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MEMORANDUM OF DECISION AND REASONS

9 February 2016

In the appeal in terms of Section 62 of the Local Government : Municipal Systems Act (32 of 200) pertaining to Erf 5282, 258 6th Street, Voëlklip, Overstrand Municipal area : Proposed departure : J van der Post

Introduction

1. The appeal lies against the whole recommendation of the Executive Mayor on 30 April 2014, as contained on page 11 to 12 of the appeal bundle.
2. The grounds of appeal are contained in the numbered paragraph 6 on page 2 of the appeal bundle and will not be repeated herein.

Grounds of appeal

3. The grounds of appeal flow from the notice of appeal bound into the appeal bundle on page 34 to 35. I deal with these grounds of appeal separately later herein.

Determination of the validity of the appeal

4. At the outset, the chairman dealt with certain threshold requirements and also qualified the position of the appeal committee pertaining to whether the appeal is available to noted objectors and/or whether the appeal has the power to pronounce on the procedure as well on the merits.
5. I deal with these issues briefly below.

5.1 Right of appeal to noted objectors

5.1.1 In the matter of City of Cape Town vs Reader,¹ (Hereinafter referred to as the "Reader" case) the court in essence confirmed the judgement of the

¹ The Municipality of City of Cape Town v Reader and Others 2009 (1) SA 555 (SCA)

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court *a quo* who found that Section 62 is not available as an alternative remedy to third parties. The Reader case dealt with the approval of a building plan where no public participation was required. In the matter of Muller NO & Others vs City of Cape Town,² (hereinafter referred to as "Muller vs City of Cape Town"), at paragraph 68 the court said that the adjoining owners, such as Muller should have been afforded an opportunity to object or comment to the building plans as is required by the land use planning ordinance, in that the building exceeds the permissible height as per the zoning scheme regulations. In this instance, the court clearly stated that interested parties must have an opportunity to object to and comment on the plans, therefore a public participation process must be followed where the approval of the proposed building plan will affect the rights of persons aggrieved thereby. Such an aggrieved person will therefore be able to satisfy the threshold requirement of Section 62 that he/she is a person whose rights are affected.

- 5.1.2 The difference between the Reader case and Muller vs City of Cape Town is important, insofar as there is a clear distinction between a decision taken where public participation is not required and one where public participation is required. Where no public participation is required, the only persons to whom the Section 62 appeal seems to be available as an alternative remedy are the applicants and the municipality as they are the parties who are involved in the decision. Where public participation is required an interested and/or affected party who objected to the proposed application and subsequent decision, becomes a party to the decision, and Section 62 therefore becomes available to them as an alternative remedy.³

5.2 The appeal committee's ability to pronounce on the procedure as well as on the merits

2 Muller NO & Others vs City of Cape Town 2006(5)SA415(C) (Hereinafter referred to as "Muller NO v City of Cape Town")

3 A Coetsee : An evaluation of the role and functioning of an appeal authority created in terms of Section 62 of the Local Government : Municipal Systems Act 32 of 2000 at page 3-9 to page 3-11

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5.2.1 The purpose of an appeal is to test the merits of the previous decision, as opposed to review which is aimed at testing the procedure followed, specifically whether it adhered to the constitutional principle of legality. In the instance of an administrative appeal, we find that the lines are not so clearly drawn, as with judicial appeals or judicial review. It is said that administrative appeals have wide powers. This indicates that the functionary in exercising his/her discretion must consider all relevant information and circumstances before coming to a decision. Therefore the functionary must consider all the relevant considerations of a valid administrative act, which include, having knowledge of the powers conferred on such functionary by authoritative legislation, and/or whether a due process was followed. In terms of Section 33(1) of the Constitution 1996, everyone has the right to administrative action which is lawful, reasonable and fair. It is therefore clear that, stated in the negative, unlawful administrative action, constitutes an infringement of rights, which in the ordinary meaning of Section 62 does fulfil the threshold requirement of an infringement of rights.⁴ As such, it is submitted that the appeal tribunal created in terms of Section 62 is a wide appeal,⁵ which may pronounce on the merits as well as on the legality of the decision. It is therefore submitted that the appeal committee in terms of Section 62 of the Systems Act is vested with powers in appeal to pronounce on the merits as well as with powers in review to pronounce on the procedures followed.⁶

5.3 Validity of the appeal

5.3.1 The committee found that the appeal is valid and may proceed. The committee further found that rights have not yet vested and that the

4 See also Bekink B – Principles of South African Local Government Law (2006) Lexis Nexis Durban (Hereinafter referred to as "Bekink (2006)") Page 213 footnote 3.

5 Refer to M5 Developments Cape (Pty) Ltd vs CC Groenewald & Others Cape Provincial Division Case no 6277/08 at paragraph 41 of the judgement by Le Grange J

6 Bekink (2006) at page 213 argues that both the substantive and procedural requirements must be complied with in order for a decision to be lawful

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prescripts of Section 62(3) do not limit the appeal committee in its discretion to consider the appeal, and confirm, vary or revoke the previous decision.

The merits of the appeal

6. The applicant submitted an application for departures to relax certain building lines and to change the use of an existing outbuilding to residential.
7. The aforesaid application was approved by the Executive Mayor on 30 April 2014, subject to certain conditions.
8. The appeal lay against the whole of the aforesaid decision

Grounds of appeal

9. The appellants submitted an appeal within the required 21 day period. His grounds of appeal can be summarized as follows:
 - a) The municipality was prejudiced in evaluating the application.
 - b) The decision was influenced by legal error.
 - c) The procedure to obtain comments was insufficient.
 - d) The decision did not take all relevant factors into consideration.
 - e) The decision did not reflect the facts in this matter.
 - f) The decision was unjust.⁷
 - g) The decision is unconstitutional or unlawful.

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"Die besluit is so onredelik dat geen redelike komitee dit sou neem nie. Dit wil dus voorkom of die komitee nie die aangeleentheid behoorlik oorweeg het nie."

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Arguments raised by the appellant

10. Arguments raised by the appellant in amplification of his grounds for appeal were as follows :

10.1 Background : Building plan approval since 1962

10.1.1 1962 : House building plan approved. Western building line 1.22m (instead of 2m).

10.1.2 1965 : Building plan for servants quarters and carport extension. Back (north) building line (1.5m instead of 3m).

10.1.3 1970 : Building plan for boundary walls approved.

10.1.4 1973 : Building plan : carport changed to playroom. North building line now same as western side : 1.22m. One window on north view.

10.1.5 1987 :

10.1.5.1 Building plan 87312 : double storey : servant's 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.

10.1.5.2 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.

10.1.5.3 North View : One window at ground level, 3 window on first floor.

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- 10.1.5.4 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,
- 10.1.5.5 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 refer to another building plan.
- 10.1.5.6 The building is vastly different today with 3 windows at ground level and 4 at first floor level.
- 10.1.5.7 No plan is on record in response to the notice of non-compliance by building inspector.
- 10.1.5.8 The number of drawing, same area, and date, which is the same on both plans points to irregularity.
- 10.1.5.9 No comments by building control officer in terms of NBRBS Act, 1977,⁸ Section 5.⁹
- 10.1.5.10 There is non-compliance with Section 7(1)(a) of the NBRBS Act as a decision is not on record regarding the relaxation

8 The National Building Regulations and Building Standards Act 103 of 1977 (Hereinafter referred to as "NBRBS")

9 It seems that the reference to Section 5 in the arguments should be a reference to Section 6(1)a. It should further be noted that this section was not amended by NBRBS 35 of 1984.

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of building lines as prescribed by the Town Planning Scheme (TPS) (Clause 8A 1(ii) to (iv)).

- 10.1.5.11 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).
- 10.1.5.11 There is non-compliance with the TPS which restricts outbuildings to single storied structures.
- 10.1.5.12 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.
- 10.1.6 In 1992, there was a building plan to convert the outbuilding to a flat.
- 10.1.6.1 There is no approval of the plan on record that could be supplied to the appellant as per its arguments.
- 10.1.6.2 The plan that was submitted differs from the existing building
- 10.1.6.3 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.

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- 10.2 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.¹⁰ 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 than 120m² and the building is more than one storey.
- 10.3 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.
- 10.4 The arguments went further to say that :
- 10.4.1 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.
- 10.4.2 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.
- 10.5 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

¹⁰ See also the appellants remarks in respect of 1987 building plan above.

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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.

- 10.6 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.
- 10.7 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.
- 10.8 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.¹¹

11 See clause 3.3 of the TPS

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10.9 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".

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

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

11.1.1 Legislation that is not applicable to the application was taken into account in making the decision.¹²

11.1.2 It was wrongly assumed that if the new town planning scheme was taken into account, certain decisions were possible but :¹³

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

11.1.2.2 Title deed restrictions still remain.

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

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

11.1.3 There was no interaction with the objector regarding a possible agreement with the applicant. A draft letter, sent for 'without prejudice' negotiations,

¹² See references to the new town planning scheme which is irrelevant.

¹³ This indicates that there is an error in law.

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where the applicant was used which was not sent by the applicant to the municipality.¹⁴

- 11.1.4 The conditions were wrongly summarised and dismissed outright without reasons by the Town Planner, whereas the applicant regarded only one condition as not warranted.¹⁵
- 11.1.5 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.¹⁶
- 11.1.6 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.
- 11.1.7 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.
- 11.1.8 The rights of the appellant were ignored in granting non primary rights to the applicant as the view of the appellant on Erf 3840 (unbuilt Erf), being affected by the relaxation of the building line on the eastern side of Erf 5282.
- 11.1.9 The comments of the manager : building in the report that served before the Executive Mayor makes no sense.
- 11.1.10 The comments of the Ward Councillor is vague and is also capable to be interpreted that she was against the application.

14 Therefore it is argued that the process was flawed.

15 This indicates that the municipality was prejudiced against the appellant.

16 This refers to irrelevant matter considered by the Executive Mayor.

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11.1.11 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 case of the respondent

12. The municipality being the respondent in the matter was represented herein by the Town Planner, Schalk van der Merwe, who confirmed at the outset that he was not the author of the report that served before the Executive Mayor and that he therefore cannot accept any responsibility for the contents of the report.
13. It seems that the main argument raised by the respondent was that he cannot answer to the arguments raised by the appellant, as Section 62(1), determines that the Appellant must provide full reasons in his notice of appeal, supporting his grounds of appeal and In that, the appellant in this instance did not do so, he now finds himself in a position of embarrassment and is not prepared to attack any of the arguments raised by the appellant.

Evaluation

14. As there are no counter arguments before the committee to weigh up against the arguments raised by the appellant, the arguments of the appellant must be accepted by the committee as the truth, unless the arguments of the appellant is so non sensical or misguided that it can be dismissed out of hand.¹⁷
15. The arguments which therefore must be supported in favour of the appellant,¹⁸ is that :
 - 15.1 The municipality was prejudiced in evaluating the application.
 - 15.2 The decision was influenced by legal error.
 - 15.3 The procedure to obtain comments was insufficient.

¹⁷ See the matter of Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

¹⁸ Whether the arguments are right or wrong.

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- 15.4 The decision did not take all relevant factors into consideration.
- 15.5 The decision did not reflect all the facts in the matter.
- 15.6 The decision was unjust, in that the Executive Mayor could not apply her mind.
- 15.7 The decision is unconstitutional and/or unlawful.
16. With regards to the objection raised by the respondent that the notice of appeal was not accompanied by full reasons, and as such it could not be expected from the respondent to answer to the arguments raised by the appellant.
- 16.1 The giving of reasons is a fundamental requirement because these reasons form the basis of the appellants grievance. In other words, these reasons constitute the grounds for appeal, upon which the appellant relies to prove his or her case. Without these reasons, it would be impossible for the respondent (municipality) as the other party to the appeal, to know what the case is they have to meet.
- 16.2 It is submitted that these reasons should also satisfy the threshold requirements of Section 62(1) in order to indicate that the grievance of the appellant is indeed indicative that an existing right of the appellant would be adversely affected, should the previous decision be allowed to stand.
- 16.3 It must be noted, however, that in administrative appeals, the appellant is not confined to the ground set out in his/her notice of appeal. These grounds maybe supplemented during the hearing of the appeal.¹⁹

¹⁹ See in this regard *Groenewald N.O. and Others vs M5 Developments 2010 (5) SA 82 (SCA)* (Hereinafter referred to as "*Groenewald v M5*") at, paragraph, 83 to 84. "There is no reason to think that an administrative appeal is to be treated in the same way as an appeal against a decision by a magistrate or a judge. Indeed, it would be anomalous to do so, for the appellant in most cases would be a lay person rather than a trained lawyer, and it would be fundamentally unfair to require such a person that he or she set out the appeal grounds exhaustively and precisely, with the penalty of no further grounds being considered being imposed on him or her ..."

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- 16.4 The giving of reasons does not require more from the appellant than to allege that specific existing rights were adversely affected by the previous decision, and that the appellant is indeed an interested and/or affected person in the context of Section 62. The allegations, however, becomes the burden that the appellant must prove during the hearing of the appeal, and as such, it should be carefully stated in precise terms, so as not to create an insurmountable object for the appellant during the hearing of the appeal. In other words, should the reasons be stated loosely, and in general terms, the appellant may find that it might become impossible to convince the appeal authority during the hearings stage, that his/her rights were adversely affected by the previous decision and that the appeal should succeed.²⁰
- 16.5 The court found in *Groenewald v M5* that the ambit of the appeal is limited to the extent that the appeal authority may only evaluate whether the appellant is entitled to succeed in his/her/its appeal, for the reasons it has provided to the appeal authority.
- 16.6 It is submitted, that if the appellant fails to provide reasons in his/her notice of appeal, it will not disqualify the appeal. The obligation to provide reasons must be regarded as a component of a fair procedure, to allow the municipality to know, early in the process, exactly what the reasons for the appellant's grievances are. If the appellant fails to provide reasons, then the municipality must request the reasons and proceed with the appeal. The appellant will stand or fall by the reasons so advanced to the appeal authority, especially if the appeal is determined on the documents instead of allowing the appellant to present oral arguments. In the latter instance, the reasons may be amplified during oral argument.²¹
- 16.7 It is submitted therefore that the embarrassment that the respondent found itself in, in this instance was a self created embarrassment that could easily have been cured if the municipality requested the appellant to amplify its reasons prior to closing the

20 *Groenewald v M5*, at paragraph 24

21 A Coëtsee : An evaluation of the role and functioning of an appeal authority created in terms of Section 62 of the Local Government Municipal Systems Act 32 of 2000 at page 3 - 26 to page 3 - 28 (par. 3.2.2.6)

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documents for the appeal hearing. In light of the aforesaid, the contention of the respondent is not supported by the committee.

The committee's finding

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 is 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.
19. The committee furthermore found in that the appellant was successful in his appeal, that his deposit be repaid.

DATED at HERMANUS on this 9th day of FEBRUARY 2015

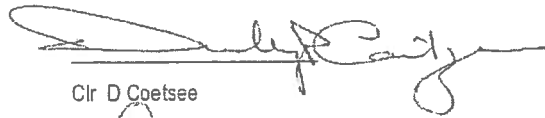
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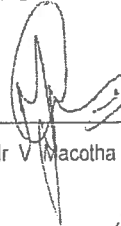
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(Chairperson)



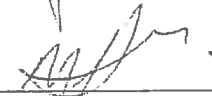
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