AGENDA of the
Portfolio Committee : Infrastructure and Planning
17 November 2015
(Also the agenda for the Mayoral Committee Meeting : 25 November 2015)

16.
ERF 5282, 258 SIXTH STREET, VOËLKLIP, HERMANUS, OVERSTRAND MUNICIPAL AREA : PROPOSED DEPARTURE : J VAN DER POST

5282 HVK (2398)
R Kuchar **(028) 313 8900** **Hermanus Administration**
2 July 2015

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1. **Executive Summary**

   An application has been received on 13 August 2013 from Mr J van der Post on Erf 5282, Hermanus for a departure from the Scheme Regulations in order to change the use of the existing outbuilding (granny flat) to primary dwelling, to relax the western lateral building line from 2,5m to 1,430m to accommodate new additions, to relax the eastern lateral building line from 3,5m to 2m to accommodate a garage, servant's quarters and store room and to relax the relevant 6m aggregate for lateral building lines to 3,43m.

   The application was approved by the Executive Mayor on 30 April 2014. The objector however submitted a Section 62 appeal. The appeal authority resolved to refer the application back to the Executive Mayor for reconsideration. The reasons for referring it back and the appeal of the objector will be discussed hereafter in more detail.

2. **Service Delivery and Budget Implementation Plan - IGNITE**

   Infrastructure and Planning
   Town- and Spatial Planning

3. **Compliance with Strategic Priorities**

   Provision of democratic, accountable and ethical governance
   Promotion of tourism, economic and social development

4. **Delegated Authority**

   Executive Mayor

5. **Legal Requirements**

   Local Government, Municipal Systems Act, No. 32 of 2000
   Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) (LUPO)

6. Background/Discussion/Evaluation/Conclusion

6.1 Background

An application for a departure for a residential dwelling, change of usage of an outbuilding and relaxation of a lateral building line were approved by the Executive Mayor on 30 April 2014 (item forms part of Annexure A attached to this report.). An appeal was lodged by Adv. J Koekemoer and was heard by the Appeal Committee on 2 February 2015. (Agenda of the Section 62 Appeal Committee is attached as Annexure A).

The findings of the Appeal Committee were as follows:

"17. The committee finds that it was impossible for the Executive Mayor to apply her mind to the true facts, as it seems there were various matters simply not put before her and as such she failed to consider all relevant information before coming to a decision. Furthermore, she may have been influenced by irrelevant information before making a decision.

18. The appeal therefore must succeed on the basis that the matter be referred back to the Executive Mayor to reconsider the application which consideration should at least include:

18.1 Whether the previous building plan approvals are valid against the background of the arguments raised by the appellant.

18.2 Whether the town planning scheme regulations which applied at the time of submission of the application provides in general for the relief sought, but specifically if it provides for a main dwelling to exceed the lateral building line on the ground floor and or on the second storey."

6.2 Discussion

In this section the administration will deal with the item that served before the Executive Mayor, Section 62 Appeal Committee and lastly the statements of the appellant's appeal will be dealt with.

6.2.1 Executive Mayoral Item (Addendum AA attached to Annexure A)

The content of the item that served before the Executive Mayor and the recommendations were made on the basis of the approved plans for Erf 5282. The validity of the plans was not interrogated as the approved building plans rendered the Municipality *functus officio.*

6.2.2 Section 62 Appeal

In terms of Section 62(1) of the Local Government: Municipal Systems Act No. 32 of 2000 a person submitting an appeal must do so within 21 days of the date of notification by giving written notice of his appeal with reasons to the Municipal Manager.

The appeal that was submitted by Adv. J Koekemoer is attached per Addendum CC attached to Annexure A. The reasons given by Adv. J Koekemoer were vague and very general. However, during the Section 62 Appeal Committee meeting Adv. J Koekemoer was allowed to substantiate his appeal in detail by putting forward very detailed statements and assumptions.

The administration argued that it did not have the detail of the appeal beforehand and because of the complex nature could not comment on the arguments.

As a result of a lack of counter arguments, the Section 62 Appeal Committee decided that the appeal must be upheld on the basis that the matter must be referred back to the Executive Mayor for reconsideration.. (Record of Decision of the Appeal Committee is attached as Annexure B).

In view of the fact that Adv. J Koekemoer's detailed reasons for the appeal were not made available to the administration when submitting the appeal, the administration was placed in a severely disadvantaged situation. It is believed that the Section 62 Appeal Committee should have adjourned the meeting to allow the administration at least to interrogate the statements of Adv J Koekemoer and to submit counter arguments.

A lot of the statements made by the appellant also referred to approved building plans. The Section 62 Appeals Committee resolved that the appeal is valid and that rights have not yet vested. However, in most of the appellants' arguments the rights have already vested, because of approved building plans even if the building plans were erroneously approved. Only a Court of Law can retract the approval of the building plan and not the Executive Mayor or the Section 62 Appeal Committee.

The arguments/the points referred to by the appellant will be dealt with accordingly.

6.2.3 Arguments raised by the appellant

Arguments raised by the appellant in amplification of his grounds for appeal is listed below and the administrations' comment directly below:

6.2.3.1 1962 : House building plan approved - western building line 1.22m (instead of 2m)

Building Plan No. 62075 is attached as Annexure C.

The appellant's statement of the appeal is incorrect as it refers to the Scheme Regulations contained in the Hermanus Town Planning Scheme. The Scheme Regulations were only enacted in 1974.

The only building lines applicable at that stage were those contained in the Deed of Transfer 1129/1935 (attached per Annexure L). In terms of Section 6 of the 1934 Ordinance, any township establishment before the Ordinance came into effect, shall be exempted from the provisions of this Ordinance in as far as the actual survey of the erven has been registered by the Surveyor General and the Registrar of Deeds. The General Plan of the Mossel River Estate was established in 1904 and the General Plan has an endorsement that exempts the township from the stipulations of the 1927 Ordinance. It is clear that in the area known as Voëlklip, the building line restrictions are in terms of the Deed of Transfer, Condition 1(d)(i) and (iii), which reads as follows:

(i) *"The Purchaser shall from date hereof be subject to all laws and Rule or Regulations, made or to be made by lawful authority and agree that the Sellers shall not be held liable to make or repair or keep in order any road, drains, culverts or any other works in so far as the Lot hereby sold are concerned";*

(iii) *"That all buildings shall stand back at least ten feet from the line of the street or avenue on which the Lot or Lots herein mentioned may front, that all outbuildings shall stand back at least thirty feet from any Street or twenty feet from any avenue on which the Lot or Lots herein mentioned may front."*

Should the Scheme Regulations have been applicable the lateral building line would have been 1,2m as Erf 5282 consisted of Erven 3837 and 3839 at that time (attached per Annexure Q 1/1))

6.2.3.2 1965 : Building plan for servants quarters and carport extension - back (north) building line (1.5m instead of 3m).

Building Plan No. 65009 approved by Building Committee 19 January 1965 is attached per Annexure D.

Again the argument is the same as under the previous point. The appellant base his arguments on the Section 7 Hermanus Scheme Regulations, which weren't applicable in 1965.

6.2.3.3 1970 : Building plan for boundary walls approved

Noted.

6.2.3.4 1973 : Building plan : carport changed to playroom - north building line now same as western side : 1.22m. One window on north view.

Building Plan No. 73233 approved by the Building Committee 6 November 1973 is attached per Annexure E.

In 1973 the Section 7 Scheme Regulations were not applicable. Thus the building lines were not applicable.

6.2.3.5 1987 : Building Plans

6.2.3.5.1 Building plan 87312 : double storey : servants quarters (ground) and bedroom, living room on first floor. Double storey not over western building line. House 122.87m², outbuilding 125.48m². Plan (drawing 107/2 dated 2/10/87) submitted by Neill Wilson Architect. Approved 23/10/87 by Town Engineer.

1987 - Building Plan No.87312 - the transgression of the building lines were raised as a point of concern and after consents have been obtained by the neighbours, it was signed off. This plan was also approved at a General Council meeting, dated 22 October 1987 (attached per Annexure F).

6.2.3.5.2 Building plan 87356 : same as above, except double storey now over western building line. House 122.76m², outbuilding 125.48m². Plan (drawing 107/2) dated

2/10/87) submitted by Neill Wilson Architect. Approved obo Town Engineer (by Marais) on 9/11/87.

Building Plan No.87356 - the plan was approved at a monthly meeting held by Council on 10 December 1987. This plan did indicate a granny flat on first floor level (attached per Annexure G).

6.2.3.5.3 North view : one window at ground level, 3 windows on first floor.

Correct as per Annexure G.

6.2.3.5.4 Notice by the building inspector (12/1/1989) that building plan was not complied with and an amended plan had to be submitted. (It was argued that it was impossible that the area of buildings could be the same in both plans as the area increased in the plan on 5/11/87.

Apart from change to windows, the footprint actually was reduced in the latter building plan as attached per Annexure G. The staircase which in the plan attached per Annexure F was outside and was in terms of Annexure G moved to be internal. All the other measurements on the plan are exactly the same. (The letter of the Building Inspector dated 12 January 1989 is attached as Annexure H).

6.2.3.5.5 It was further argued that neighbour consents, dated 26/9 and 19/10 refer to the plan dated 2/10/1987 as it is obvious and the only reasonable deduction is that the second plan was drawn up after approval of the first plan on 23/10/87. The argument is therefore that there is no valid consent for the outbuilding or relaxation of the building line as the consents on record refers to another building plan.

The second plan which was approved did not bring about any further impact as the footprint was exactly the same.

Secondly the neighbour in his consent refers to a plan no. 107/2. The first plan and the amended plan have the same

number 107/1. One can then come to the conclusion that the second plan was also showed to the neighbours, which was consented as the second plan.

6.2.3.5.6 The building is vastly different today with 3 windows at ground level and 4 at first floor level.

Apart from windows added and moved, the building is very similar.

6.2.3.5.6 No plan is on record in response to the notice of non-compliance by building inspector.

Noted.

6.2.3.5.7 The number of drawing, same area, and date, which is the same on both plans points to irregularity.

It was common in earlier years that plans and amended plans had the same number as it was all done by hand and not computer. The draughtsman used to make the necessary amendments on the original plan.

6.2.3.5.8 No comments by building control officer in terms of NBRBS Act, 1977, Section 5.

Noted. The Building Control Officer does not always comment on building plans. In some instances he only signs it as recommendation.

6.2.3.5.9 There is non-compliance with Section 7(1)(a) of the NBRBS Act as a decision is not on record regarding the relaxation of building lines as prescribed by the Town Planning Scheme (TPS) (Clause 8A 1(ii) to (iv).

Council approved the building plan with the encroachment of the building line. The building plan approved also indicated it as a dwelling.

6.2.3.5.10 There is non-compliance with Clause 9 (a) of the Town Planning Scheme ("TPS") (one building plus outbuildings ordinarily

associated therewith). This is indeed a second or additional dwelling with a greater area (143.6m² is the correct area in terms of the latest application) than the main building (122.87m² in terms of this application and 121m² in terms of the latest application).

In terms of Section 15 of the LUPO a departure can be granted for deviation from land use restrictions applied to a particular zone in terms of the Scheme Regulations.

As the Council approved the building plan with the encroachment, one must conclude that the Council approved the departures.

6.2.3.5.11 There is non-compliance with the TPS which restricts outbuildings to single storied structures.

This was no longer an outbuilding but a flat which building plan was approved by Council on 22 October 1987.

6.2.3.5.12 There is non-compliance with TPS clause 8A1(b)9(ii) (also amendment), read with Clause 8.4 and Clause 3.3, which prohibits any windows and doors on the rear or lateral boundaries if building lines have been relaxed.

Section 8A1(b) read as follows:

"Notwithstanding the building lines mentioned in sub-paragraph (a) above, and subject to the Council's consent, an outbuilding used solely for the housing of motor vehicles may be erected on such side and/or rear boundary and any other outbuilding of the same height may be erected on the rear and/or side boundary for a distance of 11 metres measured from the rear boundary of the site."

This determines that Council could have allowed an outbuilding to be erected onto the site boundary. The building that was approved was not onto the side boundary.

In terms of Section 9(ii) the Council may approve the erection of an outbuilding or additional dwelling which exceeds a side building line subject to:

“ii) such building not exceeding a height of one story.”

The above only allows the Council to approve such a building and which could be approved without neighbours’ consent as it complies to the zoning parameters and also not constitutes a departure.

However the building being double storey was approved by obtaining the consent of the adjoining owners where after Council approved the building plan.

7. In 1992, there was a building plan to convert the outbuilding to a flat.

The building was already a flat as approved in 1987.

8. There is no approval of the plan on record that could be supplied to the appellant as per his arguments.

The plan that the appellant referred to was an approved plan (Plan No. 92011) for minor alterations approved by the General Committee of the Council dated 10 February 1992 (see Annexure I).

8.1.1.1 The plan that was submitted differs from the existing building.

There might be differences as nearly 13 years have gone by since the plan was approved.

8.1.1.2 **There is no consent of neighbours on record. The appellant argues and refers to this consent in 1987 in the appeal hearing agenda, but the consents in 1987 were not valid and in any case, even if the consents are regarded as valid, which the appellant does not accept, it did not include that the lateral building line be relaxed in respect of the first storey, or so the argument goes.**

The neighbours did give their consent on the plan showing the departure of the lateral building line.

9 The town planning scheme was amended on 5/12/88 (for all municipalities by the Provincial Government in notice 1047/1988) to allow for additional dwellings as this could not be approved in terms of existing town planning schemes in the

Cape Province. This process was not followed and even if it was followed, it could not have been approved as the area of the building was (and is) more that 120m² and the building is more than one storey.

The buildings were approved in 1987 with minor building works thereafter. Thus, this was not applicable and even if it was, Council approved the building plans for the flat in 1987.

10. The appellant further argues that the approval of the building plan in 1992 was based on the consent of a neighbour that was given in 1987, therefore 4 years earlier. Therefore as the argument goes, there is no valid consent on record.

The building plan in 1992 was for minor amendments inside the existing approved building and thus the neighbours' consent was not necessary. The primary building was built with the neighbours' consent.

A balcony was approved 1995 within the building lines (attached as Annexure J).

11. The arguments went further to say that:

11.1.1 the Town Planner seems to argue that the appellant is bound by the consents (which in some cases do not exist) previously given by former or existing neighbours. This is not the case. This can only be correct if the town planning scheme was properly amended by the council in terms of legislation. As such, a decision could not be delegated; it was reserved to a decision by the administrator (later the premier) or the full council.

The application to allow for the departure on the lateral building line, double storey dwelling was approved by Council in 1987. (Refer to Annexure G.)

11.1.2 No decision of an official can be regarded as a proper departure. It does not bind any person now and cannot be regarded as a right attached to the property. See in this regard also the manual produced by the Provincial Government for applications in terms of Ordinance 15/1985 part A, par. 4.4 and part B, par 2.3.

See aforementioned comment.

12. No council decisions were provided to the appellant on any matter regarding Erf 5282, although the appellant requested this in writing. It is argued that a legally valid building plan, reflecting the outbuilding on the erf, be submitted to the committee before a decision is taken on the appeal. The appellant was unable to obtain such a plan which should form the basis for the application before the committee. The appellant argues that it has been his contention right from the start that if the building on Erf 5282 has not been validly erected, the municipality cannot consider the application whereby this illegal structure will be attached to another building. It is also the appellant's submission that the outbuilding as it stands cannot now be approved by the municipality, due to it contravening many legislative measures. This entails that the decision of the executive mayor has to be set aside regarding the application.

As stated earlier the administration based its arguments on the last approved building plan and did not interrogate the history.

However, with the appeal, the process was investigated and the evidence is provided with this item.

It is further argued that various building plans have been approved through the years and rights have vested. If there is contention that the approvals are not valid the only remedy is to approach a Court of Law to set aside the building plan approvals.

13 It was further submitted by the appellant that the municipality has no authority to approve that the outbuilding becomes part of the main building, as no provision to condone the existing illegality in either the town planning scheme or other legislation exist. It should also be borne in mind that the town planning scheme supplied to the appellant was not amended to insert an additional dwelling as a consent use in part 3, clause 5 of the TPS. It is therefore doubted by the appellant whether the municipality could even consider the approval of an additional dwelling.

The applicant now proposes to attach the existing building with the main dwelling by means of an approved building plan. The Executive Mayor (Council) does have the authority to do so as this is an application for a departure. The Executive Mayor, after considering the facts, can approve or turn down an application for a departure in terms of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985). (See Annexure K).

See previous comments on the statement of the second dwelling.

14 The appellant further submits that the municipality is bound by the terms of the title deed of the property not to approve the illegal building. In this regard, the appellant draws the attention of the committee to the title deed of the application property, no 000924194/2004, clause A(b) and the last par. on page 2 of the deed, referring to Deed of Transfer T4853/1939 and Deed of Transfer T1129 dated 20 February 1935. These clauses, the appellant argues determines that the property is subject to municipal rules and regulations. If the municipality does not want the property to comply with its rules, like the town planning scheme and other laws, these conditions will first have to be removed.

The Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) and the Hermanus Town Planning Scheme allows for the Council to consider applications to depart from the Scheme Regulations.

The clause to which the appellant refers reads as follows:

"(d) subject to the following special conditions of sale imposed by the Transferor Company:

i) the Purchasers shall from date thereof be subject to all laws and local rules or regulations, made or to be made by the lawful authority and agree that the sellers….
iii) that all buildings shall stand back at least ten feet from the line of street or avenue on which the lot or lots herein mentioned may front that all outbuildings shall stand back at least thirty feet from any street or twenty feet from any avenue on which the lot or lots here in mentioned may front."

The argument regarding the building line is thus not relevant in terms of the title deed restriction.

15 The appellant further argues that no general power is given by law to the municipality to condone transgressions of the town planning scheme. In fact, as the argument goes, the town planning scheme compels the municipality to refuse its consent to anything which constitutes or facilitates an evasion of the intent and purpose of the scheme or any of its provisions.

The appellant's statement that no general power is given to Council to condone transgressions is not factually correct.

As stated earlier the building referred to was approved and there is thus no need for condoning a transgression.

16 Furthermore, Section 39 of Lupo determines that : "every local authority shall comply and enforce compliance with the provisions of Lupo, the provisions of a zoning scheme .... and shall not do anything, the effect of which is in conflict with that sub-section".

The buildings have been approved by Council. The Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) does allow for departures from the Zoning Scheme Regulations.

17. Arguments attacking the report that served before the Executive Mayor

With regards to the report that served before the Executive Mayor, the appellant argues as follows:

17.1.1 Legislation that is not applicable to the application was taken into account in making the decision.

The report to the Executive Mayor made mention that Section 7 of the Hermanus Scheme Regulations were applicable and that the application is dealt with accordingly.

The item only mentioned that in terms of the Overstrand Integrated Scheme Regulations some of the departures would become obsolete.

17.1.2 It was wrongly assumed that if the new town planning scheme was taken into account, certain decisions were possible but :

17.1.2.1 no provisions for departures in the new town planning scheme.

The Scheme Regulations do not make provision for departures but Section 15 of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) does provide for the Municipality to consider departures.

17.1.2.2 Title deed restrictions still remain.

We agree but no restrictive condition exist which impacts on this application.

17.1.2.3 No provision that a building line may be relaxed in respect of the main dwelling on an erf.

Section 15 of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) applies, which allows for a departure of the regulations contained in the Zoning Scheme.

17.1.2.4 No provision that relaxation of a building line is possible in respect of a double storey.

Section 15 of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) applies and a relaxation of building lines in respect of a double storey is possible.

17.1.3 There was no interaction with the objector regarding a possible agreement with the applicant. A draft letter, sent for 'without prejudice' negotiations, where the applicant was used which was not sent by the applicant to the municipality.

The undated letter is attached per Annexure N.

17.1.4 The conditions were wrongly summarised and dismissed outright without reasons by the Town Planner, whereas the applicant regarded only one condition as not warranted.

The conditions were translated and are primarily in line with the letter that was also attached per item. (Attached as Addendum AA 21/26 to Annexure A).

It is agreed that some of the conditions should have received some consideration. This will be discussed in the evaluation section.

17.1.5 The municipality was influenced by a recommendation by a so-called aesthetics committee, which has no authority to be involved and whose recommendation in any event is flawed in that it looked at the building from the view of the applicant only.

The aesthetics committee only plays an advisory role and has no decision making powers.

17.1.6 The main reason, is that the report did not take into account the legal status of the building or buildings involved which refers to an error of law.

As referred to in previous discussions the buildings were built according to approved building plans.

17.1.7 The statement that the appellant is bound by previous consents without a formal departure approved by the municipal council, as explained in earlier arguments is wrong and points to an error of law.

The appellant is not bound by former consents but the building that was previously built with consent becomes a primary and permanent right in terms of Section 15 of the Land Use Planning Ordinance, 1985 and to that extent the appellant is bound.

17.1.8 The rights of the appellant were ignored in granting non primary rights to the applicant as the view of the appellant on Erf 3840 (un-built Erf), being affected by the relaxation of the building line on the eastern side of Erf 5282.

The right of the appellant has not been affected by the latest application as the impact view and privacy was already obstructed by previously approved building plans.

17.1.9 The comments of the manager : building in the report that served before the Executive Mayor makes no sense.

I agree. It seems that the comment referred to building lines applicable on the original 2 erven. However, the erven have been consolidated and different building lines apply.

17.1.10 The comments of the Ward Councillor is vague and is also capable to be interpreted that she was against the application.

Noted.

17.1.11 Many facts and motivations that should have been put by the Town Planner before the municipality were not included in the report, such as a report whether there was compliance with Section 36 of Lupo.

The main object of Section 36 is to determine if the application now before Council is desirable or not. Taking into account the existing approved buildings and existing buildings, the new development will be no more undesirable as the current situation. Therefore the facts put to the Executive Mayor were relevant.

Letter dated 24 March 2015 received from Adv J Koekemoer (attached per Annexure O)

A. HISTORY

Building plans in respect of erf 5282 were brought to me by an agent of the owner in 2013. I informed him that I am not prepared to sign on the plan indicating that I approve thereof. I followed it up with Ms van der Stoep of the Planning Department of the Municipality where I informed her of my concerns regarding the existing building on the northern boundary of the erf. I was asked by the Municipality late in 2013 to comment on an application by the owner. I formally objected to the building proposals on the erf. The owner contacted me to see if we can agree on him going ahead subject to certain agreed conditions. I wrote requesting inter alia a copy of the existing building plan on the property and was informed by the Municipality in January 2014 that no such building plan could be traced. After receipt of this information I informed the owner that I am not prepared to withdraw my objection.

During May 2014 I received a letter from the Municipality that the development has been approved. As I was given the right to appeal the decision, I submitted an appeal. I asked for information to add detail to my objection, but I received no reply. I was given the erf file and some of the information I requested, but never received a written reply. I contacted the Municipality to find out when the appeal will be heard. The appeal was heard on 2 February 2015 after I contacted the Chair of the Appeal Committee. The matter was referred back to the Executive Mayor for re-consideration by the Appeal Committee.

At the stage of the request the administration could not find the building plan referred to as it was unfortunately misfiled at the building department.

B. PAST IRREGULARITIES/ POSSIBLE IRREGULARITIES

1. **The application was made in terms of the Hermanus Town Planning Scheme, 1974 (HTPS). Part VI, Clause 16, 2 determines that a record of all approvals, consents, authorities or permissions granted must be kept, which shall be available for inspection. No record was produced of any departures (i.e. from building lines) granted on Erf 5282, although I requested it in writing for preparation of my appeal.**

Some of the approvals were given before the date of the Town Planning Scheme coming into effect. The register of older approvals was kept manually and is not readily available. The administration then searched the archive to retrieve whatever information was available.

2. **The building line on the western boundary of erf 5282 is 1.2m, whereas Part IV, Clause 8, A, 1, (a) (iii) determines lateral building lines at 2.5m (aggregate 6m). The building line on the rear boundary is 1m, whereas the same clause point (ii) determines it at 3m.**

These building plans were approved by Council.

3. **Non-compliance with S7(1)(a) of the National Building Regulation an Building Standards Act, 1977 (NBRBSA) as no decision is on record regarding the relaxation of the building lines.**

The neighbours' consented to the relaxation and Council approved the building plans (Annexure F6/7 & Annexure F7/7).

4. **Part I, Clause 1 defines an outbuilding as a 'single-storeyed structure', yet the outbuilding on the northern boundary of erf 5282 is a double-storeyed structure.**

See point above.

5. **Part V, Clause 9 (a) allows only one building with such outbuildings as are ordinarily used in connection therewith, whereas erf 5282 has a dwelling house (122.87m²) plus a double-storeyed outbuilding consisting of two flats**

(142.6m²). The structure at the rear boundary (flats) cannot be classified as an outbuilding but rather as a second dwelling.

Council approved the second dwelling (flat). Council does have authority, to depart from the Zoning Scheme Regulations.

6. **The structure on the rear boundary (structure) is not in accordance with any building plan that was made available to me.**

The findings of the Building Department were as follows:

"The first floor is not built completely as per the approved plans. The section which was approved as stairs has been converted to form part of the bedroom and bathroom and the stairs have been moved to the inside of the house. This is the only real deviation from the previously approved plans." (Attached per Annexure M).

7. **Regarding the structure, a building plan was made available to me by the Municipality dated 1987. Two approvals of neighbours for the structure are attached to building plan, one from van der Merwe, no address indicated, and one from Nicol, erf 6324. I have no idea where erf 6324 is situated. A plan was approved on 23 Oct 1987 where the double storey on the structure did not exceed the side building line. Another plan was approved on 5 Nov 1987 where the side building line was exceeded at double storey level, which is against the HTPS. The building area (m²) on the second plan is also incorrectly calculated. A letter is also on record from the building inspector dated 12 Jan 1989 instructing that revised building plans had to be submitted as there were a number of deviations from the plan. No plan was made available to me where this was done. I cannot see that the comments of neighbours could refer to the revised building plan approved on 5 Nov 1987 as it was in respect of the first plan.**

As previously stated a second plan was submitted and this was available with all other information. The appellant actually referred to the second plan, having the same number as the first plan, as being irregular.

8. **A further building plan dated 1992 was made available to me. On this plan the structure is referred to as a 'woonstel' (flat). There is no indication on this plan that it was**

approved. In the agenda of the Appeal Committee, the Planning Department refers to this plan as follows: 'Outbuilding converted to flat, 1987 neighbours consent'. How the 1987 neighbours' consent can be construed to apply to this plan, is beyond my understanding, especially as the 1987 plan where the 'consent' was allegedly given, differs from the built structure and can therefore not be regarded as consent at all. It must further be noted that the HTPS was amended on 5 December 1988 to provide inter alia for granny flats to be erected, thus before this alleged approval in 1992. No approval for such structure could be given before this amendment. However, such flat was restricted to 120m² and to one storey. The structure could therefore not be approved as it is more than 120m²(143.6m²), it is a double storey structure, and the structure still did not comply with the approved building plan. Although requested, no decisions were provided as required in terms of LUPO or the HTPS that any deviation or approval was given for the erection or use of the structure, except the dubious building plan approvals in 1987 (no approval supplied to me for the 1992 plan).

The approval for the double storey flat was approved according to building plans approved in 1987.

The plan of 1992 was for minor amendments to the existing structure.

The regulations regarding second dwellings only became law after 1987. However, even with the prescription of 120m² and single storey Council can still depart from these prescriptions in terms of regulation 15 of the Land Use Planning Ordinance.

9. **None of the building plans supplied to me has any reference to comments of the Building Control Officer, as required by the NBRBSA.**

Plan No. 62075: signed by Building Surveyor 29 August 1962
signed by Town Engineer 10 September 1962
signed by Plan Committee 10 September 1962

Plan No. 65009: signed of Building Surveyor 25 January 1965
signed by Town Engineer 25 January 1965
signed by Chair Building Committee 26 January 1965

Plan No. 69262: signed by Building Surveyor 3 December 1969
signed by Engineer 6 January 1970
signed by Chair Building Committee 6 January 1970

Plan No. 73233: signed by Chair Building Committee 6 November 1973

Plan No. 87312: signed by Building Surveyor 23 October 1987
submitted an amended plan no. 87356

Plan No. 87356: signed by Building Surveyor 9 November 1987
approved by Chair Building Committee 10 December 1987

Plan No. 92011: approval recommend by T van Rooyen (no date)
signed off by Chair Building Committee (no date)

Plan No. 95260: signed by Building Inspector (no date)
signed on behalf of Town Engineers (no date)

10. It is clear from the HTPS that if a building exceeds the building line, it should only be at one storey level and that windows should not be allowed or at least be restricted.

In terms of the Hermanus Town Planning Scheme it only stipulates that no windows or doors to be allowed for buildings erected onto a lateral- or rear boundary.

The reference to one storey is only when a consent is granted but over and above a consent a building can be approved which differs from the Scheme Regulations as a departure.

C. THE APPLICATION AND REPORT TO EXECUTIVE MAYOR

1. The report and application seems to confirm that no deviations have been approved in the past, as the relaxations of building lines are applied for. Why does the report not include the rear building line?

The building exceeding the rear building line was existing; no relaxation of a building line was therefore applied for.

2. The eastern lateral building line, which should be 6m-1.2m= 4.8m, is relaxed to 2m disregarding my right on erf 3840. This right is ignored in the report and has a serious effect on the value of this erf.

Clause 8A1(a)(iii) reads as follows:

(iii) *"2,5 metres to any lateral boundary, if the frontage of an erf exceeds 22 metres, provided that the aggregate side space shall not be less than 6 metres,"*

Clause 8A(b)(i) reads as follows:

"(b) (i) Notwithstanding the building lines mentioned in sub-paragraph (a) above, and subject to the Council's consent, an outbuilding used solely for the housing of motor vehicles may be erected on such side and/or rear boundary and any other outbuilding of the same height may be erected on the rear and/or side boundary for a distance of 11 metres measured from the rear boundary of the site."

The proposed building on the eastern lateral building is an outbuilding consisting of a garage, servant's quarter, store room and wash room.

Thus, the Scheme Regulations determines that the buildings could be allowed, with Council's approval, onto the lateral- and rear boundary, which will affect the owner of Erf 3840 much more than the current proposal.

3. **Negotiations between myself and the owner of erf 5282 which I did not supply to the Municipality, and which were always qualified in respect of the validity of the erection of the structure, were included in the report and all my requirements were summarily dismissed as 'excessive' without reasons. As set out above, I was informed in writing by the Municipality that there was no building plan for the structure and my only reaction at the Municipality was my objection.**

If the appellant did not supply it to the Municipality then why must the proposals be addressed in the item to the Executive Mayor? However, the letter and conditions will be discussed in more detail in the evaluation section. It was already stated that the building plan could not be found at the stage of first enquiry.

4. **The report states that it was my responsibility to follow up on the alleged illegality of the rear structure. I questioned the legality of it with the heads of town planning and building survey many years ago. It is however the duty of the Municipality in terms of LUPO to follow up on any illegality. Even the 1987 deviation from the building plan on**

their records was not followed up on. In the case of United Technical Equipment v Johannesburg City Council 1987 (4) SA 343 (T) Judge Harms said: 'The respondent has not only a statutory duty, but also a moral duty to uphold the law and to see to the due compliance with its town planning scheme. The same could be said about building rules.

The appellant did question the building years ago when he bought the property. From Town Planning side it was stated that there was no building plans that could be found at that stage. The appellant at that stage did not request that the legality must be further investigated. As stated in one of his comments that he did not pursue the matter because he was employed by Overstrand and did not want to litigate against his employer.

5. **No comments by the Town Planner as required by S36 of LUPO is part of the report and reference to the new Town Planning Scheme (NTPS) is irrelevant. In fact the reference to the NTPS is also misleading as it suggests that it will support the application. I could not find that the NTPS allows for any deviation, which will entail that the buildings erected without valid deviations in place will have to be demolished.**

The report merely mentioned the restriction as contained in the Integrated Town Planning Scheme Regulations. The application was submitted under the Hermanus Section 7 Scheme Regulations and was also evaluated accordingly.

D. OTHER LEGAL ASPECTS

1. **It is argued in the report to the Executive Mayor that I am bound by consents of previous owners of thee erven and other neighbours given in the past for building plans. If no recorded deviation was validly approved, this cannot be the case.**

The plans were approved with neighbours' consent by Council in 1987 and this became a permanent right.

2. **I cannot find any power for the Municipality to approve a structure which is not in compliance with the HTPS or NBRBSA. Furthermore the Title Deeds applicable to the erf stipulate that all municipal and legal requirements must be**

complied with regarding structures on the erf. Both the HTPS and the NTPS stipulates that they are subservient to title deed conditions. The Municipality is also bound by its town planning scheme. In the case of Club Mykonos Langebaan Ltd v Langebaan Country Estate Joint Venture and Others 2009 (3) SA 546 (C), Act Judge Koen said: 'Once they are imposed the conditions acquire the force of law, because s 39 of LUPO compels both the local authority and all other persons to comply with them.

It was previously explained that there is no transgression of any title deed restriction. The building plans have further been approved by the power conferred upon to the Municipality in terms of the Land Use Planning Ordinance and the Scheme Regulations.

E. CONCLUSION

This memorandum does not set out all detail, as it highlights only most of the salient points. My argument at the appeal hearing provides some more detail on some aspects. It is disturbing that the Municipality could not produce at my written request any decision regarding deviations in respect of erf 5282, although it is its statutory duty they imposed on themselves in its town planning scheme, nor any policy or delegation in terms of which decisions are made. In spite of their arbitrary and cavalier way of handling town planning applications, I am accused of not doing my duty and even mala fides in their reports. My objection and even comments are not given any consideration whereas I am entitled to a balanced consideration of my objection. The fact remains that there are many relevant aspects that the expert officials did not put before the Executive Mayor in their report. Although the report classifies the rear structure on erf 5282 as 'illegal' there is no reference to the power of the municipality to condone such a structure by the Municipality.

If I did not insist on documents, the unfairness, bad processes and blatant illegalities would have remained unanswered. This should not be the task of a member of the public. I am prepared to give further information on any aspect.

The administration did not accuse the appellant/objector of not doing his duty and being mala fide. This was contained in a letter of the applicant. As already stated the report to the Executive Mayor was based on

approved building plans. Nowhere in the report are the rear structures on Erf 5282 classified as "illegal".

The administration tried to provide the information as well as it could to the appellant/objector.

The Manager of Town- and Spatial Planning also extended an invite to the appellant to discuss the situation and inspect the information at his office which was refused by Adv J Koekemoer.

Letter of appellant/objector dated 14 May 2015 attached per Annexure O.

As you are aware, the application for certain departures has been referred back by your Appeal Committee to the Executive Mayor for consideration after the first decision was set aside. This appeal was heard during February 2015.

I visited you after this decision and forwarded a memorandum to you afterwards summarising my input at the Appeal Committee. My argument at the Committee should also be on record as I submitted it in writing.

In view of my experience last year, I am concerned that a new report may be considered by the Executive Mayor which may not take into account my input at the Appeal Committee. I also believe that my previous inputs may be too comprehensive for that purpose. My request is therefore that this letter be submitted with any report to the Executive Mayor and/or any committee which may consider the application.

My objection to the application can be summarised as follows:

1. **In spite of my written request, no decision for any departure on erf 5282 could be produced by your administration. The only logical conclusion therefore is that no departure has been validly approved in the past.**

The approved building plans have been provided to the objector. The chronological order of the approval has already been stated in earlier arguments in this regard.

2. **In spite of my written request, no policy for the consideration of departures from prescribed building lines was produced by your administration. I submitted evidence at the appeal hearing that your administration do not allow buildings of higher than ground floor level when building lines are relaxed.**

Due to legal principles you are legally bound to treat all applications alike at least in the same area.

No such policy exists and that is why it could not be provided to the appellant/objector. Principles are applied when relaxing a building line. Further, each application is evaluated on its own merit.

3. **There was no public participation on the building plan which was ultimately approved for the building on the northern boundary of erf 5282. This approval, if indeed it was approved, is unlawful.**

The affected parties at the relevant time in 1987 when the building plan was approved gave their consent to the building. The subsequent building plans and amendment was of such nature that no public participation was required.

4. **The use of the building was apparently changed for occupation purposes or 'granny flat', without following the procedure as set out in the Town Planning Scheme applicable at that time. Furthermore, no approval of such application was supplied to me, although requested in writing.**

The 1987 plan that was approved already showed the building as a dwelling unit. There was no plan approved for occupation or proposed granny flat. There in any way does not exist any definition for "granny flat" in the Scheme Regulations.

5. **Your records which were supplied to me indicate that your building inspector informed the owner of erf 5282 that the 'approved' building plan was not complied with regarding the structure built on the northern boundary. This notice was given just after the structure was erected. It is clear from my view of the building that until today the building is still not in compliance with the building plan.**

A revised building plan was submitted but it appears that there were still some internal deviations.

6. **Regarding the proposed development, I submit that you do not have the power in law to condone the structure that was illegally erected in any way. Even if you purport to have that power, it will be in breach of a title deed condition applicable to all erven in Voëlklip.**

The Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) allows for Council to approve transgressions, however, in this case there was approved plans. It was already discussed that the title deed restriction referred to is not applicable.

7. **The application for the relaxation of the building line on the eastern boundary of erf 5282 is indeed affecting my rights as owner of erf 3840. The remark in the report that served before the Executive Mayor that my rights are not affected, is incorrect.**

   Clause 8A1(a)(iii) reads as follows:

   (iii) "2,5 metres to any lateral boundary, if the frontage of an erf exceeds 2 metres, provided that the aggregate side space shall not be less than 6 metres,"

   Clause 8A(b)(i) reads as follows:

   "(b) (i) Notwithstanding the building lines mentioned in sub-paragraph (a) above, and subject to the Council's consent, an outbuilding used solely for the housing of motor vehicles may be erected on such side and/or rear boundary and any other outbuilding of the same height may be erected on the rear and/or side boundary for a distance of 11 metres measured from the rear boundary of the site."

   Council can thus allow an outbuilding right onto the boundary which would have affected the applicant more than the current proposal.

The above is a summary of the points raised and must not be seen as the complete list of comments there are or may be. It is regretted that the officials who compiled the report to the Executive Mayor did not raise any of the above, and then continued to defend the illegalities on erf 5282 at the Appeal Committee.

I appeal to the Municipality to now start doing its legal duty by enforcing its legislation. Your reaction in this regard will be appreciated.

Evaluation

The evaluation hereafter must be read together with the item which served before the Executive Mayor, attached per Addendum AA attached to Annexure A.

However this evaluation will serve to give more clarity and consideration of the application and comments received from the appellant/objector.

An application has been received on 13 August 2013 from Mr J van der Post on Erf 5282, Hermanus for a departure from the Scheme Regulations in order to:

- change the use of the existing outbuilding (granny flat) to residential;
- relax the western lateral building line from 2,5m to 1,430m to accommodate the new additions;
- relax the eastern lateral building line from 3,5m to 2m to accommodate the garage, servants quarters and store room and
- relax the relevant 6m aggregate for lateral buildings lines to 3,43m.
- change of use of existing outbuildings (granny flat) to residential.

The flat or second dwelling is existing and was approved in 1987. It is located 1,2m from the northern rear boundary and 1,43m from the western boundary. It is a double storey with a roof height of 7m above ground level.

The application is to link the previous dwelling with the structure and to make it part of the main dwelling. The use will stay residential however two dwellings will now only be made one.

Relax the western lateral building line from 2,5m to 1,430m to accommodate the new additions

This relaxation applied for is to allow the applicant to extend the existing single storey main structure and to incorporate it into the new structure. This deviation is located to the south of the existing structure on the northern boundary and on the same western line of 1,430m from the boundary.

The additions for which the departure is applied for will be lower than the existing structure on the northern boundary. Thus the departure will not be visible from the erf of the objector.

To relax the eastern building line from 3,5m to 2m to accommodate a garage and store room

The proposed structure is single storey at a height of 3,74m.

"(b) (i) Notwithstanding the building lines mentioned in sub-paragraph (a) above, and subject to the Council's consent, an outbuilding used solely for the housing of motor vehicles may be erected on such side and/or rear boundary and any other outbuilding of the same height may be erected on the rear and/or

side boundary for a distance of 11 metres measured from the rear boundary of the site."

The proposed departure will have a minor effect on the objector's/appellant's property as the building is only single storey and buildings to the south of the erf are single and double storey. There are also trees standing higher than the proposed building in the lateral and rear area. Thus, the proposed departure will have very little to no impact.

To relax the relevant 6m aggregate lateral building line to 3,43m

The departure to allow an outbuilding 2m from the eastern boundary has been discussed above.

The western boundary currently with the existing building on the north western boundary is already 1,43m. The addition for which the departure is now required is located to the south of the existing building and is lower than the existing roof.

The departure will thus add no additional impact on the objector/appellant's property.

Letter from Adv Koekemoer (Attached per Annexure A26 and 27)

The condition set will be discussed in the same order as stated in the objector/appellant letter.

1. ***"Die terugtrekking van my beswaar beteken nie dat ek aanvaar dat die goedkeuring van die oprigting van die struktuur aan die noordekant van die erf reëlmatig plaasgevind het nie."***

Noted.

2. ***"Aangesien die uitsig vanaf my erf 3838 totaal deur die strukture op erf 5282 versper word weens die oorskrydings van die normale boulyne van toepassing op 'n gewone erf in Voëlklip sowel as die struktuur in 1. vermeld, is dit vir my van kardinale belang dat dit as voorwaarde gestel word deur die Munisipaliteit dat enige struktuur wat opgerig word aan die oostekant van erf 5282 beperk sal word tot een verdieping."***

The views from Erf 3838 would any way have been impacted upon. One must acknowledge that Erf 5282 before consolidation existed of two erven which could have been developed with double storey buildings. The slope between the erven is also of such nature that even if a building was set back 3m from the rear boundary that a double storey building would have obstructed the view from the objector/appellant's property being Erf 3838. Further, even with the

consolidation of the two erven to form Erf 5282, the minimum lateral boundary would have been 3,5m. The building currently stands away 1,43m.

Erven 6324 (south west), Erf 3815 (south west) and Erf 3805 (south east) are erven developed with double storey dwellings 1,2m from the lateral building boundaries. Thus even if erf 5282 was developed 2,5m away from the boundary the objector/appellants' view corridor is already impaired by the buildings on the mentioned erven. Taking cognisance that there also are numerous tall trees in the view corridor further obstructs any view which the appellant would have enjoyed.

Thus to make the statement that the development on Erf 5282 totally obstructs the view from Erf 3838 of the objector is exaggerated.

Further, to propose that a condition be laid down to restrict any building to be built on the eastern section of Erf 5282 because of the so called obstruction of the view from erf 3838, does not make sense. Further it seems that the objector want to obtain a right that in circumstances he would not have been entitled to.

3. ***"Behalwe soos in 1. Uiteengesit, moet die vensters op die boonste verdieping van die struktuur in 1. Vermeld vervang word met vensters wat nie laer as 1.93 mter van die vloer* op die tweede verdieping is nie, behalwe die vesnters soo in 4. Hieronder aangedui."**

The objector further proposes a condition that the windows in the structure on the western side be at least 1,93m in height. Firstly this would be very impractical from opening and cleaning of windows. Secondly if this condition is to provide privacy for the objector, a building 3m away from the boundary would not have given him more privacy anyhow.

The rooms where the windows are to be provided from are two bedrooms and a playroom, making it even more impractical to locate the windows 1,93m from the floor.

As the bedroom on the north western corner has a window on the western side, one can possibly state that the window on the northern side be placed 1,13m from the ground.

The playroom window will be discussed under point 4.

4. ***"'n Venster van 700mm breed mag egter aangebring word op die boonste verdieping van struktuur in 1. vermeld, welke venster nie verder as 400mm van die oostelike hoek van die struktuur mag wees nie."***

The objector/appellant proposes a window more than 700mm wide be placed not further than 400mm from the north eastern corner of the building. The playroom does have a door on the eastern side and windows on the southern wall. Thus ample light and circulation is available. It can be recommended that the window be moved and that it is to not exceed 1m as measured from the north eastern corner.

5. ***"Die noordekant van die struktuur, spesifiek die gedeelte bokant die muur van die motorhuis op my erf, moet geverf word met 'n aanvaarbare nie-glans (matt) verf en nie 'n helder kleur nie weens die weerkaatsing van sonlig in my woning."***

The proposal that the walls of the building on the northern boundary be painted with a non-reflective, non-bright colour can be seen as a reasonable request, although even if a building had stood back 3m from the rear boundary, the reflection experienced by the appellant would have been quite similar.

6. ***"Voordat die bouwerk 'n aanvang neem moet die boom wat die telefoondraad belemmer op die agterste grens van die oostekant van erf 5282 verwyder word of afgesny word tot 'n hoogte van 5 meter en op daardie hoogte gehou word. Insgelyks moet die ander boom aan dieselfde kant gesnoei word sodat dit nie hoër is as die gebou op die erf daarnaas nie aangesien dit die beperkte see-uitsig wat ek oor die oostekant van erf 5282 het, versper. Die boom moet op daardie hoogte gehou word."***

The appellant proposes that the trees on the eastern side and which interfere with the telephone lines and the other trees impairing the objector / appellant's views, either be removed or trimmed to 5 meter in height and be kept at that height. The other trees should be pruned to a height that is not higher than the building adjoining.

Although this may provide the appellant with a sight line, this could be temporary as the building on erf 667 is part double part single storey. However, the section being double storey is directly in the sightline if the appellant's property.

Again it is believed that the appellant is trying to acquire a right to a view that in normal circumstances he would not have had anyway.

7. ***"Voormelde voorwaardes moet aangebring word op, of gehou word by, die bouplan en sal afdwingbaar wees teen enige nuwe eienaar."***

Lastly, it is recommended by the appellant that the conditions that are proposed be endorsed on the building plan and be applicable on the current owner as well as any new owner.

We do not agree that all the conditions as requested by the objector/appellant are reasonable.

Conclusion

The deliberation and recommendation as per the Mayoral Committee Item 6, dated 30 April 2014, remains applicable.

7. Financial Implications

None

8. Staff Implications

None

9. Comments from other Departments, Divisions and Administrations

Engineering Services Department

None

Building Department

Attached as Annexure M

10. Annexures

Annexure A:	Agenda of the Section 62 Appeal Committee dated 2 February 2015
Annexure B:	Record of Decision of the Appeal Committee dated 2 February 2015
Annexure C:	Building Plan No. 62075
Annexure D:	Building Plan No.65009
Annexure E:	Building Plan No. 73233
Annexure F:	Building Plan No.87312
Annexure G:	Building Plan No. 87356
Annexure H:	Building Inspector's letter
Annexure I:	Building Plan No. 92011
Annexure J:	Building Plan No. 95260
Annexure K:	P.N. 1050/1988
Annexure L:	Deed of Transfer 1129/1935
Annexure M:	Building inspector's findings dated 2015
Annexure N:	Undated letter from Adv. J Koekemoer
Annexure O:	Memorandum dated 24 March 2015 from Adv. J Koekemoer

Annexure P: Letter dated 14 May 2015 from Adv. J Koekemoer
Annexure Q: SG Diagram 304/65

RECOMMENDATION:

that the resolution of the Executive Mayor dated 30 April 2014 regarding the proposed departure on Erf 5282, Voëlklip, **be upheld**.

RESPONSIBLE OFFICIAL : H VAN DER STOEP

TARGET DATE FOR IMPLEMENTATION : 9 DECEMBER 2015

TARGET DATE TO INFORM APPLICANT : 9 DECEMBER 2015

TARGET DATE TO INFORM OBJECTORS : 9 DECEMBER 2015

16.
ERF 5282, 258 SIXTH STREET, VOËLKLIP, HERMANUS, OVERSTRAND MUNICIPAL AREA : PROPOSED DEPARTURE : J VAN DER POST

5282 HVK (2398)
R Kuchar **(028) 313 8900** **Hermanus Administration**
2 July 2015

THIS MATTER SERVED BEFORE THE JOINT PORTFOLIO COMMITTEE ON 17 NOVEMBER 2015, WHICH COMMITTEE SUPPORTED THE RECOMMENDATION

RESPONSIBLE OFFICIAL : **H VAN DER STOEP**

TARGET DATE FOR IMPLEMENTATION : **9 DECEMBER 2015**

TARGET DATE TO INFORM APPLICANT : **9 DECEMBER 2015**

TARGET DATE TO INFORM OBJECTORS : **9 DECEMBER 2015**