or township, to enforce the provisions of the zoning schemes."* Relying on the *dictum* of Plasket AJ in *Greyvenouw*[19] Her Ladyship embraced the constitutionally mandated development of the common law in recognizing the standing of community-based bodies such as ratepayers' associations to apply for the enforcement of zoning schemes in their areas of interest, or operation.

[43] Meer J also referred to cases such as *Bedfordview Town Council* and *Teazers* [20], both of which are judgments following *BEF* and in which support is to be found for the proposition that town planning schemes are intended to serve the interests of the inhabitants of the area covered by such scheme.

[44] In the present case the court is dealing with a By-law recently published which is intended to address the competing interests of landowners in, *inter alia,* a GR4 subzoning area. To the extent that the By-law is expressly designed to accommodate the potential for increased densification of properties in the area of application, it must follow that the right to challenge such an increase where it is likely to detrimentally

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[18] At 638 [19]

[19] Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004(2) SA 81 (SE) at 103 C-F

[20] Bedfordview Town Council and Another v Mansyn Seven (Pty) Ltd and Others 1989(4) SA 599 (W); Pick 'n Pay Stores Ltd and Others v Teazers Comedy and Revue CC and Others 2000(3) SA 645 (W)

affect the enjoyment of, for example, the public thoroughfares in such area by virtue of an increase intraffic volumes occasioned by such densification, should be recognised. In the circustances I am satisfied that the applicants have established the requisite *locus standi* for the interim relief which they now seek.

IRREPARABLE HARM

[45] The applicants contend that the irreparable harm that they will suffer if no interdict is granted lies in the fact that the project will continue towards completion and that the prospects of the review court ordering the demolition of the structure in the event of that court upholding their claims will be sorely restricted. In reply thereto Bantry Hills gave a solemn undertaking in the answering affidavit, which was repeated by Mr Jamie SC in argument, that it would not rely on this factor in resisting a claim by the applicants for demolition.

[46] A similar undertaking was offered in *the Phase III* matter, but that notwithstanding, Rogers J granted the interdict sought. He remarked as follows in this regard:

> "*[82] If the review were sound on its merits, [Phase III'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-story 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 [Phase III] 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 and Another v Harris and others 2008 (3) SA 633 (C) para 106)

[47] In *Searle*, Binns-Ward AJ added for consideration –

"*[11] … 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."*

[48] Finally, one need only have regard to the extraordinary ends to which the landowner in *Lester* [21] went over many years in attempting to avoid an order to demolish his luxury seaside house built in contravention of building plans in order to

[21] Lester v Ndlambe Municipality and Another 2015(6) SA 283 (SCA). The original order for demolition in this case referred to in para 10 of Searle as a likely event, was granted in June 2007.

appreciate the risks inherent in accepting such an undertaking as constituting the panacea to the potential harm to which the applicants may be exposed.

[49] Having regard to the considerations advanced in these cases, I am not persuaded that the irreparable harm which the applicants are likely to endure can effectively be avoided by these undertakings, however bona fide those undertakings might be. I shall revert further address this aspect when I deal with the balance of convenience hereafter.

BALANCE OF CONVENIENCE

[50] In urging the court to refuse interim relief, Bantry Hills pointed to the costs which it has incurred thus far. In addition to the purchase of the property (R51m) it says that its building costs, professional fees and "general costs" amount to R 56,8m. It goes on to say that in the event that the project is delayed for a period of six months the following further and irrecoverable costs will be incurred :

- Contractors' standing time – R13,3m;
- Escalation of building costs – R5,9m; and
- Finance charges – R6,9m.

In addition, the developer says it is unable to calculate the loss of profit which it may suffer as a consequence of delay, particularly with regard to the cancellation of pre-sales and agents' commissions payable in relation thereto.

[51] In argument Mr Jamie SC pointed out that there had been no tender by the applicants to make good any losses on the part of Bantry Hills in the event of the

review not succeeding. A tender of such damages might have alleviated the inconvenience to the developer in the event of a temporary order being granted but the review ultimately failing[22] and is certainly a factor that might have swung the balance of convenience firmly in favour of the applicants. In light of the anticipated extent of those damages, however, I do not think that the applicants can be criticized for failing to do so.

[52] The judgment of Plewman JA in *Hix Networking*[23] serves to remind courts that the decision as to whether ultimately grant interim relief or not involves the exercise of a wide discretion. In *Augoustides*[24] Dlodlo J, summarized the approach in matters such as this (including various of the authorities referred to in footnote 1 above) as follows –

> *"The stronger the prospects of success in the review proceedings (i.e. the prima facie right) the greater the subordination of prejudice occasioned by a cessation of the building work. Otherwise stated, the principle of legality tends to operate decisively in this context.*
>
> *As Conradie J noted in Beck's case*[25] *supra, if applicants are likely to be proved right in the review proceedings, 'it is desirable that the building operations should be stopped now, that is to say, sooner rather than later.' "*

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[22] Hix Networking Technologies v System Publishers (Pty) Ltd and Another 1997(1) SA 391 (A) at 403F

[23] At 401G

[24] At 197E

[25] Beck and Others v Premier of the Western Cape (Unreported CPD Case No 12596/06, 11 October 1996)

[53] In light of my findings earlier in regard to the extent of the road reserve in Ilford Street and Tramway road, I am of the view that this is a matter in which the applicants' prospects of success on review are strong. And, issues of legality tend to prevail in such circumstances.

[54] In the supplementary affidavit filed on Thursday, 27 October 2016, Bantry Hills stated that there would be no building on the site during the customary builders' holidays at the end of the year. In addition, it was stated that by the time the review matter was to be heard in February 2017, little of the building works (if any) would have projected above ground level. As the photographs which accompanied that affidavit reveal, extensive excavations have already taken place on the site. A large crane has been installed and the construction works involve foundations, retaining walls, lift shaft walls, lateral support to adjacent properties and pile caps. A sectional diagram was also attached to that affidavit which demonstrates that by that stage very little of the building work, if any, would have proceeded beyond the natural ground level of the site.

[55] An undertaking[26] was furnished in that affidavit by Ms Liat Mazor, also a director of Bantry Hills, in the following terms-

> *"[6] …I am authorised to state that Bantry Hills undertakes that the extent of the building works, in the period up until 20 February 2017, will not rise above the ground floor slab in respect of blocks 1, 2, 3 and 5 of the development and that it will not rise above the first level slab in respect of block 4 of the*

[26] Offered without prejudice to the right to claim damages.

development…As is apparent from [the enclosed section diagram].. the ground floor slab in respect of Blocks 1, 2, 3 and 5, and up to the first floor level in respect of Block 4 will not protrude above the sites (sic) pre-existing natural ground level…..

[8] If necessary, I am also authorised to extend the undertaking referred to in paragraph 6 above for the period after 20 February 2017 and until the above Honourable Court delivers judgement in the review application."

[56] In the follow-up affidavit filed in reply to that of Ms Mazor, the first applicant says:

"[9] The undertaking, regrettably, is not acceptable to the Applicants. This is so because it is claimed that the building works will have progressed significantly by 20 February 2017. Differently put, this is not a case where if the review application is ultimately successful and building works are stopped that it will be necessary merely to fill in a hole in the ground. A demolition order will be required in regard to (sic) ground floor slab and the first floor slab (mentioned in regard to Block 4)."

[57] In my considered view the undertaking now furnished by Bantry Hills goes a long way to addressing the irreparable harm discussed in paragraphs 45 to 48 above. I would think that a reviewing court might be more persuaded to direct a developer to remove a relatively limited portion of slab and otherwise fill in what remains of a hole in the ground, than to direct the demolition of a building

several stories high. Accordingly, the incorporation of the first respondent's latest undertaking in an order of court will afford sufficient protection of the applicants' rights in this matter.

[58] Mr Smalberger SC indicated that the applicants did not press for a costs order at this stage and in the latest affidavit the first applicant repeats that acquiescence. In my view this is a reasonable and conciliatory approach.

ORDER OF COURT :

1. The review application is set down for hearing on Monday, 20 February 2017 and Tuesday, 21 February 2017 on the semi-urgent roll.

2. The second respondent is directed to file the record of proceedings by Wednesday, 9 November 2016.

3. The applicant shall supplement the founding papers in the review application by Monday, 21 November 2016.

4. The first respondent and the second respondent shall file their answering affidavit in the review application by Thursday, 15 December 2016.

5. The applicants shall file their replying affidavit in the review application by Monday, 23 January 2017.

6. The applicants shall file their heads of argument on Monday, 6 February 2017.

7. The first and second respondents shall file their heads of argument on Monday, 13 February 2017.

8. The undertakings furnished by Ms Liat Mazor on behalf of the first respondent in para's 6 and 8 of the affidavit dated 26 October 2016 , are made an order of this Court.

9. All costs relating to this application shall stand over for determination by the Court hearing the review application.

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GAMBLE, J