



Republic of South Africa

In the High Court of South Africa
Western Cape High Court, Cape Town

In the matter between:

Case No: 4841/2010

The Trustees for the Time being of the
Triple Eight Trust No. T2645/2004
Patrick Christopher George Morton
Tweed Heads Prop Investments (Pty)Ltd
DLX Properties (Pty) Ltd
Allen Targhi Tavakoli
Tailorbird (Pty)Ltd
Ruth Friedman
Berenice Wolman
Steven Jossel
The Trustees for the Time Being of
The Barfin Trust
Michael Coles

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant
Seventh Applicant
Eight Applicant
Ninth Applicant

Tenth Applicant
Eleventh Applicant

And

Midnight Feast Properties 24 (PTY)
Juan Pera
Rene Pera
Gilda Vernier
John Anthony Vernier
The City of Cape Town
ECO Ventures Property Development

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent

Judgment delivered: 23 September 2010

Louw J

[1] In this application for judicial review the applicants seek the review and setting aside of building approval granted on 27 July 2009 under plan number 00650/2009 by the City of Cape Town ('the City') in terms of section 7 (1) of the National Building Regulations and Building Standards Act, 103 of 1977 ('the NBR Act') in respect of a block of 39 sectional title flats consisting of 7 storeys plus one basement parking garage, to be erected on erven 417, 418, 419, 657, 712 and 799 situated on the corner of Queens Road and Kloof Road Bantry Bay ('the subject properties').

[2] The first respondent purchased the subject properties which make up three adjoining properties (erven 417, 418, 419 and 657 constitute one property). Save for erf 712 of which it is the owner, the first respondent has not yet taken transfer of the other erven of which the second to fifth respondents are the registered owners. The first respondent is in the process of consolidating the subject properties into one property which will then be 2603m² in extent. The Surveyor General has approved a diagram for the consolidated properties but the consolidation has not yet been registered.

[3] At present there are improvements on the subject properties but neither the demolition of the existing structures nor the building works in respect of the development have at present commenced.

[4] Once erected, the building will be in excess of 20 metres in height and because it is to be erected on a consolidated piece of land, the setbacks from the erstwhile internal common boundaries between the separate erven will no

longer apply resulting in a solid wall stretching for 60 meters from East to West along and below Kloof Road. It will dominate its surroundings in the manner depicted on 'Annexure 'LF7'. The applicants contend that this will constitute an overbearing development of an inappropriate nature.

[5] This application was launched on 10 March 2010, initially for urgent interim relief pending the outcome of the review. On 12 May 2010 an order was made by agreement setting the matter down for hearing on 19 August 2010 and recording an undertaking by the first respondent not to commence construction of its development pending the hearing of the application.

[6] The City is the sixth respondent and abides the decision of the court. Eco Venture Property Development (Pty) Ltd is cited as the seventh respondent on the basis that the applicants believed it to be the developer of the project. Since the first respondent has stated that it is the developer, no relief is sought against the seventh respondent who does not oppose the relief sought.

[7] The applicants are the owners of properties in the neighbourhood of the proposed development and the majority of them have their permanent homes at these properties. Their standing to bring the application is not in dispute.

[8] The subject properties are subject to the Zoning Scheme Regulations of the Municipality of the City of Cape Town Zoning Scheme, (the scheme

regulations), as published in Provincial Gazette 4649 dated 29 June 1980, corrected by Provincial Gazette 4684 of 1 March 1991 and amended by annexure "A2" to Provincial Notices 134 in Provincial Gazette 6438 of 18 May 2007.

[9] The subject properties have been zoned General Residential Use, sub-zone R4, permitting the construction of a building with 7 storeys together with basement storey/s. Once consolidated, the consolidated property will remain subject to the scheme regulations and continue to be zoned General Residential Use sub-zone R4.

[10] The applicants, who are represented by Mr. Bremridge attack the approval of the plans on a broad front. In outline, the applicants contend that:

1. The plans are unlawful in that it contravenes the NBR Act and other applicable laws namely, the scheme regulations and section 17 of the Roads Ordinance, 19 of 1976;
2. The City's officials failed to apply their minds to the precepts of section 7 (1)(b)(ii) of the NBR Act by failing to undertake a proper sensitivity assessment and by failing to find that the negative factors listed in the section obtained;
3. The building control officer ('the BCO'), in this case Mr Moir, failed to make a proper recommendation as required by section 6 (1) of the NBR Act and failed to provide the decision maker, in this case Mr Theron, with sufficient information and in effect

usurped the authority to make the decision under section 7 of the NBR Act.

[11] The relevant provisions of the NBR Act are section 4 (1), section 6 and section 7 (1). The relevant portions read as follows:

"4 (1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act".

6 Functions of building control officers

(1) A building control officer shall-

- (a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4 (3);
- (b) ensure that any instruction given in terms of this Act by the local authority in question be carried out;
- (c) inspect the erection of a building, and any activities or matters connected therewith, in respect of which approval referred to in section 4 (1) was granted;
- (d) report to the local authority in question, regarding non-compliance with any condition on which approval referred to in section 4(1) was granted.

2) When a fire protection plan is required in terms of this Act by the local authority, the building control officer concerned shall incorporate in his recommendations referred to in subsection (1) (a) a report of the person designated as the chief fire officer by such local authority, or of any other person to whom such duty has been assigned by such chief fire officer, and if such building control officer has also been designated as the chief fire officer concerned, he himself shall so report in such recommendations.

(3) ...

(4) ...

7 (1) If a local authority, having considered a recommendation referred to in section 6 (1)(a)-

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i) is not so satisfied; or

(ii) is satisfied that the building to which the application in question relates –

(aa) is to be erected in such manner or will be of such nature or appearance that-

- (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
 - (bbb) it will probably or in fact be unsightly or objectionable;
 - (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;
- (bb) will probably or in fact be dangerous to life or property, such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal:

Provided ..."

[12] The interpretation of these sections was considered by the Constitutional Court in the matter of Walele v City of Cape Town and Others 2008 (6) SA 129 (CC). In True Motives 84 (Pty) Ltd v Mahdi and Another 2009 (4) SA 153 (SCA), the majority, Japhta JA as he then was dissenting, held that the Constitutional Court was wrong as to its interpretation of section 7(1)(b)(ii) of the Act but that the Constitutional Court's finding on this issue was obiter. Counsel on both sides accepted in argument that this court is bound by the SCA's interpretation of section 7 (1)(b)(ii).

[13] It is common cause and trite that the scheme regulations constitute an instance of 'applicable law' under section 7 (1)(a) of the NBR Act and that the

respondents' application for plan approval must comply with the scheme regulations.

[14] The applicants contend that the approved plans provide for a building which contravenes the following provisions of the scheme regulations:

1. Section 30, which restricts the coverage for a building on the subject properties to 50%;
2. Section 60, which imposes certain building lines and set-backs;
3. Section 75 which prohibits the erection of a building on the subject properties if any portion of the street boundary is less than 8 metres from the central line of the street.

[15] The respondents who are represented by Mr. Rosenberg and with him, Mr. Baguley, submitted that:

1. the City properly exercised its discretion to approve the first respondent's plans as they comply with both the provisions of the NBR Act itself as well as other applicable law in that:
 1. the ceiling of the basement level is below ground level as defined by the scheme regulations and accordingly, the basement is exempted from the calculation of coverage so that the coverage permitted by the scheme regulations is not exceeded;

2. the basement level of the development is wholly below the ground level as defined by the scheme regulations and accordingly, no set-backs are required at the basement level;
3. the City has relaxed the set-back required on the Queens Road boundary so that the boundary there is correctly set-back;
4. the roads authority has relaxed the set-back required on the Kloof Road provincial road so that the basement and ground floor on the Kloof Road side are correctly set back.

2. The City's decision maker properly applied his mind to the precepts of section 7 (1)(b)(ii) and was not satisfied that the development will probably disfigure the area in which it is to be erected, will probably be unsightly or objectionable and will probably derogate from the value of adjoining or neighbouring properties.

[16] In my view, this application can be decided on the basis of the objections to the approval based on the coverage and setback restrictions, both of which turn on whether the basement parking garage must be excluded from consideration. The meaning of 'ground level', as defined in section 2 of the scheme regulations when applied to the basement parking garage is relevant to:

1. The coverage restrictions in sections 30 and 31 (2) of the scheme regulations, since storeys of buildings, 'the ceilings of which are below ground level', are in terms of section 36(a) to

be disregarded in the calculations to determine the coverage restrictions; and

2. The setback provisions in section 60 of the scheme regulations do not apply to a storey which is 'wholly below the ground level'.

Coverage

[17] The applicants contend that part of the ceiling of the basement parking garage is above the ground level and that the basement parking garage as a whole is therefore a storey of the building that must be included in the calculation of actual coverage. The respondents contend that only that part of the basement, the ceiling of which is not below ground level, is to be included in the calculation. It is common cause, however, that if the whole of the basement parking garage is included, the building as approved exceeds the 50% coverage allowed by the scheme regulations.

[18] Under section 31 (2) of the scheme regulations the permissible 'actual coverage' for the building on the subject properties is 50%. This means that the building may not cover more than 50% of the area of the subject properties.

[19] 'Actual coverage in relation to a building' is defined in section 2 to mean

'the area which is covered by such building calculated in the manner hereafter prescribed'

[20] Under section 35 (1) 'actual coverage' includes the area covered by all parts of the building on the subject property but section 36 provides that:

'The areas covered by the following buildings or portions of buildings shall be disregarded in the calculation of Actual Coverage:

- (a) Buildings or storeys of buildings the ceilings of which are below ground level
- (b) ...
- (c) ...
- (d) ...'

[21] I agree with the applicants' contention that the basement is a storey of the building for purposes of section 35 (1)(a) and that if part of the ceiling of the basement is not below ground level, the whole of the basement (the storey) must be included in the calculation.

Setback

[22] It is common cause that in terms of Section 60 of the scheme regulations the ground storey of the building in this case must, in accordance with the relevant calculations under that section, be set back 8,165m from the

street and common boundaries with adjoining properties. The approved plans reflect that from level 1 upwards, the building is properly set back the required 8,165metres. The basement parking garage is, however, not so set back and it is common cause that if the setback requirements are applicable to the basement parking garage, the building will, if constructed in accordance with the approved plan infringe upon the setback requirements.

[23] The applicants contend that the setback requirements do apply to the basement while the respondents contend that the restrictions do not so apply.

[24] Section 60 (6) of the Scheme regulations provides:

60 (6) Every storey below ground storey, other than a storey wholly below the ground level, shall for purposes of this section be deemed to be the ground storey.

[25] It follows that unless the basement is 'wholly below the ground level' it shall be deemed to be the ground storey and will be subject to the setback requirement of 8,165metres.

The meaning of 'ground level'.

[26] The current definition of 'ground level' in section 2 of the scheme regulations was introduced by way of an amendment on 18 May 2007 and reads as follows:

"ground level", in relation to a building means the existing level of the surface of the finished ground level surrounding and immediately abutting the building as determined by reference to data in Council's records or by a Land Surveyor's certificate or, alternatively, through interpretation of such data or by another method as determined by Council. (In case of a dispute, Council's opinion shall prevail)'.

[27] At the same time, Section 11 of the scheme regulations was introduced on 18 May 2007. It reads as follows:

Raising the ground level

'Any unsupported earthbanks, soil retaining structure, column, suspended floor or any other device which exceeds 2.1m in height or enables a ground floor or platform to be more than 2.1m in height above the existing ground level shall require the Council's consent. Where a series or number of such structures are used to achieve a raised floor or platform, these shall require Council's consent where the cumulative height of these structures or devices exceeds 2.1m when measured horizontally over a distance of 3m or less'.

[28] In essence the dispute between the parties is that the applicants contend that 'ground level' refers to an historical existing level, that is to the level of the ground as it exists at the time plan approval is being considered. The respondents contend, on the other hand, that 'ground level' refers to the

level as it will exist once the building or other structures or devices have been constructed in accordance with plans for which approval is being sought.

[29] Prior to the amendment on 18 May 2007, the definition read as follows:

"ground level', in relation to a building, means the finished level of the surface of the ground surrounding and immediately adjoining the building when erected'.

[30] The meaning of ground level under the previous definition clearly referred to the position as it will be once the building is erected. This is common cause. The respondents contend that the new definition has not brought about any change in this regard.

[31] The applicants emphasise that the definition refers to '... the existing level of the surface of the finished ground level'. The definition recognises, so it is contended, that a person wishing to develop a property may find that the property had previously been developed. The person seeking to further develop and build on such property is then not restricted to taking the measurements from some pre-existing natural ground level which may be difficult or impossible to determine. The developer must, for plan approval, work with the then existing and finished ground level as it is at the time plan approval is being sought, that is, as it was before commencement of construction. This meaning of ground level, it is contended, accords not only with the plain meaning of the words, that is, the existing ground level, though

it may previously have been finished, but it also accords with the methods prescribed in the definition itself for determining the ground level. The definition provides that ground level shall be determined:

1. by reference to data in City's records; or
2. by a Land Surveyor's certificate, or alternatively;
3. through interpolation of such data or by another method as determined by the City.

These methods, it is contended on behalf of the applicants can only have application to the determination of an historically existing ground level at the time plan approval is being sought.

[32] The respondents contend that the definition of ground level must be read in conjunction with section 11 which was introduced at the same time. They contend that the purpose of introducing section 11 was clearly to prevent vertical retaining walls of excessive height or pillars holding up ground floors at heights of say 10 or 20 metres above ground level. A system allowing the raising of such structures or devices incrementally by up to 2.1m every 3 metres was therefore introduced to allow ground levels to be raised in a sensitive manner instead of in a vertical manner. The provision requiring the determination of the ground level with reference to the records of the City or a land surveyor's certificate were inserted, so it is contended, in order to ascertain the ground level before it is increased in terms of section 11. Such determination is necessary because section 11 requires the City's consent for

any increase above 2,1 metres. The respondents therefore contend the 'ground level' as defined is the finished level of the ground once the building works as set out in the plan, are complete and not the level of the ground at the time approval is being sought, that is as it existed prior to the commencement of the project.

[33] The respondents consequently contend, that section 11 allows a developer to raise the ground level by 2.1m every 3 metres as of right and that measurements from 'ground level' as defined must then be taken from the top of the device or structure by which the level has been raised (or the uppermost of such device or structure in series) rather than from the level before it was raised.

[34] The approved plan makes provision for a soil retaining wall structure on two down slope sides of the building. The plan TBI illustrates the effect of the containing wall and fill. The respondents' case is that if the building is constructed in accordance with the approved plan it will be surrounded by the retaining wall structure on the down slope sides, and that through the use of this device, the ground level will have been increased from the ground level as it exists at present on the down slope sides, by 2,1 metres. This increase will, it is contended, result in the basement being wholly below the 'ground level' as defined in section 2 of the scheme regulations, since the retaining wall and the fill it retains abutting the building on the plan TB1 will have occurred within the parameters determined by the scheme regulations. From this it follows, it is contended, that the basement as shown on the approved

plan is situate wholly below the ground level, being the finished level of the earth immediately abutting the building.

[35] Mr Moir, who was the BCO on this project, was employed in various capacities by the City since 1974. He moved to the City's Building Survey Department in 1981 as a plans examiner. In 1990 he was appointed Principal Building Control Officer ('the BCO'). He retired in 2008 but was thereafter employed on a contract basis by the City as its BCO until March 2008. He has for 30 years examined plans submitted to the City and during his 12 years as BCO he considered thousands of plans. Mr Moir's evidence regarding the manner in which the City interpreted and applied the definition of 'ground level' is as follows:

"22. At all material times since the amendments to the zoning scheme on 18 May 2007 (including a change in the definition of '*ground level*') the City has interpreted ground level to mean the *finished* level of the ground and not the pre-existing level of the ground.

23. The City's interpretation of '*finished ground level*' has been the level of the ground surrounding the building as at 17 May 2007 (the day before the so-called '*critical amendments*') with reference to the City's records as lawfully increased in terms of section 11 of the zoning scheme regulations.

24. The City consistently interpreted and applied this construction of the applicable provisions of the zoning scheme from the date of the amendments of 18 May 2007 until relatively recently.
25. On the basis of what was settled practice, plans were regularly prepared and approved, providing for (within the limits allowed by the zoning scheme regulations) a change of ground level to enable the inclusion of a basement in developments along the Atlantic Seaboard and elsewhere.
26. When I considered the first respondent's basement, I was satisfied that it complied with the definition of a basement and that it was wholly below the ground level. I still hold that view unequivocally.
27. Section 11 of the zoning scheme regulations permits an applicant to raise the level of the ground by up to 2.1m without the consent of the City. The first respondent has done precisely this by erecting a retaining wall at 2.1m. There is no doubt that this legitimate and legislatively sanctioned device effectively raises the ground level and renders the basement wholly below ground level.
28. Furthermore, I confirm that section 11 of the scheme regulations permits the raising of ground level by 2.1m every 3m. Mr

Brümmer's depiction of the consequence of this on "TB 1" of his answering affidavit ('GK 2' to Mr Klotz' affidavit) is correct.

29. Recently the City has made a number of decisions based on a different interpretation of '*ground level*' namely that this means the pre-existing unfinished level of the ground. I know that the City also employs the finished ground level approach too with the result that its approach is no longer consistent.

30. In my view the correct approach is the approach adopted in the present matter."

[36] There is a dispute whether, even on the respondents' version of the increase of ground level by the retaining structure, the basement will be wholly below ground level. The applicants contend that even on the respondents' version, the structure itself does not render the basement wholly below ground level because parts of the basement ceiling is above the 2,1m height of the retaining wall. If the increase is taken to the top of the soil piled behind the retaining wall, as the respondents contend, then the increase in height is 2,8m which is above the 2,1m allowed by section 11 of the scheme regulations and requires the City's consent which, it is common cause has not been obtained. Mr Rosenberg submitted that the excess of 700mm should be ignored as *de minimis*. In view of the conclusion to which I have come, it is not necessary to consider this dispute.

[37] The current definition of 'ground level' was introduced when the scheme regulations were amended on 18 May 2007. At the same time a new section 11 was inserted into scheme regulations. These new provisions, whether read together or on their own, are confusing, obscure and uncertain. 'Ground level' is defined in Section 2 as being both the existing and finished 'ground level'. Section 11 is headed 'Raising the ground level', but the body of the section does not in terms deal with the raising of the ground level itself.

[38] The surveyor, Mr Tony Vroom made calculations of the ground level on the subject properties which show, on the applicants' interpretation of 'ground level' namely ground level, though finished, as it existed at the time of plan approval, prior to the commencement of works, that the parking garage is not 'wholly below' that ground level and that the ceiling level of the parking garage is, in certain areas, above that ground level. His evidence is not disputed. It is therefore common cause that if the applicants' contention that ground level means the level of the ground as it exists at the time plan approval is sought, the basement is not wholly below ground level and that part of the ceiling of that the basement is above ground level and that the approved plan offends against the setback and coverage provisions of the scheme regulations and that plans should not have been approved.

[39] Counsel on both sides presented full argument on the meaning to be given to the current definition of 'ground level'. However, given the particular facts of this case, I am not satisfied that the difficult issue of the meaning to be

given to 'ground level' as it is currently defined has been fully addressed in all its possible implications.

[40] The case can in my view be decided, however, without making a choice between the two interpretations of the meaning of 'ground level'.

[41] I will accept in the respondents' favour (without deciding) that the level of the ground may legitimately be raised to constitute a new 'ground level', that is that the respondents' interpretation of the definition is correct and that the 'ground level' must be determined at the level of the ground at which it will stand upon completion of the works.

[42] Assuming that section 11 does provide for the ground level to be raised, this is not the only purpose to which the works and devices mentioned in section 11 can be put. The mere construction under section 11 of an *unsupported earthbank, soil retaining structure, column, suspended floor or any other device enabling a ground floor or platform to be raised*, does not *per se* entail a raising of the level of the ground. The execution of such works may or may not result in the *de facto* raising of the level of the ground.

[43] The first question is therefore whether the retaining wall and soil fill will, once constructed, in fact result in an increase in the level of the ground. Only once it is found that the level of the ground will in fact be raised, the next question will arise, namely, whether the new level constitutes 'ground level' as defined in section 2 of the scheme regulations.

[44] The Concise Oxford Dictionary (10th Revised Edition, 2002), gives the following meaning to key words in the definition of ground level: Ground, 'the solid surface of the earth'; Level, 'a horizontal plane or line with respect to the distance above or below a given point'; Surface, 'the outside part or uppermost layer of something'; To finish, to 'complete the manufacture or decoration of (something) by giving it an attractive surface appearance' and 'the manner in which a manufactured article is finished; the surface appearance of a manufactured article'.

[45] The plain meaning of the words used in the definition of ground level indicates that it is the uppermost layer (surface) of the solid surface of the earth (ground) which may be above or below (the level) of a given point and which has been completed (finished) by giving it a surface appearance. The respondents contend that the retaining wall structure will result in the level of the ground being raised from the existing level to a new level which will then constitute 'ground level' as defined. For the top of the fill behind the retaining wall to constitute the new raised 'surface of the finished ground level' logically requires it to have a real connection to the existing ground, that is, to the solid surface of the earth before it was raised.

[46] In my view, the respondents' case falls down at the first question posed above in par [43]. The top of the soil retained by the retaining wall structure in this case cannot, in my view, once it is constructed, properly and realistically be said to be the surface, that is, the uppermost layer of the ground in the sense of the 'solid surface of the earth'. It will, once constructed, be no more

than the upper surface of a band of soil, in part 2,9 metres wide, which is retained by the wall which encloses the basement on the North Eastern (Queens road) and North Western (common boundary sides of the building). This band of soil will have no real connection with the existing ground level and cannot realistically be called the new level of the ground. In addition the retaining structure (wall) and soil contained behind it, will in my view, in fact be a part of the building itself. It will not only contain the soil but will also in part, constitute the structure of the entrance and exit to the basement, albeit with a planter filled with soil which is to be placed over the gaps in the wall forming the entrance and the exit. It will also contain structures such as the council electric meter room. The 'ground level' will in my view, not be raised at all by the retaining wall structure. The 'ground level' will still be where it is at present. Once the building is completed, the *'ground level surrounding and immediately abutting the building'* will be at the surface of the ground where it abuts the outside of the retaining wall.

[47] This is not to say that the level of the ground cannot be raised by means of a device such as a retaining wall. However, in this case, all that will occur is that a relatively narrow band (given the dimensions of the project as a whole) of soil will be placed around a large part of the building. On the facts of this case, the ground level on the down slope sides of the building will not be raised at all.

[48] It follows that, assuming (without deciding) the respondents to be correct in their interpretation of the definition in section 2 read with section 11,

the surface of the ground will not be raised if the building should be erected in accordance with the approved plan. The building erected according to the approved plan will consequently have a basement which is not be wholly below ground level and the whole of the ceiling of the basement will not be below ground level.

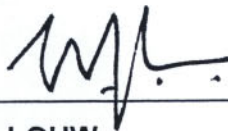
[49] It follows that the plans do not comply with the requirements of section 30 (relating to the coverage restrictions) and section 60 (relating to the setbacks restrictions) of the scheme regulations. It is not disputed that if this is the conclusion, the City should not have approved the plan and that the plan approval should be set aside.

[50] In the light of this conclusion, it is not necessary to consider the further points raised by the applicants.

[51] It follows that the following order must be and is herewith made:

1. The decision of the Sixth Respondent in terms of section 7 of the National Building Regulations and Building Standards Act No. 103 of 1977, taken on the 27th of July 2009, to approve First Respondent's building plans in respect of erf 907 Bantry Bay under plan number 00650/2009, is reviewed and is set aside;

2. The First Respondent is ordered to pay the costs of this review application, such costs to include the costs occasioned by the employment of two counsel.



W.J. LOUW

Judge of the High Court