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

REPORTABLE

Case number: 2026-08500

In the matter between:

SAVE OUR SEA POINT RESIDENTS ASSOCIATION

Applicant

and

SBG REAL ESTATE (PTY) LTD

First Respondent

**THE TRUSTEES FOR THE
TIME BEING OF THE SKY TRUST**

Second Respondent

THE CITY OF CAPE TOWN

Third Respondent

Heard: 27 August 2026

Judgment: 7 September 2026

Summary: Review of decisions to approve building plans. Interpretation of Item 41(e)(i) of the Development Management Scheme of the Municipal Planning By-law of 2015 of the City of Cape Town. Whether the 180 day period in section 7(1) of the Promotion of Administrative Justice Act 2 of 2000 ("PAJA") should be extended in terms of section 9(1) thereof. The

appropriate just and equitable remedy in terms of section 8 of PAJA: whether, if the review is upheld, the court should decline to set aside the decisions and/or grant appropriate declaratory orders in the exercise of its discretion in terms of section 8 of PAJA.

ORDER

It is ordered as follows:

1. In the exercise of the court's discretion, the 180 day period in section 7(1) of PAJA is extended in terms of section 9(1) thereof to the date of the institution of this application.
2. The third respondent's decisions dated 3 June 2024 to approve the second respondent's building plans (case numbers ID 1700508230 and ID 1700507104) for Erf 1[...] Sea Point East and Erf 1[...]2 Sea Point East are reviewed and declared not to be in compliance with Item 41(e)(i) of the Development Management Scheme of the City of Cape Town, as read with the Table 5 thereof, but are not set aside in the exercise of the discretion of the court.
3. It is declared that, in terms of Item 41(e)(i) of the Development Management Scheme of the Municipal Planning By-law of 2015 of the City of Cape Town, as read with the Table 5 thereof, for the purposes of General Residential 4 (GR4), in respect of a common boundary which does not intersect a street boundary:
 - (1) no building shall be erected nearer than 4.5 metres to a common boundary which does not intersect a street boundary;
 - (2) this is notwithstanding that a common boundary building line which does intersect a street boundary may be allowed at 0.0 metres up to 18 metres measured perpendicular from such street boundary;
 - (3) in the event of, and to the extent of, a conflict between (1) and (2) above, the former 4.5 metres prevails insofar as a common boundary building line which does not intersect a street boundary is concerned.

4. The applicant shall pay the wasted costs of the day of 11 June 2026, with Scale B in terms of Rule 67A read with Rule 69 applying.
5. The first respondent and the second respondent shall, save as ordered in paragraph 4 above, pay the costs of this application jointly and severally, with Scale B in terms of Rule 67A read with Rule 69 applying.

JUDGMENT

Handed down by email to the parties' legal representatives
on 7 September 2026, that date being the date of the Judgment

Judgment handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII.

KANTOR, AJ:

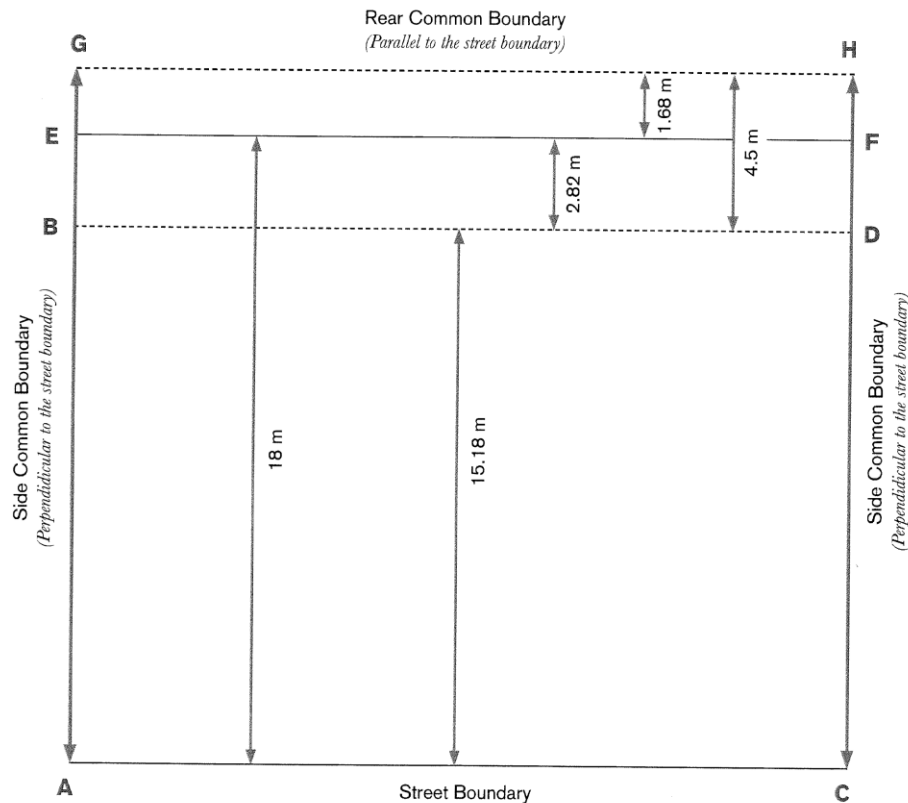
1. The third respondent (the "**City**") approved building plans in respect of Erven 1[...] and 1[...]2 Sea Point East, situated at 2[...] and 3[...] S[...] J[...] Road, Sea Point, Cape Town ("**the Erven**" and "**the Plans**"). The issue which crystallised in argument in this matter was whether the Plans were compliant with the City's Development Management Scheme ("**DMS**") which is attached to the City's Municipal Planning By-law of 2015, as amended ("**the MPBL**"), in particular Item 41(e)(i) thereof ("**Item 41(e)(i)**") read together Table 5 (in respect of building lines) which appears thereafter in the DMS ("**the Table**"). The applicant contends that the City erred in this respect. The first and second respondents contend the opposite. The City abides.

2. The second respondent initially owned the Erven which were subsequently transferred to the first respondent. As stated on behalf of the first and second respondents (“**the respondents**”), it is not relevant to this application which of these two respondents owned the Erven at any particular date.
3. While various grounds of review were raised in the founding papers, the merits of the review crystallised to turning on the proper interpretation of Item 41(e)(i) and the Table, which sets the applicable boundary line distances for residential buildings in Cape Town. This item was the subject of an advisory notice issued by the City’s Development Management Department in 2021, being the Development Management Scheme Compliance Advisory: 7 of 2021 titled “*Interpretation of common boundary line requirements in general residential subzonings ...*” (the “**Advisory**”).
4. There are five aspects to be determined in this matter:
 - 4.1. The respondents’ striking out application.
 - 4.2. Urgency.
 - 4.3. The merits of the review.
 - 4.4. Extension in terms of section 9(2) of the Promotion of Administrative Justice Act 2 of 2000 (“**PAJA**”).
 - 4.5. The discretion whether to set aside the decisions in question.

The correct focus on the merits of the review

5. This is mentioned upfront because of the cardinal importance of the correct focus in this matter.

6. For illustrative purposes, I prepared the following diagram in preparing for this matter. It applies equally to both of the Erven (**“the Diagram”**):



7. Item 45(e)(i) and the Table provides two alternative building lines of 4.5 metres and 0.6H for common boundaries (boundaries shared by an erf with another erf, as opposed to street boundaries). Which of the alternatives of 4.5 metres and 0.6H may apply is of no moment. For simplicity, only 4.5 metres will be used in the analysis in this judgment.
8. The Table provides for an exception to this of as little as 0.0 metres, as follows: “4,5 m or 0,6 H (0,0 m up to 15,0 m in height where intersecting a street boundary, for a distance of 18,0 m measured perpendicular from such street boundary).” (“the Exception”, which is the portion in brackets). Absent the Exception applying, any common boundary building line must be 4.5 metres.

9. As shown in the Diagram, each of the Erven has a street boundary and three common boundaries. The question in this matter is to which of these three common boundaries of the Erven the Exception applies by operation of Item 41(e)(i) and the Table.
10. There is no question that the Exception applies to the two common boundaries which extend at the perpendicular from the street (i.e. lines **AG** and **CH** in the Diagram, being the '*side*' or '*lateral*' common boundaries when viewed from the street, although such terminology does not assist and confuses the enquiry). The question in this matter therefore reduces to whether the Exception applies to the third common boundary which is opposite the street boundary (i.e. what has been called the '*rear*' common boundary, although such terminology does not assist and confuses the enquiry).
11. It is natural and easy to fall into the trap of referring to the boundary opposite the street as the '*rear*' boundary. I did so myself in reading into this matter, preparing for it and preparing the Diagram (which uses such terminology). That, however, bedevils the enquiry, which actually concerns the Exception which applies to common boundaries which intersect a street, as opposed to those which do not. I found that once one's focus is correctly channelled as such, the answer to the merits enquiry presents itself with clarity.
12. I mention this because the analysis below on the merits is fairly lengthy, but with the above focus maintained, the answer to the enquiry, in my view, becomes self-evident.

The application to strike out

13. The respondents applied for the striking out of paragraphs 7 to 12 of the supplementary founding affidavit, annexures “FA5”, “FA6” and “FA7” thereof and the confirmatory affidavit of George Quintus Thom, a town planner, whom the applicant has sought to qualify as an expert. In essence, the content sought to be struck out relates to Mr Thom's view that the Plans were not compliant with Item 41(e)(i).
14. The basis for the aforesaid being sought to be struck out is it they “*relate to issues of law*”. In its heads of argument, the applicant asserted that the court ought to agree “*with the applicant ... and the Mayor and the applicant's expert [ie Mr Thom]*’ regarding ‘*the meaning [of] item 41(e)*”. The respondents contend that the meaning of item 41(e) amounts to an interpretation thereof, which, it is trite, is a question of law (KPMG v Securefin Limited 2009 (4) SA 399 (SCA) at paragraph 39: “*... interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses ... the rules about admissibility do not depend on the nature of the document, whether statute, contract or patent ...*”). The respondents also assert that it is trite that evidence of a legal nature is inadmissible and irrelevant opinion, *a fortiori* where the source of the opinion, like Mr Thom, lacks legal expertise. I agree (KPMG, as quoted). See, for example, Prophet v National Director of Public Prosecutions 2007 (6) SA 169 (CC) at paragraph 43
15. The respondents contend that insofar as the applicant relies on the legal views expressed by the Mayor in his appeal decision in the consolidation application,

that too constitutes inadmissible opinion and should be disregarded by the Court on that basis. I agree and it will be disregarded.

16. I agree with the contention of the respondents that opinions expressed by Mr Thom do relate to questions of law which are to be determined by the court. His affidavit contains information and diagrams relevant to the matter. It will therefore not be appropriate to strike it out. However, his opinions on legal issues (as well as those of the Mayor) will not be taken into account in the determination of this application. I raised this with counsel for the parties in argument and they agreed on this approach.

Urgency

17. Paragraph 2 of the order postponing this matter on 15 June 2026 records: "*The question of urgency is yet to be determined, with the first and second respondents reserving the right to argue urgency.*"
18. As to the timeline imposed by the applicant when they launched the application, I agree with the respondents' contention that it was unrealistic and unreasonably curtailed. This inevitably required the applicant to adjust its proposed dates and, ultimately, led to a foreseeable postponement. I was in fact on urgent duty and before whom the application served in the urgent court on 11 June 2026. When I received the file, there was no replying affidavit and no heads of argument. The replying affidavit appeared two days before the date of set down. Heads of argument did not make any appearance. The papers ran to approximately 1300 pages. The urgent court is very busy. That day I had approximately 20 matters. No approach had been made to the Judge President

in the two months between the launching of the application and the date of set down in order for the matter to be allocated to a Judge for hearing, as it should have been.

19. The consequence of the setting down of the matter on 11 June 2026 would, absent the agreed postponement, have been that the application would have been struck from the roll (in other words, that is what I would have ordered in the above circumstances): Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others 2006 (4) SA 292 (SCA) at paragraph 9.
20. For these reasons, the costs associated of the day on 11 June 2026 will be paid by the applicant.
21. The matter was then postponed by agreement to 26 August 2026 (and heard on 27 August 2026). Heads of argument were delivered in due course (albeit a day late in the applicant's case). There was a full set of papers before the court and no further affidavits were sought to be filed. The date of 26 August 2026 therefore did not involve timing issues which were unrealistic or unreasonable. The matter itself has a degree of urgency in that the respondents are proceeding with the building work.
22. While the application should have been launched earlier, it would nonetheless have remained an urgent application. In that core sense the urgency is not self-created and the application is an urgent application. What was self-created and inappropriate was the inordinate manner in which it was originally set down.

That has been cured by the postponement and as to the cost implications thereof, the wasted costs of the day will be paid by the applicant.

23. Finally, while the matter was brought as an urgent application, it was ultimately not heard in the urgent court but rather as an opposed matter allocated to a particular (acting) Judge. It was allocated early, but that is due to the length of the papers as required by the practice directives of this court.
24. At the commencement of the hearing, I asked Mr Fagan, who appeared with Mr Price for the respondents, whether the reserved question of urgency would be pressed by the respondents bearing in mind that the matter had been allocated for a dedicated opposed hearing outside of the urgent court. He indicated that urgency would not be pressed. I consider that to have been the correct decision and proceeded to hear the matter.

Chronology

25. The chronology presented by the respondents in their heads of argument is reproduced below, with some adjustments. It is relevant to the merits and the extension sought in terms of section 9(2) of PAJA.
26. November 2022: The second respondent purchased the Erven.
27. 5 July 2023: Permits for the demolition of structures on the Erven were obtained.
28. 7 July 2023: The first application to consolidate the Erven in terms of the MPBL was launched.

29. November 2023: The second respondent submitted an application to the City for building plan approval on the Erven.
30. November 2023: The first application to consolidate the Erven was withdrawn.
31. 3 June 2024: The City approved the Plans for both of the Erven, recording that the Plans were '*fully compliant*' with the DMS. These are the decisions impugned by the applicant in this matter.
32. 27 July 2024: The second application to consolidate the Erven in terms of the MPBL was launched.
33. 13 September 2024: The second consolidation application was publicly advertised. That application expressly referred to the City's approved plans for the two Erven, as follows (quoted *verbatim*): "*There are currently 2 approved building plans one plan for erf 1[...] and a plan for erf 1[...]2. Both building plans are DMS compliant and no departures were applied for, the buildings which are 5 storeys in height.*"
34. 1 April 2025: The City's Municipal Planning Tribunal ("**the MPT**") approved the second consolidation application.
35. 21 May 2025: The City extended the validity of the Plans for both of the Erven to 3 June 2026.
36. June 2025: Demolition of the structures on both of the Erven commenced.
37. 18 November 2025: The Mayor of the City upheld an internal appeal, brought by certain members of the later formed applicant in their individual capacities,

against the MPT's approval of the second consolidation application. The Mayor's '*Notice of Decisions and Reasons*' expressly referred to the approved Plans.

38. 12 December 2025: Members of the later formed applicant became aware of the Mayor's decision.
39. 12 February 2026: Building works commenced on the Erven in accordance with the Plans approved on 3 June 2024, as extended on 21 May 2025.
40. 12 February – 6 March 2026: Members of the later formed applicant correspond in their individual capacities with the City's Building Inspector, the Mayor, the Deputy Mayor and Councillor Nicola Jowell, in regard to the commencement of building works. Various replying emails are sent by the Building Inspector, Deputy Mayor and Councillor explaining that the building work was lawful under the Plans approved in 2024.
41. 27 March 2026: After the aforesaid members engaged with the Sea Point, Fresnaye and Bantry Bay Ratepayers and Residents Association ("**the SFB**") in regard to conducting litigation in respect of the Plans, the SFB informed them that it was unable to sustain the burden of taking the litigation forward.
42. 6 April 2026: The applicant is established in order to bring the application.
43. 15 April 2026: This application is launched, which:
 - 43.1. indicated that it would be moved on 11 June 2026;
 - 43.2. afforded the City until 12 May 2026 to file the records of the decisions;

- 43.3. committed the applicant to filing supplementary papers on 15 May 2026; and
- 43.4. required the respondents to file answering papers on 29 May 2026.
44. 11 May 2026: The City delivered the records of the decisions. The applicant, having erred as to the true deadline for the records, was forced to adjust its proposed dates for supplementary and answering papers, but remained committed to the 11 June 2026 hearing date.
45. 21 May 2026: The applicant delivered its supplementary founding papers.
46. 4 June 2026: The respondents delivered answering papers in accordance with an extension granted by the applicant, but which was only ten court days from the date of the applicant's supplementary papers and only five court days from the hearing date.
47. 9 June 2026: The applicant delivered its replying papers, two days before the anticipated hearing date.
48. 11 June 2026: The original date on which the application was set down by the applicant for hearing. The parties agreed to postpone the hearing of the application to 26 August 2026, which is made an order of Court on 15 June 2026 (**the postponement order**), paragraph 2 of which expressly incorporates the respondents' right to argue urgency.
49. 5 August 2026: The applicant's heads of argument are delivered at 17h15 on 5 August 2026, a day later than as provided for in the postponement order.
50. 12 August 2026: The respondents delivered their heads of argument.

51. 27 August 2026: The application was argued (by agreement, the hearing was moved from 26 to 27 August 2026).

The merits

52. The merits of the review will be dealt with first because they are a factor in respect of (1) the section 9(1) extension in terms of PAJA; and (2) the exercise of the discretion, if the decisions are found to be reviewable, as to a just and equitable remedy and whether or not to set aside the decisions in question.
53. As mentioned, the merits crystallised in written and oral argument to the interpretation of Item 41(e)(i) and the Table. It would therefore be convenient to first briefly consider the interpretation of written instruments.

Interpretation of written instruments

54. The principles applicable to the interpretation of written instruments, including statutes, have been thoroughly traversed by the higher courts in a number of judgments in recent years.¹ It is accepted that the correct approach is that succinctly expressed in paragraph 18 of Endumeni, the standard reference to which in judgments and counsel's submissions has become what one judge of appeal quite recently described as a 'ritualised incantation'.² Interpretation consequently entails a 'unitary exercise' undertaken with reference to the

¹ The leading judgment is Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13 (16 March 2012); [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA). See, amongst others, University of Johannesburg v Auckland Park Theological Seminary and Another [2021] ZACC 13 (11 June 2021); 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC), Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others [2021] ZASCA 99 (9 July 2021); [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA), Novartis v Maphil [2015] ZASCA 111 (3 September 2015); 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA); Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2013] ZASCA 176; 2014 (2) SA 494 (SCA).

² Capitec at paragraph 49

language used in the instrument (the so-called 'point of departure') assessed not in isolation but with regard to its employment in the instrument read as a whole, the context (or 'factual matrix') of the instrument's creation and its evident object or purpose.

55. In paragraphs 18 and 23 of Endumeni the proper approach to interpretation is described as follows:

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document ... The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. If interpretation is, as all agree it is, an exercise in ascertaining the meaning of the words used in the statute and is objective in form, it is unrelated to whatever intention those responsible for the words may have had at the time they selected them."

56. In Tongaat Hulett Limited and Others v South African Sugar Association and Others 2026 (3) SA 108 (SCA), these principles were recently reiterated:

"[34] These provisions should be construed in accordance with the recognised principles of interpretation. The proper approach to legislative interpretation in our law requires courts to ascertain and give effect to the intention of the legislature, as expressed in the wording of the statute, while also considering the context, purpose, and underlying values of the Constitution. In this regard, the purposive approach is favoured, ensuring that statutory provisions are read holistically and in a manner that promotes the spirit, purport, and objects of the Bill of Rights.

[35] The Constitutional Court, in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others (Hyundai Motor Distributors)*, affirmed that interpretation must be consistent with

constitutional values and that ambiguity must be resolved in a way that best promotes those values. Similarly, this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* emphasised that statutory interpretation is a unitary exercise, requiring consideration of language, context, and purpose together. These authorities underscore the importance of a contextual, purposive, and constitutionally aligned approach to legislative interpretation.

[36] It is a fundamental tenet of our law of statutory interpretation that legislation must, wherever possible, be read in a manner that is consistent with the Constitution. This principle, often referred to as the doctrine of constitutional compliance, has become a cornerstone of modern interpretive methodology in South Africa. It requires courts to favour an interpretation of statutory provisions that upholds, rather than undermines, constitutional rights and values.”

57. In the same decision at paragraph 40, the SCA also observed that statutory provisions must be interpreted within the broader framework of the legislation of which they form part:

“Given the legal principles outlined above, s 136(2) must also be interpreted within the broader framework of Chapter 6 of the Companies Act, which regulates business rescue proceedings. That chapter sets out the statutory framework for business rescue proceedings in South Africa. Its provisions empower business rescue practitioners temporarily to suspend or apply for the cancellation of certain company obligations arising from agreements concluded before the commencement of business rescue proceedings.”

58. Finally, it is trite that the interpretation of a written instrument, including a statute, is a question of law: paragraph 39 of *KPMG*, quoted above.

The interpretation of Item 41(e) of the DMS

59. Section 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 (the “**Building Act**”) requires a decision maker to be satisfied that an application for building plan approval satisfies the requirements of the Building Act “*and any other applicable law*”. The DMS is an applicable law in this context.

60. This matter turns on the meaning of Item 41(e)(i) read together with the Table.
61. The Plans are in respect of two blocks of flats which are General Residential 4 (GR4) as contemplated in Item 41(e)(i). Item 41 of the DMS is titled “*Development rules for flats, boarding houses and hotels*”. It sets out four categories of development rules for flats, being coverage, floor factor, height and, material to this matter, “*building lines*”. This last aspect of “*building lines*” is the subject of Item 41(e)(i) and the Table.
62. Item 41 read with item 41(e)(i), provides as follows:
- “The following development rules apply to flats, boarding houses and hotels:
- ...
- (e) Building lines
- (i) No building shall be erected so that any point on the building is nearer to a street boundary or a common boundary than the distance specified in the following ‘Table of building lines in General Residential Subzonings GR2-GR6’, provided that:
- (aa) the symbol ‘H’ means the height in metres of the point concerned above the ground floor, and
- (bb) where two alternative building lines are prescribed, the greater of the two building lines shall apply.” [emphasis added]
63. Part of the Table referred to in item 41(e)(i) is reproduced below (the portions relevant to this matter are underlined and italicised):

Table of building lines in General Residential Subzonings GR2-GR6

Subzoning	Street boundary building line		<u><i>Common boundary building line</i></u>	
	Points up to 25,0 m above existing ground level	Points over 25,0 m above existing ground level	Points up to 25,0 m above existing ground level	Points over 25 m above existing ground level
GR2	4,5 m	N/a	<u><i>4,5 m or 0,6 H (0,0 m up to</i></u>	N/a (unless a departure permitted in terms of this development
GR3			<u><i>15,0 m in height where</i></u>	
GR4			<u><i>intersecting a street boundary, for a distance of</i></u>	

			<u>18,0 m measured perpendicular from such street boundary)</u>	management scheme has been approved)
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64. Of relevance in this matter from the Table are the rules applicable to a GR4 zoning. Under the headings “**Common boundary building line**” and “*Points up to 25,0 m above existing ground level*”, the Table provides that (the part in brackets is what has been defined above as the “**Exception**”):

“4,5 m or 0,6 H (0,0 m up to 15,0 m in height where intersecting a street boundary, for a distance of 18,0 m measured perpendicular from such street boundary).”

65. For a common boundary building line, either 4.5 metres or 0.6H applies (whichever is the greater by operation of Item 41(e)(i)(bb) above), unless the Exception applies, in which event 0.0 metres applies (for any particular dimension from this point on, ‘metres’ will be shortened to ‘m’ after the numeral).

66. In the instant matter, as mentioned, which of the alternatives of 4.5m and 0.6H may apply is of no moment and, for simplicity, only 4.5m will be used in the analysis in this judgment.

67. Accordingly, absent the Exception applying to it, any common boundary building line is 4.5m.

68. This matter concerns the applicability of the Exception to the three common boundaries of each of the Erven. There is no question that the Exception applies to the two common boundaries which extend at the perpendicular from the street (i.e. the ‘*side*’ or ‘*lateral*’ common boundaries when viewed from the street, although such terminology does not assist and confuses the enquiry).

The question in this matter therefore reduces to whether the Exception applies to the third common boundary which is opposite the street boundary (i.e. what has been called the '*rear*' common boundary, although such terminology does not assist and confuses the enquiry).

69. As mentioned, in this exercise it is natural and easy to fall into the trap of referring to the boundary opposite the street as the '*rear*' boundary. I did so myself in reading into this matter, preparing for it and preparing the Diagram. While helpful for illustrative purposes, it however, bedevils the enquiry, which actually concerns the Exception which applies to common boundaries which **intersect the street boundary**, as opposed to those which do not. As mentioned, I found that once one's focus is correctly channelled as such, the answer to the merits enquiry presents itself with clarity.
70. The terminology '*rear boundary*' made appearance in the papers and in argument. It is of no assistance to the matter other than for illustrative and reference purposes and otherwise bedevils it. The Table makes no mention of '*rear boundary*'. What is in issue is common boundaries.
71. In the Table the street boundary line for GR4 is also 4.5m.
72. The following definitions are contained in Item 1 of the DMS:
- 'building line'** means an imaginary line on a land unit, which defines a distance from a specified cadastral boundary, within which the erection of buildings or structures are completely or partially prohibited;
- 'common boundary'** in relation to a land unit means a boundary that is common with an adjoining land unit other than a street boundary;
- 'street boundary'** means the boundary between a land unit and an abutting public street or private road; provided that the boundary of a pedestrian way or

service lane that cannot or will never be used by motor vehicles, shall be deemed to be a common boundary for the purpose of determining building lines, street centreline setback and site access requirements;”.

73. Street boundaries and common boundaries are different: a street boundary is a boundary between an applicable erf and a street, whereas a common boundary is a boundary between an applicable erf and a neighbouring erf. A boundary can only be one of these.
74. In terms of the Plans in respect of the Erven, the building is to be 0.0m from the common boundaries which intersect the street boundary at the perpendicular (lines **AG** and **CH** in the Diagram). This is within the perpendicular distance of 18 metres from the street boundary as provided for in the Exception and is therefore, in that sense, in compliance with Item 41(e)(i) of the DMS. These will be referred to as “**Street-Intersecting Common Boundaries**”. This is a feature which is crucial to this application.
75. In terms of the Plans, the buildings on each of the Erven are to be built up to 1.68m from the common boundary **which does not intersect the street boundary and is opposite the street boundary (and which happens to be the rear common boundary, but that is of no moment, the crucial feature being that it does NOT intersect the street boundary)**. These will be referred to as “**NON-Street Intersecting Common Boundaries**”. This is a feature which is crucial to this application. This is emphasised because it is fundamental to understanding Item 41(e)(i) and the Table. This 1.68m building line on the “**NON-Street Intersecting Common Boundaries**” (which happen to be their rear common boundaries) is 2.82m less than the 4.5m provided for in

Item 41(e)(i) and the Table (leaving aside the question of the Exception). It is accordingly invalid, unless the Exception applies, in which event the building line is 0.0m.

76. Whether the Exception applies depends on: (1) the criterion for the Exception to apply; and (2) whether that criterion was satisfied
77. It is usually easier to understand concepts of this nature with the assistance of a diagram such as the above Diagram which applies equally to both of the Erven:
78. From the Diagram one can more readily appreciate the following:
 - 78.1. Line **AC** is the street boundary.
 - 78.2. Lines **AG** and **CH** are common boundaries which intersect the street boundary at the perpendicular. The Exception therefore applies to them.
 - 78.3. Line **BD** is a building line setback 4.5m from the common boundary opposite the street boundary and which does not intersect the street boundary (which happens to be the common boundary at the rear of the Erven).
 - 78.4. Line **EF** is the building line approved in the Plans which is 1.68m from the common boundary which does not intersect the street boundary (which happens to be at the rear of the Erven). That is a **NON-Street**

Intersecting Building Line. Absent the Exception applying to it, it exceeds the applicable building line by 2.82m and is invalid.

- 78.5. Line **EF** is what is in issue in this matter, the applicant's contention being that it is, to the extent of 2.82m, impermissibly within the 4.5m building line which applies in terms of Item 41(e)(i) and the Table. The respondents contend that it is valid.
- 78.6. Line **GH** is a **NON-Street Intersecting Boundary** opposite the street boundary. If the Exception does not apply to it, then the approved building line **EF** transgresses the 4.5m building line provided for in Item 41(e)(i) and the Table.
- 78.7. The question then is whether the Exception applies to Line **GH**, which is the **NON-Street Intersecting Boundary** opposite the street boundary.
79. This turns on whether a building line in respect of a **NON-Street Intersecting Boundary** being within 4.5m thereof is valid in terms of Items 41(e)(i) and the Table.
80. The respondents contend that the '*impact*' of Item 41(e)(i) and the Table is that a building can be built within 4.5m of a common boundary which does not intersect the street boundary, even up to 0.0 metres from it, if that is within 18 metres measured perpendicular from the street boundary. In my view, this proceeds from, and depends on, a fundamental misconception of the Exception.

81. The Exception is that a building line for GR4 can be 0.0 metres from a common boundary (up to 15 metres in height), instead of the prescribed 4.5m, in cases where the common boundary in question intersects a street boundary, for a distance of 18 metres '*measured perpendicular*' from such street boundary. The '*up to 15 metres in height*' in the Exception is irrelevant to the analysis below and will be left out in the consideration of the wording thereof.
82. Neither '*intersect*' nor '*perpendicular*' are defined in the DMS and thus their ordinary meaning applies. Mr Fehr, who appeared for the applicant, referred to the definitions in the Shorter Oxford English Dictionary 5th Ed (2002):
- 82.1. '*intersect*' means (in relation to lines, roads etc) to cross one another so as to have at least one point in common; and
- 82.2. '*perpendicular*' means a straight line at right angles (i.e. 90 degrees) to another line.
83. This means that the 0.0m Exception to the 4.5m common boundary line applies to a **common boundary which intersects a street boundary** for up to 18 metres **along that common boundary perpendicular to the street boundary**, i.e. at right angles to, or in a straight line from, the street boundary.
84. The Exception does not mention **rear common boundaries**: in the instant matter, that would be the common boundary which is not perpendicular to the street boundary – the **NON-Street Intersecting Boundary** at Line **GH** on the Diagram. This makes sense because that common boundary line is not perpendicular to the street boundary.

85. Mr Fehr, who appeared for the applicant, argued that the following paragraph in the Advisory appears to have caused the City's error in approving the respondents plans:

"2.8. Note: In properties smaller than 18 m in length, the 18 m "perimeter block" will override the rear common boundary line allowing the property to develop on the rear boundary. See top left property in Diagram 4."

86. I agree and consider this further below. The error is sourced in referring to a rear common boundary line, as opposed to identifying the criterion on the basis of which the Exception applies. In essence, this criterion is that it applies to a common boundary which intersects a street boundary. If a common boundary does not intersect the street boundary, then it does not satisfy the criterion for the Exception to apply and it does not apply to it. This is unpacked below, as is paragraph 2.8 of the Advisory.

87. My views follow below.

88. The section of the Table in which the 4.5m (and 0.6H) building line and the Exception appear is headed "**Common boundary building line**". It is not headed *side* or *lateral* and/or *rear* building lines or those which are *perpendicular* to the street boundary, or any combination thereof.

89. In my view, therefore, the Exception applies to all common boundaries which satisfy its qualifying criterion and using labels such as *side* or *lateral* and/or *rear* building lines does not add to the exercise (rather, it creates confusion).

90. The (1) building line generally applicable to common boundaries and (2) the Exception thereto read: "4,5 m or 0,6 H (0,0 m up to 15,0 m in height where

intersecting a street boundary, for a distance of 18,0 m measured perpendicular from such street boundary).” [my underlining]. This needs to be unpacked:

- 90.1. The 4.5m in the Table is the default position for all “**Common boundary building line[s]**”. In other words, absent the Exception applying, from which the 0.0m building line can only arise, the building line of 4.5m applies to the **NON-Street Intersecting Boundary** at Line **GH** on the Diagram opposite the street boundary (the ‘rear’ boundary line of the two Erven).
- 90.2. The import of the Exception is its effect on any particular “**Common boundary building line**” being considered.
- 90.3. In my view, key to understanding the ambit of the Exception, is to identify the subject of the words ‘*where intersecting*’. In other words what is the thing that is intersecting because that is what can be at 0.0m. The wording in the Exception is understandably economical, being in a table.
- 90.4. The answer, in my view, is that the subject of the words “*where intersecting*” is the applicable “**Common boundary building line**”. This is because the ‘*where*’ in the Exception refers to the applicable common boundary building line in question being analysed.
- 90.5. Assistance may be derived from a presentation, of the Exception as it applies to any common boundary building line, combined with what is

provided for in the introductory paragraph of Item 4(1)(e)(i) (leaving out what is superfluous and irrelevant). The wording would be:

“A **Common boundary building line** shall not be nearer than 4.5m from its common boundary, except that it may be at 0.0m therefrom where it intersects a street boundary, for a distance of 18m measured perpendicular from such street boundary.”

90.6. The wording of the Exception alone would be:

“A **Common boundary building line** may be 0.0m from its common boundary where it intersects a street boundary, for a distance of 18m measured perpendicular from such street boundary.”

90.7. From this wording, I think that it can be more easily understood that what can be at 0.0m is a *common boundary building line which intersects a street boundary*. In other words, a building line which does not intersect a street boundary (a **Non-Street Intersecting Boundary**) does not satisfy the criterion to be at 0.0m.

90.8. This means that:

90.8.1. 4.5m applies to any common boundary building line which does not intersect a street boundary.

90.8.2. 0.0m applies in terms of the Exception to a common boundary building line which *intersects a street boundary*.

90.9. In my view, this means:

90.9.1. The 0.0 metres will apply to a common boundary building line which intersects a street boundary for 18m measured perpendicular from the street boundary.

90.9.2. For the Erven, that can only be the side/lateral common boundaries at lines **AG** and **AH** on the Diagram, because (1) the (rear) common boundary opposite the street boundary (line **GH** on the Diagram) does not intersect a street boundary; and (2) it cannot be measured as extending or existing in a perpendicular distance from a street boundary.

90.9.3. The (rear) common boundary opposite the street boundary (line **GH** on the Diagram) does not intersect the street boundary, thereby failing to satisfy the qualifying criterion to be at 0.0m, and therefore its building line remains at 4.5m. This is because the 4.5m applies to any common boundary which does not satisfy the qualifying criterion of the Exception which is that it intersects a street boundary.

91. It is of fundamental importance that the building line being prescribed and what is prescribed for it are identified, both in regard to the default position and the Exception thereto. That may sound axiomatic, self-evident and unnecessary to say, but it is important because what is in issue is a building line, whether the default 4.5m or the 0.0 Exception (the latter being the building line, if it applies). In this regard:

91.1. The building line to which the 0.0m Exception applies is a '**Common boundary building line**' '**where intersecting a street boundary**'.

91.2. If the Exception applies, then that **Street Intersecting Building Line** becomes 0.0m (for up to 18m perpendicular from the street boundary).

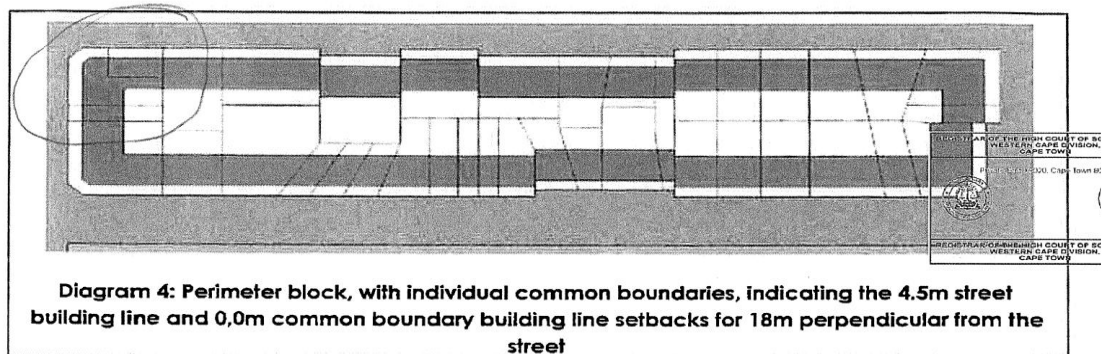
It applies to that building line because that building line qualifies. Whether other building lines qualify depends on whether they satisfy the qualifying criterion in the Exception.

91.3. The **Non-Street Intersecting Building Line** opposite the street boundary does not satisfy the qualifying criterion in the Exception because it does not intersect the street boundary. It therefore remains at 4.5m. **This is the most fundamental point to understanding the merits of this matter.**

91.4. When I raised this with Mr Fagan, he made a valiant attempt to address it by arguing that the 0.0m **Street Intersecting Building Lines** up to 18 metres perpendicular from the street boundary (lines **AE** and **CF** on the Diagram) have an '*impact*' on the '*rear*' boundary building line (more correctly the **Non-Street Intersecting Building Line** opposite the street boundary). That argument is, in my view, misconceived: each **Common boundary building line** must be determined in terms of Item 41(e)(i) and the Table. They are not derivatives of another. There are only two possibilities: the 4.5m³ or the 0.0m Exception. The latter depends on the criterion of it intersecting the street boundary being satisfied. This is not satisfied for the **Non-Street Intersecting Building Line** opposite the street boundary because it does not intersect the street boundary. That building line therefore remains at 4.5m.

³ Leaving aside the 0.6H for the sake of simplicity, as mentioned above.

92. The same fundamental problem pervades paragraph 2.8 of the Advisory, which provides: *“Note: In properties smaller than 18 m in length, the 18 m “perimeter block” will override the rear common boundary line allowing the property to develop on the rear boundary. See top left property in Diagram 4.”* Diagram 4 is reproduced below this paragraph. In this regard:



- 92.1. As mentioned, a **Common boundary building line** is to be determined in terms of Item 41(e)(i) and the Table. There are two possibilities: the 4.5m or the 0.0m Exception (if the criterion of intersecting the street boundary is satisfied for it).
- 92.2. There is no question of an ‘override’ of a building line (the term in the Advisory) or an ‘impact’ thereon (Mr Fagan’s terminology).
- 92.3. On the contrary, the ethic of the regime is the express opposite: *“... where two alternative building lines are prescribed, the greater of the two building lines shall apply.”*
- 92.4. That is, however, not the import of the core point, which is that there is no question of an ‘override’ of or ‘impact’ on a building line distance.

- 92.5. The result is that the building lines are: (1) 0.0m for the two street intersecting common boundary building lines by application of the Exception; and (2) 4.5m for the **Non-Street Intersecting Building Line** opposite the street boundary to which the Exception does not apply.
- 92.6. There is no scope or provision for an '*override*' of or '*impact*' on this 4.5m building line.
93. A further fundamental problem in paragraph 2.8 of the Advisory is to be found in the words "*... override the rear common boundary line allowing the property to develop on the rear boundary. See top left property in Diagram 4.*":
- 93.1. Diagram 4 has been reproduced at paragraph 92 above. The top left property is circled because that is what is referred to in paragraph 2.8 of the Advisory and because of its importance.
- 93.2. The use of the word '*rear*' is integral to this fundamental problem.
- 93.3. If one uses the terminology of Item 41(e)(i) and the Table as stressed in this judgment, it is unmistakably simple why the building lines are at 0.0m on both common boundaries perpendicular to the street boundary: it is because they are both **Street-Intersecting Common Boundaries**, thereby satisfying the criterion in the Exception for 0.0m to apply.
- 93.4. Whether they are '*rear*' boundaries is irrelevant.

- 93.5. In fact, that terminology is problematic because they can be both '*rear*' and '*side/lateral*' boundaries. If one views any one of these **Street-Intersecting Building Lines** from the street opposite them, then they are at the '*rear*' of the property from that perspective or direction. Yet, from the other street boundary that very same boundary is '*side/lateral*'. Again, this bedevils.
- 93.6. The answer lies not in them being '*side/lateral*' or '*rear*', but in that they are and remain **Street-intersecting Building Lines** from which ever direction or perspective or street boundary one considers them, thereby satisfying the qualifying criterion in the Exception. That is what invokes the 0.0m Exception. Being at the '*rear*' of the property from the perspective or direction of a street is irrelevant to this.
- 93.7. The building line at 0.0m in this respect has nothing to do with them being '*rear*' boundaries and the 4.5m for those '*rear*' (depending on the perspective) boundaries being '*overriden*' or '*impacted*'. The building line is at 0.0 metres on these two common boundaries because they are street intersecting, thereby satisfying the qualifying criterion in the Exception.
- 93.8. Paragraph 2.8 of the Advisory is confusing and misleading.
- 93.9. Again, as has been stressed, the key point is the **street-intersecting prism** through which the qualification criterion for the Exception must be viewed. Through that prism, both the (irrelevantly) categorised '*rear*' boundaries (depending on the direction or perspective of one's view) of

the erf circled at the top left corner of Diagram 4 qualify for the 0.0m, **simply because they intersect the street boundary**. Use of the word 'rear' obfuscates and misleads.

- 93.10. For such a corner erf which is 18m or less 'deep' from both street boundaries, the building line will be 0.0 metres for the full length of each common boundary building line. Those erven will have two full sides open to the street with building lines 4.5m from the street boundary. Put another way, they have an extra length of the erf open to the street and 4.5m from the street boundary instead of it being only the 4.5m gap from a neighbouring erf. This is substantially more than one side open to the street with a building line 4.5m from the street boundary and one at 4.5m from a neighbouring erf, which applies for erven which are not corner erven.
- 93.11. This can be understood visually from the top left erf circled on Diagram 4 reproduced above.
- 93.12. The above is what creates the '*block perimeter*', referred to in paragraph 2.8 of the Advisory with reference to diagram 4 of the Advisory (referred to by the applicant as the continuous street façade), with unbuilt open area in the middle which will be a minimum of 9m in width (2x 4.5m) on my interpretation even where the erven are all 18m 'deep', but which would disappear to zero on the respondents' interpretation resulting in a claustrophobic massed grouping of buildings with no gap between them. That was plainly not intended.

94. In my view, therefore, the 0.0 metre Exception does not apply to the **Non-Street Intersecting** 'rear' common boundary building line opposite the street boundary on the Erven.
95. Mr Fagan argued that this interpretation resulted in two absurdities:
96. The first is as follows: It would be nonsensical for the Exception to apply to erven less than 18m 'deep' from the street (as indicated by paragraph 2.8 of the Advisory), but not to erven more than 18m 'deep'. On the respondents' approach, he argues, an erf that is only 17m 'deep' from the street may accommodate a structure built at 0m from the rear common boundary, whereas an erf that is 19m 'deep' from the street would require a 4.5m setback. The absurd implication, so the contention went, is that the 17m erf could lawfully accommodate a *larger* structure than the 19m erf could. The alleged absurdity does not arise because the proposition is wrong on its introductory factual premise: a 17 metre 'deep' erf also has to have a 4.5m 'rear' common boundary setback on what I consider to be the correct interpretation. This argument is plainly of no merit. Mr Fagan did not appear to press it with much vigour in oral argument.
97. Mr Fagan's second argument was that corner plots could have a 0.0 building line at the rear while others cannot which creates an absurdity in Item 41(e)(i), read with the Table. This argument is plainly of no merit for the reasons explained in paragraph 92 and 93 above. In brief:

- 97.1. The common boundary building lines are at 0.0 m because they are both street intersecting. It has nothing to do with them being at the '*rear*'.
- 97.2. Those properties do not even have a specific '*rear*': for each of the two common boundaries, from the direction or perspective of the one street that common boundary is at the '*rear*' and at the same time that very same common boundary is '*side/lateral*' from the direction or perspective of the other street.
- 97.3. Those corner erven both have two full boundaries open to the street with a street boundary building line at 4.5m, substantially more than what applies to non-corner erven.
- 97.4. Again, as has been stressed, the key point is the **street-intersecting prism** through which the qualifying criterion for the Exception must be viewed. Through that prism, both the (irrelevantly) categorised '*rear*' boundaries qualify for the 0.0m, **simply because they intersect the street boundary**. Use of the word '*rear*' obfuscates and misleads.
98. Mr Fagan argued that, owing to the fact that the side boundary can be approved up to a perpendicular distance of 18m from the street boundary, it has the '*impact*' of allowing for the 4.5m for the '*rear*' building line to be shortened. For the above reasons, that argument is plainly wrong: simply put, each **Common boundary building line** must be determined by applying Item 41(e)(i) and the Table and for it to be at 0.0m depends on whether it satisfies the criterion in the Exception of being street intersecting. This argument would

in any event not assist the respondents because, at best for them, it would then mean that the 4.5m in the Table applies and, vicariously through the two Street-Intersecting (side) common boundary building lines the 0.0m applies to the 'rear' building line. This would result in two building lines being at play for the same boundary. Item 41(e)(i)(bb) is then triggered, providing that "*where two alternative building lines are prescribed, the greater of the two building lines shall apply*". The 4.5m, being the greater, takes precedence, and therefore applies. As mentioned, I do not think that the entry point for this argument is valid, but it, in any event, does not assist the respondents.

99. A final point is mentioned because it featured prominently in the respondents' argument. The argument is that their interpretation is supported by the fact that very recently, on 3 July 2026, the City published a draft amendment to (*inter alia*) DMS item 41(e) for public comment, which is apparently intended to bring item 41(e) into line with the applicant's interpretation.⁴ The argument is that such an amendment would obviously be unnecessary if the applicant's preferred interpretation of item 41(e) had been correct as it stood in 2024 (and still stands today pre-amendment). In my view, this reasoning does not bear scrutiny: (1) it transgresses the very principle on which the respondents relied in their application to strike out: the court must interpret Item 41(e)(i) and whether the City thinks it may mean something else and may require amendment is of no moment (save in the case of ambiguity, as to which see below, which does not apply); (2) the logic is partisan: it could be that the City is now satisfied that Item 41(e)(i) as it currently stands is to be or may be interpreted as contended by the applicant, but because of disputes in regard

⁴ 2026 MPBL draft amendments version A.3, para 24 on page 14.

thereto a revised version would be desirable. Ironically, in oral argument, Mr Fagan argued that the amendment will likely not pass because of his second absurdity point above. The ultimate point is that the respondents' argument is speculation which trespasses into the domain of the court and should play no role in the interpretative process.

Supplementary written submissions by the respondents

100. The day before the hearing, the respondents filed supplementary written submissions dealing with the legal position in the event that the language of item 41(e)(i) allows for the interpretations contended by both parties.

101. This has been rendered redundant by the exposition set out above: I do not consider that item 41(e)(i) allows for the interpretations contended by both parties and am of the view that the proper interpretation is as I have concluded. Be that as it may, the argument will be dealt with briefly.

102. It is contended that the City's planning officials have for some years consistently interpreted and applied DMS item 41(e)(i) in the manner indicated in the Advisory and relied upon by the respondents. It is further contended that this is relevant to the interpretation of item 41(e)(i). This is not entirely correct: it is relevant as some form of a tiebreaker in the event that the provision in question is ambiguous and two interpretations are equally valid. Mr Fagan confirmed this in oral argument.

103. In Commissioner, South African Revenue Service v Bosch and Another 2015 (2) SA 174 (SCA) at paragraph 17, it was held as follows (references omitted):

“There is authority that in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation. This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question. As such it may be a valuable pointer to the correct interpretation. In the present case the clear evidence that for at least eight years the revenue authorities accepted that in a DDS scheme the exercise of the option and not the delivery of the shares was the taxable event, fortifies the taxpayers' contentions.”

104. Bosch relied on R v Detody 1926 AD 198 at 202 in which it was held as follows:

“It will be proper also to pay some regard to the manner in which the Ordinance in question and the law which preceded it upon the subject of native passes have been administered by successive Governments and succeeding sets of officials. Custom, of course, cannot prevail over the plain and unambiguous meaning of a statute, but where language is open to two constructions, then the fact that it has been uniformly read in one sense by those entrusted with the administration of the measure cannot be ignored. The Civil Law attached great importance to prior custom as a factor in the interpretation of statutes But the tendency of modern decisions is greatly to restrict the weight to be attached to contemporaneous exposition ... Yet some weight it must retain. ... The weight to be attached to custom as an element in the construction of statutes was discussed by this Court in *Rex v Lloyd*, where it was remarked by JUTA JA, that when the language was capable of two constructions, then the fact that it had been construed by all concerned in a certain way ever since it came into operation, was an element to be considered.”

105. In Marshall NO and Others v Commissioner, South African Revenue Service 2019 (6) SA 246 (CC), at paragraphs 6 to 19, the rule was in effect accepted, but regard had to be taken into account of *inter alia* the transition from legislative supremacy to constitutional supremacy, that the partisan view of litigating parties are not a good fit with it and that a unilateral practice of interpretation by officials may play a role in the determination of the reasonable meaning to be given to a statutory provision where the practice is evidence of an impartial application of a custom recognised by all concerned, citing (at

paragraph 15) R v Lloyd 1920 AD 474 in which it was held that “... *when the language was capable of two constructions, then the fact that it had been construed by all concerned in a certain way ever since it came into operation, was an element to be considered.*”

106. The respondents point out correctly that the interpretation of the City planning officials has been uniform and consistently applied for approximately two years, on the basis of the Advisory, on which applicants for approval have relied.
107. The respondents submitted that, in the event that the Court is of the view that item 41(e)(i) is open to two constructions, then the interpretation adopted and applied by City planning officials is ‘*clear evidence of how reasonable persons in their position would understand and construe the provision in question*’.
108. In the instant matter, this applies should item 41(e)(i) be open to two constructions. Pregnant in this is that it must be once the interpretative process considered above (based on Endumeni etc) has been undertaken and it results in it being open to two constructions. The rule/canon of construction then steps in to perform the function of a tie-breaker, much like the *contra proferentum* rule does. As mentioned, I raised this with Mr Fagan and he agreed.
109. The problem for the respondents is that the interpretation exposition articulated above has not resulted in Item 41(e)(i) being open to two constructions.
110. In the result, it is the conclusion of this court that the Plans were approved in consequence of a material error of law and that those approvals are reviewable

in terms of section 6(2)(d) (“the action was materially influenced by an error of law”) of PAJA.

Extension in terms of section 9(1) of PAJA

Statutory provisions

111. Section 7(1) of PAJA provides as follows (underlining added):

“Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—

- (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”

112. Section 9(1) of PAJA provides as follows (underlining added):

“(1) The period of—

- (a) 90 days referred to in section 5 may be reduced; or
- (b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

- (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.”

Legal principles

113. A tension exists between two important objectives of the law, namely legality (against insulating an irregular decision from review) and certainty/finality of decisions (*Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at paragraph 36, albeit in the context of the exercise of a discretion

whether or not to grant or withhold a remedy on review). Both are self-evidently important to the rule of law. The principles dealing with the resolution of this tension in particular matters are considered below. Ultimately, the facts and circumstances of the case, including the prospects of success, are all to be considered and a discretion is to be exercised by the court as to whether to extend the 180 day period in section 7(1) of PAJA in terms of section 9(1) thereof.

114. The period in section 7(1)(b) starts to run from the date on which the reasons for it became known, or reasonably ought to have become known, to the applicant, not when it became aware of the invalidity, as held in City of Cape Town v Aurecon South Africa (Pty) Ltd 2017 (4) SA 223 (CC) (Aurecon (CC)) at paragraph 41:

“On a textual level, the City’s contention confuses two discrete concepts: *reasons* and *irregularities*. Section 7(1) of PAJA does not provide that an application must be brought within 180 days after the City became aware that the administrative action was tainted by irregularity. On the contrary, it provides that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant.”

115. Where reasons are not requested or furnished, the 180 day period commences “... to run, when, taking a broad view, the public at large might reasonably have been expected to have become aware of the action.” (Mostert NO v Registrar of Pension Funds and Others 2018 (2) SA 53 (SCA) at paragraph 50).

116. Once the 180 day limit is reached, the delay is taken to be unreasonable and the court has no authority to entertain the review application at all, unless the 180 days is extended, in respect of which the extent of the unreasonableness of the delay is one of the factors to be taken into account. As held in Opposition

to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others [2013] 4 All SA 639 (SCA) ("OUTA") at paragraph 26 (underlining added):

"Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay (see eg *Associated Institutions Pension Fund* para 46). That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54)."

117. In the above passage of OUTA, reference was made to Camps Bay Ratepayers' & Residents' Association v Harrison [2010] 2 All SA 519 (SCA) at paragraph 54 which is the passage regularly cited as setting out the factors relevant to the exercise of the Court's discretion in terms of section 9(1). This was approved and applied in Aurecon South Africa (Pty) Ltd v City of Cape Town 2016 (2) SA 199 (SCA) (Aurecon (SCA)) at paragraph 17, which was endorsed by the Constitutional Court on appeal in Aurecon (CC) at paragraphs 46 and 49). Paragraph 54 of Camps Bay provides that whether an extension is to be ordered depends on:

"... the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: The party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."

118. In relation to administrative acts that affect the public at large, OUTA held as follows at paragraph 27 (emphasis added):

“In its terms s 7(1) envisages asking when ‘the person concerned’ was informed, or became aware, or might reasonably be expected to have become aware, of the administrative action. This admits of an answer where the act affects and is challenged by an individual, but does not readily admit of an answer where it affects the public at large. In that situation it would be anomalous – if not absurd – if an administrative act were to be reviewable at the instance of one member of the public, and not at the instance of another, depending upon the peculiar knowledge of each. It seems to me that in those circumstances a court must take a broad view of when the public at large might reasonably be expected to have had knowledge of the action, not dictated by the knowledge, or lack of it, of the particular member or members of the public who have chosen to challenge the act.”

119. In regard to paragraph 27 of OUTA, in Mostert it was held that ‘public at large’ should not be read as referring to the general public, but, effectively, the part thereof involved in what is under consideration (emphasis added):

“[44] I do not think that the public at large, as referred to by Brand JA, was necessarily intended to be a reference to the general public. In this case it seems to me to refer to those members of the public who are involved with the pension fund industry, such as administrators, board members, principal officers, some employers, curators and liquidators. Evidence of actual knowledge is not required. What is required is a broad view of when the public at large might reasonably have been expected to have become aware of the action ...

[45] ... He pointed out that the application for review was brought on 27 March 2015, well outside the 180 day period after the date of the administrative action, which was 22 April 2003 ...

[48] The approach adopted by the learned judge was not in accordance with the statement in *Opposition to Urban Tolling Alliance* to which I have referred. The making of the regulation did not affect the appellant as an individual. It affected the public at large, in the context to which I have referred. It was therefore not appropriate to consider when the appellant personally became aware of the administrative action or when he might reasonably have been expected to have become aware of it. As Brand JA pointed out, it would be anomalous if an administrative act were to be reviewable at the instance of one member of the public, and not at the instance of another, depending upon the peculiar knowledge of each. The court a quo should therefore have taken a broad view of when the public at large might reasonably have been expected to have become aware of the action.”

120. Oudekraal Estates (Pty) Ltd v City of Cape Town 2010 (1) SA 333

(SCA) (known as 'Oudekraal 2'), in applying Wolgroeiërs Afslaers v Munisipaliteit van Kaapstad 1978 (1) SA 13 (AD), had regard to the following *dictum* from that case at 39C-D (translation borrowed from Camps Bay at paragraph 60; emphasis added) which identifies that in deciding whether a section 9(1) extension is to be ordered, a judicial discretion is to be exercised by the court, taking into account all the relevant circumstances:

"If it is alleged that an applicant did not institute the proceedings within a reasonable time, the Court must decide (a) whether the proceedings were in fact only launched after a reasonable time had elapsed and (b) if so, whether the unreasonable delay should be condoned. Again, as it appears to me, with reference to (b), the Court exercises a judicial discretion while taking into consideration all the relevant circumstances."

121. Camps Bay is also helpful for the instant matter on a factual level because of the similarity of context, both involving a challenge to building plans, including as to building line setbacks, in respect of property in an upmarket suburb of Cape Town. The period of delay from the decision in that matter was three years. An extension was refused. The court held as follows at paragraph 62 in explaining why:

"In the present case the lapse of three years before the appellants acted was undoubtedly inordinate, particularly if regard is had to the promptitude with which people might ordinarily be expected to act and build in accordance with approved building plans. Proceeding to the next step of the enquiry, namely whether the delay should nevertheless be condoned, it is necessary to step back and consider the totality of circumstances. There is no suggestion that Harrison consciously flouted the building line restriction. Acting in reliance upon the approval of the plan she has built a substantial structure. Besides the substantial cost that would be necessitated by adapting the building, Harrison has sustained considerable cost in defending litigation that was quite unrelated to the encroachment over the building line. Moreover, the infraction is relatively minimal, so much so that it went unnoticed even by the array of experts employed by the appellants until the litigation was well advanced. The local authority supports Harrison and there is not the slightest prospect that the infraction will impact in any meaningful way on the aesthetics or future development of Camps Bay. Throughout this saga Harrison has attempted to the best of her ability to deal with the appellants' concerns. They, on the other hand, have been intractable. For all these reasons I conclude that the delay in raising this

issue should not be condoned and the application to review and set aside the plans on that ground should not succeed.”

122. Camps Bay holds (as do numerous other decisions) that the prospects of success are a factor, as confirmed by the Constitutional Court, albeit in the context of a legality review, in Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal 2014 (5) SA 579 (CC) at paragraph 57:

“An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view, this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.”

123. Even if there is not a full and reasonable explanation for a delay, the court will balance the delay against the prospects of success and may still grant condonation (extend the section 7(1) period). In a legality review, Valor IT v Premier, North West Province and Others 2021 (1) SA 42 (SCA) held that even a delay which is unreasonable and is not satisfactorily explained can be condoned. In that matter, a delay of over two years was involved and it was held as follows:

“[30] Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a ‘factual, multi-factor and context-sensitive’ enquiry in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other.

[32] There can be no doubt that the delay in challenging the lawfulness of the award of the SDA to VIT was unreasonable. ...

[33] In these circumstances, one would have expected a full and thorough explanation for the delay. That was not to be. ...

[38] One of the factors that must be considered whenever condonation is sought is the applicant’s prospects of success on the merits. It must be borne in mind that the grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. So, for instance, very weak prospects of success may not off-set a full, complete and satisfactory

explanation for a delay; while strong prospects of success may excuse an inadequate explanation for the delay (to a point).

[39] As I shall demonstrate in the following paragraphs, the provincial government's prospects of success on the merits are strong: the scheme in terms of which VIT purported to provide services, and for which it was handsomely remunerated, was unlawful from start to finish. As a result, even if it were to be found that the explanation for the provincial government's delay was wanting, the interests of justice, in the light of its strong prospects of success, require condonation to be granted."

124. In Aurecon (CC) at paragraph 37, it was held that there may be significant differences between a legality review and a PAJA review, mainly because of the 180 day period in section 9(1) of PAJA, but on the facts of a case it could be that there is no difference:

"While it is so that the case cannot be decided on an assumption of the appropriateness of PAJA as a regulatory framework if legality review might yield a different result, this need not be an insurmountable hurdle to disposing of the present matter within the confines of PAJA. It may well be that there are differences, even significant differences, between condonation in terms of section 9 of PAJA and unreasonable delay under legality review in some cases, but this is not so here. In the present matter, for reasons set out below, the delay is found to be both unreasonable and outside of the 180-day time limit. The practical implication is that, on these particular facts, it is essentially the same enquiry conducted by the Court as would be the case if assessing the application for condonation within the framework of legality review."

125. Also in Aurecon (CC) it was held that, in a PAJA review, the prospects of success are to be considered even in the absence of a reasonably and fully explained delay, as was the case therein (emphasis supplied):

"[48] The City's application was nearly a year late. The City was questioned during the hearing specifically on the seven month delay from 17 January 2012 to 29 August 2012. The former was the date on which Aurecon was informed that a pending appeal against the award of the tender had been resolved. The latter was the date on which the City tabled the award for consideration in terms of section 33 of the MFMA. Its counsel could not offer any reason for the delay other than ascribing it to bureaucratic governmental processes. Suffice to say, this explanation is unsatisfactory.

[49] Nonetheless, due regard must also be given to the importance of the issue that is raised and the prospects of success."

126. Prejudice to other parties (the respondents in the instant matter) are less important to delay under PAJA because they play a more material roll in the exercise of the court's discretion and the fashioning of a just and equitable remedy: Notyawa v Makana Municipality and Others (CCT115/18) [2019] ZACC 43; 2020 (2) BCLR 136 (CC); [2020] 4 BLLR 337 (CC); (2020) 41 ILJ 1069 (CC) (21 November 2019) at paragraph 50 and 51.

The delay

127. The plans were approved on 3 June 2024. Those approved plans were not attached to the second consolidation application advertised on 13 September 2024, but were referred to therein in the following (clumsily drafted) passage:

“There are currently 2 approved building plans one plan for erf 1[...] and a plan for erf 1[...]2. Both building plans are DMS compliant and no departures were applied for, the buildings which are 5 storeys in height.”

128. The respondents contend that this is the relevant date from which the applicant (or its members) ought to have been aware of the decisions and it is from then that the 180 day period in terms of section 7(1) of PAJA is to be considered. That date (or, more accurately, a reasonable time thereafter) is technically correct. I therefore agree with the respondents' contention that the 180 day period commences then, save that I would allow for a one-month period taking into account that the decision affects the public in the sense explained in Mostert at paragraphs 44 to 48, quoted above. This results, in my view, in the length of the delay being 12 months. I do not think that this period makes a material difference from the 13 months contended for by the respondents.

129. At that time, members of the later formed applicant (“**Members**”) were not aware that the Plans were ‘*tainted by irregularity*’ as per Aurecon (CC) quoted in paragraph 117 above. As discussed above, Aurecon (CC) holds that when an applicant became aware of the decision being ‘*tainted by irregularity*’ is not when the 180 days commences. Accordingly, that aspect does not affect from when the 180 day period begins to run, but it does play a role in explaining why it was not complied with. In accordance with OUTA at paragraph 26, quoted in paragraph 116 above, the ‘*extent of that unreasonableness*’ is a factor to be taken into account, with others (such as the prospects of success) as summarised in Camps Bay at paragraph 54, quoted in paragraph 117 above. The overall context and factual circumstances is what is to be considered and a value judgment made by the court in the exercise of the discretion whether or not to extend in terms of section 9(1).

130. While the 180 day period commences as aforesaid (effectively resulting in a delay of approximately 12 months), that does not, however, occur to me to be realistic from the perspective of explaining the reason for the delay and would be somewhat myopic in sidelining the wider factual context and circumstances:

130.1. Members took various publicly available steps to challenge the proposed development on the Erven, twice participating as objectors and once as objectors and appellants in terms of the provisions of the MPBL (in the two consolidation applications which both failed, the first having been withdrawn and the second having been denied on appeal, both in the face of vigorous opposition from members of the public, including Members).

- 130.2. The respondents point out that Members did not challenge the Plans. Mr Fagan argued that, on the second consolidation application being advertised on 13 September 2024, they should have taken advice on challenging the Plans and Item 41(e)(i) as communicated in the Advisory and applied by the City, and therefore the delay was not reasonable.
- 130.3. I do not think that this submission can be accepted for reasons explained below.
- 130.4. The trigger relied upon by the respondents is the passage in the second consolidation application quoted in paragraph 127 above which includes the express recordal that the plans are “... *DMS compliant and no departures were applied for ...*”
- 130.5. Everyone involved, even the City, accepted and operated on the basis that (1) the Plans were DMS compliant; as well as (2) the position vis a vis Item 41(e)(i) was as communicated in the Advisory and applied by the City. In my view, from this it could not be expected that any person could reasonably suspect that the Plans were not DMS compliant and that departures were required.
- 130.6. I therefore think that delay from a month after when the second consolidation application was advertised was reasonably expected in the circumstances, or at least occurred reasonably in the circumstances. The question as to what happened thereafter needs to

be considered to further assess the position. That requires the wider context to be considered, including before then.

130.7. In 2023, a consolidation application in respect of the Erven was brought. It was challenged by various Members in their capacities as interested persons and residents. The application was later withdrawn.

130.8. The plans were approved on 3 June 2024.

130.9. On 27 July 2024, the second consolidation application in respect of the Erven was brought. After being advertised it was challenged by various Members in their capacities as interested persons and residents. The respondents contend that they should have known of the Plans then because they were referred to therein. They were described therein as DMS compliant and everyone involved, including the City, operated on that basis. The applicant also points out that the Plans were not attached to the second consolidation application and that they were not publicly available. That second consolidation application was approved on 1 April 2025.

130.10. Thereafter demolition commenced on the Erven in June 2025, at which point, the respondents contend, members of the later formed applicant were, or should have been, aware that the respondents intended to proceed with developing the Erven. There is merit in this contention. But it begs the question of whether they acted reasonably, or as to the extent of their unreasonableness, in not challenging the

Plans then. They were not aware of any compliance issues with the Plans and with the considerations in this regard mentioned above applying could not have been reasonably suspected any.

130.11. That decision to approve the second consolidation application was appealed by certain objectors, including Members, the ultimate result of which was that the appeal was upheld and the second consolidation application was refused. The appeal decision was dated 18 November 2025. Mention is made in the appeal decision of an opinion having been provided by attorneys for the appellants on 21 October 2025, but no detail was provided in the papers, so this takes the matter no further. Members were informed of the appeal decision on 12 December 2025.

130.12. The focus had been on the consolidation applications with Members not directing any challenge to the Plans which had been reasonably considered to be compliant. The respondents also took a supine approach insofar as commencing with any building work in terms of the Plans throughout the aforesaid period was concerned (demolition was attended to).

130.13. The applicant contends that it was only after (certain of) its members became aware of the appeal decision (on 12 December 2025) and the reasons for it that they were aware that the Plans could be reviewable. Although not explored, this would be some time after 12

December 2025, bearing in mind that time would have been required to consider the decision and with the year-end approaching.

130.14. On 11 February 2026, the second respondent commenced building work on the Erven.

130.15. Correspondence was entered into with the City by Members, contending that this was unlawful because of the Mayor's decision. The City responded, correctly, to the effect that the building work was legal because the Plans had been approved.

130.16. Members started fund-raising and campaigning to raise support to bring these review proceedings. From early March 2026, they canvassed residents of the SFB about conducting the proposed litigation. On 27 March 2026, the SFB informed them that it was unable to sustain the burden of taking the litigation forward. I agree with the submission of the respondents that the members of the applicant could not insist that someone else litigate on their behalf or pay for their litigation. However, this aspect only arose in the month before the application was launched. For this reason, I do not consider it to be of any materiality.

130.17. Members discussed the matter, the raising of funds and the entity to litigate. On 6 April 2026, the applicant was formed. While that alone is not of any material moment and cannot be relied on *per se* by the applicant, including because its members had been active in regard to

opposition to the development in its two guises, it must be read in the overall context of what had transpired before.

130.18. A letter of demand was sent to the respondents on 9 April 2026 giving them until 14 April 2026 to comply with undertakings to stop construction pending a review.

130.19. This application was launched on 15 April 2026.

131. The respondents contend that the applicant's members should have become aware of the Plans when they were advertised on 13 September 2024, with which I agree other than that this should be 13 October 2024 for the reasons articulated above (as mentioned, in my view this difference of a month has no material effect on the matter in the overall time scheme). The respondents level criticism against the applicant for not having taken action to review the Plans then. While, as I have already held, that date is technically correct for the purposes of the 180 days commencing to run, there are three factual aspects which, I think, materially temper the effect thereof on the determination of the section 9(1) extension: (1) the above facts establish that the focus was on opposing the consolidations, both prior to and after the approval of the Plans; (2) there was no reason for the approval of the Plans to be considered unlawful until 12 December 2025 or a short time thereafter; and (3) it was not a matter of the members of the applicant having taken a supine approach insofar as their opposition to the development was concerned.

132. Taking the above into account, especially point (2) in the above paragraph to the effect that there was no reason for the approval of the Plans to be

considered unlawful until 12 December 2025 or a short time thereafter, then the delay calculated from then until the launch of the application on 15 April 2026 would have been approximately 100 days.

133. The Members erroneously thought that building work would not follow the refusal of the second consolidation application because (1) two separate buildings was not what the respondents wanted; and (2) it was not authorised because it was in disregard of the Mayor's decision, a legally incorrect contention which was corrected by the City on 13 February 2026. This is reflected in correspondence, from the day that building work started on 11 February 2026 until 6 March 2026. Members corresponded in their individual capacities with the City's Building Inspector, the Mayor, the Deputy Mayor and Councillor Nicola Jowell, in regard to the commencement of building works. Various replying emails were sent by the Building Inspector, Deputy Mayor and Councillor explaining that the works were lawfully proceeding under the Plans approved in 2024. This application was launched two months later.

134. In my view, the above facts show that the persons behind the later formed applicant did not take a supine approach or sit on their hands. They were consistently opposed to the development (or, more correctly, aspects thereof). During this time, building work in terms of the plans did not take place. While, strictly speaking, they should have taken the approval of the plans on review at an earlier stage and that the 180 day period had begun to run in October 2024, I do think that there is a bigger contextual picture at play and it is over-simplistic to fixate on this in isolation without assigning some relevance to their consistent action to deal with the development in the context where the Plans were not

being acted upon, building work was not being commenced and when non-compliance was not a factor. When building work did commence, they took action relatively expeditiously in the circumstances. They also explained that building work had not taken place and they did not expect it to do so without the consolidation. This last sentence is probably one of the weakest aspects of the applicant's explanation for the delay. It is however, tempered, to an extent, by their consistent opposition to the development, lack of any knowledge of the invalidity of the Plans or any reason to suspect that they were invalid, a view shared by the City and professionals in the field, and the relatively short period of the delay implicated by this factor.

135. I accept that the Members could not have reasonably been aware that the approval of the Plans was invalid prior to December 2025. This does not relate to when the 180 day period began to run (Aurecon (CC), as referred to above). The reason why I mention it, however, is that, as the respondents argued, the Advisory had been consistently applied and therefore they could not have known of the invalidity. *A fortiori*, this must also apply to the Members who were much further removed from the Plans. It follows that they could not have reasonably been aware of the reasons for the decision or for any possible invalidity. This is not the test for when the 180 days in section 9(1) begin to run, as explained in Aurecon (CC), but it does relate to the explanation for the delay, which is what is in issue.

136. The earliest, in my view, that the Members of the later formed applicant could have been aware of the reasons why (and the possibility that) the Plans could be invalid must have been when they became aware of the appeal decision in

the second consolidation application, which was on 12 December 2025 or shortly thereafter. As mentioned, in the Mayor's appeal decision reference is made to an opinion received from the applicant's attorneys, stated to have been on 21 October 2025 and "*addressing certain aspects of the appeal*", but that was not part of the papers and I do not know what it contained.

137. In their heads of argument, the respondents asserted that they were "...*fully entitled to implement the 2024 plans (as validly extended) by commencing building works in February 2024*". The second '2024' is an obvious typographical error and should be '2026'. What this means is that the respondents also waited until the outcome of the second consolidation application to commence building works. This aligns with a finding that, while there are weaknesses in the applicant's explanation, and cogent argument for action having been taken earlier by them, this must be seen in the overall context that this was not a simple factual and legal context, that there were various variables at play and that the Members were not supine in that overall context, having involved themselves with some vigour in opposing the development, albeit in regard to a different aspect, and that was in the context in which no building work was taking place. Once they obtained knowledge of the failure of the second consolidation application, they perhaps should have acted with greater expedition, but that involves a far shorter time period of four months and a not insignificant portion thereof would have been taken up in considering the consolidation appeal result, by the fact of the December year-end and in preparing the application.

138. In my view, therefore, the respondents' focus on a 13 month period (the 401 days) (12 months being applicable, in my view, but that makes no material difference) does not take into account a much more detailed context in which the members of the later formed applicant did not take a supine approach in the greater context of opposing the development in which the reasonableness of their actions ought to be considered.

139. In my view, taking into account the overall context and facts and circumstances, I am of the view that the applicant's (or its members') explanation for the delay is reasonable and materially complete.

Prejudice and unfairness

140. While this is more pertinent to the discretion to set aside (Notyawa), it was also relied on heavily by both sets of parties in respect of a section 9(1) extension and will therefore be dealt with here.

(1) Prejudice and unfairness to the respondents

141. The respondents contend that prejudice to them arising from an extension of the statutory period would be '*flagrant*' because they relied on the plans in good faith and were entitled to commence building work in February 2026. They also contend that for these reasons an extension would be unfair. The averments of prejudice and unfairness are tied up in the same factual context and enquiry and will be considered together.

142. In their answering affidavit, the respondents said that they have incurred substantial costs of over R36 million in proceeding with the development, have

foregone substantial rental income of over R1 million and have concluded binding contracts with many third parties as is usual in these types of developments which would be frustrated, including an architect, structural engineer, geotechnical engineer, electrical engineer, mechanical engineer, quantity surveyor, sustainable-energy consultant, town planner, and the main contractor and various subcontractors, including plumbing, electrical, mechanical, glazing and lift specialists. Any cessation or interruption of the project at this late stage will result in severe financial prejudice, including irrecoverable sunk costs, substantial accrued contractual liabilities and exposure to claims, penalties and damages.

143. The first problem with this submission is that it is, in a sense, potentially, albeit no doubt unintentionally, misleading: of the R36 million, R25 million was expended on purchasing the Erven in November 2022 which was significantly prior to the approval of the Plans in June 2024. Similarly, substantial expenditure must have been incurred in respect of the Plans and on various professionals prior to the second consolidation application having been brought, which is when the respondents allege that the applicant should have been aware of the Plans. Yet those are not set out or even indicated in a figure. The court is left in the dark. All that is itemised, in annexure JS39 to the answering affidavit, is a globular figure of R10 335 324 in respect of “*Construction Costs*”. Nothing is itemised as to the cost of actual construction for the two months from 11 February 2026 (when construction commenced) until the application was launched on 15 April 2026 or until when the answering affidavit was signed on 4 June 2026.

144. The court is further left in the dark as to many important aspects, such as:

144.1. What had actually been constructed by then, whether it was past the laying of foundations and the cost thereof.

144.2. What would be wasted were the building have to be reconfigured to accommodate a building line which reduces the length of the building from the street boundary building line to the rear boundary building line by 2.82 metres.

144.3. There is no version as to what additional costs would be incurred if the Plans were to be set aside which would not have been incurred without them being set aside.

144.4. There was also no version as to what would happen to the development if the delay is condoned and the Plans set aside.

144.5. Further obvious questions arise which one would have expected the respondents to have addressed, including: whether the development would proceed with the building being built a further 2.82m from the rear boundary than as is currently on the approved plans (i.e. to comply with the 4.5m rear boundary setback). This may entail internal walls being adjusted and smaller rooms in some apartments – the court does not know because it was not told. Or whether there was a prospect of obtaining a departure. Or whether they would simply not have gone ahead with the development if they knew that the rear boundary setback was to be 4.5m.

144.6. Put another way, it was not articulated how the respondents would in fact be prejudiced, as opposed to raising it in general terms. The fact that R36 million has been expended on the development does not

mean that that amount (or any material portion of it) has been lost, and certainly does not mean that it has been lost because of the timing of this application, for the reasons considered above. The court is left in the dark in this regard, save that all indications, as considered further below, are that it will not be lost.

144.7. In my view, from the perspective of the respondents, the scenario of the development not proceeding one way or the other if the Plans are set aside does not seem likely because, when their initially planned project of a development on a consolidated erf floundered, they changed tack and developed on the separate Erven as presented in this application.

145. When I raised the question of what the respondents would do were the Plans to be set aside and whether the development would not proceed, Mr Fagan confirmed that it would proceed, with either a departure being obtained or with the 4.5m rear building line being accommodated in the building project.

146. When I raised problems of the nature identified above with Mr Fagan, he submitted that the answering papers were prepared under time pressure. Notwithstanding this, an answering affidavit of 58 pages was prepared (265 pages, including 41 annexures). Mr Fagan's argument withers in the face of the respondents having filed a further affidavit two days before the hearing dealing with what had been built, the building costs involved and prejudice to them. None of the above aspects were addressed. The applicant filed an affidavit in response. Both parties referred to these affidavits and I am satisfied that they be admitted.

147. The respondents' further affidavit was filed late, on 25 August 2026, two days before the hearing. No reason for such a late filing was shared with the court.

The affidavit recorded the following:

147.1. Concrete works have been completed and the structures have reached roof height.

147.2. Approximately R52 256 442 has already been spent on the project.

This is tempered substantially by the confirmation in argument that one way or the other the project would proceed and would not disappear. Further, nothing was presented as to what would be wasted, although it is obviously the case that adjusting the structure to accommodate the 4.5m building line would involve future further expense and past wasted expenditure, resulting in financial prejudice to the respondents, more of which below.

147.3. A further amount of R38 899 061 has been committed under contractual obligations and remains payable regardless of whether the project is completed. This is not supported by any contractual details or documents. It is such an extraordinary state of affairs (for example a builder being paid the full amount for a build which does not continue) which I cannot accept in the bald manner in which it is contended. It was contended that cancellation would lead to damages. In any event, whether either or both of these may apply, is tempered substantially by the confirmation in argument that one way or the other the project would proceed and would not disappear. That being said, it is obviously the case that in regularising the situation, substantial expense/loss would be incurred, resulting in financial prejudice to the respondents.

147.4. If the works are stopped the respondents will be responsible for Preliminary and General costs (P&Gs – in rough terms, a form of builder's overhead) and associated expenses as well as interest, which currently amounts to a total of approximately R541 666 per month. This is not itemised in any respect, nor is the contractual basis disclosed. If the Plans are set aside, building work would be illegal. That is a *vis maior*. Nothing is disclosed to the court as to the contractual situation which prevails in this regard. The respondents leave the court largely in the dark. That being said, if building work stops while the planning situation is regularised and the builder vacates, this would no doubt have an effect on P&Gs, but for a limited period, and interest, resulting in financial prejudice to the respondents.

148. Mr Fehr submitted that the respondents knowingly took the risk of much of any prejudice which it may suffer (Bengwenyama at paragraph 87). I think that there is some force in this submission: the decision to build was in the face of the strong public opposition to the proposed development, including action taken by Members, as well as the second consolidation appeal decision in which the Mayor had expressed the unequivocal view that the Plans were vulnerable to review. These aspects were mentioned in the replying affidavit signed on 9 June 2026, *inter alia*, as follows: "*I repeat – it was the Respondents['] choice to proceed to start building based on plans which the Mayor had indicated were reviewable in the face of very strong public opposition to the proposed development. The Respondents['] choice to do so, in light of their knowledge that their plans were susceptible to review and strong community resistance can in no way shield them from the consequences of their choice. It also appears to us that the Respondents have*

accelerated construction on the site over the course of the last week and a half, with construction workers on site until after ordinary hours.” Despite all of this, building work commenced subsequent thereto. Although entitled to build, and even though the Mayor’s decision was not binding insofar as the Plans were concerned, the respondents were well aware (or ought to have been, but I have no doubt that the former applies) of the risks of commencing and continuing to build and knowingly took that risk. That they were entitled to do, and I do not assign any blame or fault to them in this regard. But it is a factor to be taken into account.

149. While there is no question that the respondents will suffer some financial prejudice, that case as to prejudice, for the reasons canvassed above, was poorly presented, is vague and lacking in necessary detail in material respects, and much, if not most, of the risk of prejudice was knowingly taken.

150. The above being said, the respondents’ argument that they acted lawfully in relying on approved plans is a very significant factor. I therefore cannot assign any blame or fault to them. Further, the partial demolition and re-building of a five-storey structure will self-evidently be a costly exercise, as will the delay while the Plans are regularised one way or the other. Material financial prejudice, to a degree, will in all probability be suffered.

(2) Prejudice to neighbouring property owners

151. It is essential not to lose sight of the fact that what is in issue in regard to the Plans is the ‘rear’ building line opposite the street. It is through that prism that prejudice to neighbouring property owners must be considered: it is the impact

of that rear building line aspect on them which is relevant. In other words, the same building is to be considered at 4.5m from that 'rear' common boundary opposite the street and at 1.68m from that same boundary to determine the relevant prejudice.

152. The applicant contends that the prejudice to its members and community members is substantial, in that two large five storey buildings, which are in effect one building because of the zero space between them, and out of keeping with the environment, are being built in breach of the building line setbacks. Mr Fehr argued that the 2.82m non-compliance is exaggerated when what is being built is a five-storey building, as opposed to a single or double storey dwelling. While there is some force in this argument, what is cautioned in the above paragraph must be borne in mind: the size of the building is constant, save the 2.82m difference. This aspect of the effect on neighbouring properties was referred to in detail in the appeal decision. That decision did not concern the rear building line *per se* and involved various other factors. The aspects of prejudice mentioned therein which I think would, however, also result from or be aggravated by a reduced building line would include reduced privacy, reduced natural light, reduced direct sunlight and increased shadows. However, those same factors would also result from a building 2.82m further away from the neighbouring property. The question is the difference. The appeal decision also dealt with other aspects relevant thereto, such as massing and scale, which do not arise insofar as the rear building line *per se* is concerned. One must therefore be careful in allowing those aspects from the appeal decision to trespass into the present enquiry.

153. The fact is that the '*rear*' building line is at the common boundary with two other erven. It therefore can only really affect them insofar as the position of the buildings being constructed is concerned (it could perhaps have some limited effect on the two properties on either side of them). For example, the two adjacent neighbouring properties of the Erven are on a side boundary in respect of which, it is common cause, that a 0.0m building line applies in terms of Item 41(e)(i) (save for the last 2.82m of the 18m thereof, but that is not material). The relevant factors, such as reduced privacy, reduced natural light, reduced direct sunlight and increased shadows, are tempered materially by: (1) comparing the two scenarios of the buildings on the two Erven being built with a rear building line of (a) 4.5m as required and (b) 1.68m as built. Plainly, the effect in respect of the relevant factors mentioned will be greater in the case of the latter, but there will also be substantial effect in respect of the former, with not much difference between them for the same size building. Accordingly, while there is some prejudice from the position of the building line, I do not think that the full impact of the buildings themselves can be taken into account in this regard, which greatly tempers the impact of the building line differential; (2) the fact that the Plans were approved and the respondents were entitled to build in terms thereof.

154. I am satisfied that the applicant has established some prejudice in this respect were the extension not to be granted and the application for review refused. However, I consider that the prejudice to the respondents, coupled with considerations of fairness, considered above, on balance exceeds that caused by the difference of the same building 2.82m closer to the rear boundary insofar as the neighbours on that boundary are concerned.

(3) *The importance of the decision in the review and prejudice to others*

155. That, however, is not the end of the enquiry. Prejudice to others, including the applicant, its members, and members the community and the public must be considered, in respect of which the importance of the decision under review plays a prominent role.
156. The decision to approve the Plans turns on a question of development rules which apply to all properties throughout the City, on any measure a vast impact. There is a dispute as to its interpretation which has a material impact on the setback for common boundary building lines of up to 4.5m, which will have a considerable and widespread impact on many properties. It is plainly an important issue.
157. The applicant submitted as follows: if the City continues to approve plans for the building of flat buildings on erven smaller than a certain size, then the neighbours who share rear boundary lines with those flats are being deprived of their rights under the DMS and, consequently, other rights which the development rules are meant to protect (such as those listed in section 99 of the MPBL). This is an important issue to determine especially in a City where development is progressing apace and densification and massing of buildings (especially in places like Sea Point) are intensifying and one of the only protections which communities and residents have are the City's development rules (as set out in the DMS).

158. The respondents argued that, in the event that the proposed amendment thereof is implemented, the current wording of Item 41(e) will no longer apply and its interpretation will no longer be of public importance. There are three problems with this. The first is that the current version is in place and is being applied. The second is that the respondents also argued the opposite, namely that it is unlikely that the amendment will survive objection (thereby contradicting their previous argument that the amendment would go through rendering the issue academic going forward). The third is that, had the proposed new version of Item 41(e) been the same as the interpretation of the current version as contended by the respondents, one could perhaps have accorded this more weight because then what was being built would be valid in terms of the new version and it would be somewhat unfair to keep the respondents rooted in the old. However, that would not apply and the Plans would not be compliant in terms of this new version.

159. In my view, the issue is important. Mr Fagan contended that a declarator on this issue would have the same general impact. I agree, but this is more properly a factor in relation to a just and equitable remedy under section 8 of PAJA and in the exercise of the discretion of the court in this regard, which is considered in the next section below. In counter, it would not, however, ameliorate the plight of the neighbouring properties, as considered above and which will have to be taken into account in the consideration of discretion in the next section, but that, as mentioned, is materially tempered by (1) the minimal difference between the effect of the same building on two different rear building lines which are 2.82m apart; and (2) the fact that the respondents were entitled to build in terms of

approved plans. This is all part of the overall context in which the balancing exercise in the reaching of a value judgment is to be undertaken.

160. Insofar as prejudice and fairness overall is concerned, I am of the view that the aspect of the importance of the issue on review in this matter and its wide impact thereof shifts the overall balance in respect of fairness and prejudice in favour of the applicant insofar as an extension in terms of section 9(1) is concerned.

The prospects of success

161. As dealt with above, my view is that, on the merits of the review, the decisions in questions are reviewable and the applicant's case is very strong. This strength may serve to balance any weaknesses in the explanation for the delay identified above.

Comparing the decision in Camps Bay

162. While one must (1) guard against it reducing to keeping score in a menial bean-counting exercise and (2) ensure that the ultimate enquiry in this application culminates in the reaching of an overall value judgment based on all the circumstances, helpful assistance may be sourced from comparing the circumstances in the similar type of challenge which was in issue in Camps Bay in which the discretion as to whether or not to extend the 180 days was exercised, in that instance, against an extension. Paragraph 62 of Camps Bay, quoted in paragraph 121 above, summarises the considerations of the court therein. In this regard:

162.1. There the delay was three years. In the instant matter it was 12 months.

162.2. In both cases, there was no suggestion that the owner of the property consciously flouted the building line restriction.

162.3. In both matters, acting in reliance upon the approval of the relevant plans, the owners built substantial structures.

162.4. In the instant matter, however, the respondents did most of that building work in the knowledge that the Plans were vulnerable to review and being challenged.

162.5. In Camps Bay, the infraction was held to be relatively minimal and went unnoticed even by the array of experts until the litigation was well advanced.

162.6. In the instant matter, the infraction results in a five-storey building 2.82m closer to two neighbouring erven. It only went unnoticed because of the Advisory, not because it was relatively minimal. Mr Fagan did call it a 'sliver', but I think that was more for effect. If not, I disagree.

162.7. In Camps Bay there was not the slightest prospect that the infraction would impact in any meaningful way on the aesthetics or future development of Camps Bay. That is not the case in the instant matter.

163. Compare the circumstances in Waenhuiskrans Arniston Ratepayers Association and Another v Verreweide Eiendomsontwikkeling (Edms) Bpk and Others 2011 (3) SA 434 (WCC) at paragraphs 86-87 (for completeness the last sentence of paragraph 87 has been retained, but it does not apply to the instant matter):

“86. Given the municipality's failure to respond to the ratepayers association's queries I am satisfied that the ratepayers could not reasonably have become aware, prior to the commencement of construction work, that the development of Erf 599 was set to continue. Inasmuch as the ratepayers association was under the impression that construction work had to be complete before transfer of ownership in the property could be effected, as was provided for in the Deed of Sale entered into in 2004, there was no cause for it to anticipate or to suspect that transfer would take place earlier. Once it was alerted to the fact that the proposed development was set to become a reality, it acted with despatch and brought its application within the time stipulated by section 7 of PAJA.

87. In any event, it appears to me that this is a case where the interests of justice require that the parties be heard and that their dispute be determined by this Court. The case is undoubtedly an important one. From Verreweide's point of view, it has made a substantial financial investment in the venture. Seen from the municipality's perspective, it is responsible for managing the town of Waenhuiskrans/Arniston for the benefit of all of its residents. As such, it has an obligation to create employment- and development opportunities, as well as to protect the environment for the benefit of present and future generations as is envisaged in section 24 of the Constitution. The ratepayers association and the action group have a clear interest in preserving the beauty and unspoilt character of this unique coastal village which is one of the gems along the Cape South coast. A further factor which cannot, in my view, be overlooked, is the ostensible collusion between Jordaan and Verreweide/ Haarburger.”

164. I am of the view that the circumstances of the instant matter are materially more in favour of an extension than as applied in Camps Bay.

165. For the sake of completeness, it is mentioned that launching an application for review within the 180 day period does not guarantee compliance with section 7(1) of PAJA which requires that it be launched without unreasonable delay, but that aspect of section 7(1) was not a factor in the papers and in argument in this matter, it being concerned with the 180 day period.

Conclusion

166. Based on the above factors, in the exercise of the court's discretion, the 180 day period in section 7(1) of PAJA is to be extended in terms of section 9(1) thereof to the date of the institution of this application.

Discretion

167. Section 8(1) of PAJA provides as follows (emphasis added):

"The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—

- (a) directing the administrator—
 - (i) to give reasons; or
 - (ii) to act in the manner the court or tribunal requires;
- (b) prohibiting the administrator from acting in a particular manner;
- (c) setting aside the administrative action and—
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
 - (ii) in exceptional cases—
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
 - (bb) directing the administrator or any other party to the proceedings to pay compensation;
- (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
- (e) granting a temporary interdict or other temporary relief; or
- (f) as to costs."

168. The word 'may' in section 8(1) introduces a discretion. A court asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or withhold the remedy or to grant "any order that is just and equitable". That is a wide discretion which "... *constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide ...*" (*Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) at paragraph 32, quoting with approval *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paragraph 36).

169. Legality, on the one hand, must be considered against certainty, finality and practicality, on the other hand. As held in Bengwenyama at paragraph 85:

“The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.”

170. In Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) 2014 (4) SA 179 (CC) at paragraph 30 the Constitutional Court held, with reference to the above passage, that the default position is in favour of legality:

“Logic, general legal principle, the Constitution, and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.”

171. While it, and the principles in relation thereto, are of general application, the aforesaid tension often arises in cases concerning public procurement. This is for good reason because the performance of contracts and the cost thereof are often far down the road and would require to be unscrambled. The common factors to be taken into account can fit quite neatly in that context, including: (1) the undesirability of disrupting a public service; (2) effect on the public purse; (3) considerations of pragmatism and practicalities (for example, the nature and extent of work remaining to be completed on a tender contract); (4) questions of

fairness and prejudice; (5) the seriousness of the illegality; (6) delay; and (7) the failure to pursue alternative remedies. See, for example, Chairperson: Standing Tender Committee v J F E Sapela Electronics (Pty) Ltd 2008 (2) SA 638 (SCA) at paragraphs 28 and 29. (1), (2), (3) and (7) above do not apply in the instant matter and were not argued. (4), (5) and (6) have been dealt with already in the above section dealing with the section 9(1) extension.

172. The following two examples illustrate the importance and application of different circumstances: In Sapela the court declined to set the decision aside because most of the work in terms of the tender contract had already been performed and it would be impractical and disruptive to start the tender process over again for the completion of the remaining work. On the other hand, in Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA) the decision was set aside because the three months of work remaining on a two year contract consisted of a series of separate, ad-hoc assignments relating to the collection, processing and sale of scrap metal which could easily be taken over by another contractor and there were no public policy considerations militating against setting aside.

173. As mentioned, the Constitutional Court in Bengwenyama at paragraph 87 has held that whether prejudice was suffered knowingly is a factor:

“The last consideration, that of finality, must yield to the principle of legality and the fact that Genorah was aware from a very early stage of the Community’s interest in the granting of a prospecting right. When it went ahead in the execution of the prospecting right, despite this knowledge, it was interdicted from doing so. Any further prejudice it suffered, it suffered knowingly.”

174. Questions of fairness and prejudice are also relevant and, in my view, ought to play the prominent and decisive role on the facts of this matter. This has been

dealt with in the above section and the conclusion of the court there is that, on balance, it does not compel in favour of the exercising of the discretion in the respondents' favour for the reasons set out therein.

175. The enquiry in this section is different in one crucial respect: the question of the important issue to be decided in respect of Item 41(e)(i) and the Table can be addressed in a declarator. That has two material results: (1) that legal question is determined by the court; (2) it addresses the prejudice to the public and community arising from the building line in this instance being 2.82 metres short.

176. What it would not address is the prejudice to the two neighbouring properties at the rear. That prejudice remains relevant to the exercise of the section 8 discretion. The conclusion already reached in the above section is that, on balance, the questions of fairness and prejudice favour the respondents in this respect.

177. Section 8 of PAJA provides that a court 'may grant any order that is just and equitable' (section 8(1)) and an order 'declaring the rights of the parties in respect of any matter to which the administrative action relates' (section 8(1)(d)).

178. In the result, (1) the review will be upheld, (2) the discretion in terms section 8 of PAJA will be exercised to issue an appropriate declarator on the legal question as to the interpretation of Item 41(e)(i) and the Table and (3) the Plans will not be set aside.

Conclusion and costs

179. In the exercise of the court's discretion, the 180 day period in section 7(1) of PAJA is to be extended in terms of section 9(1) thereof to the date of the institution of this application.

180. The third respondent's decisions dated 3 June 2024 to approve the second respondent's building plans (case numbers ID 1700508230 and ID 1700507104) for Erf 1[...] Sea Point East and Erf 1[...]2 Sea Point East will be reviewed and a declarator issued on the interpretation of Item 41(e)(i). The Plans will not be set aside.

181. As to costs:

181.1. As mentioned, the applicant shall pay the wasted costs of 11 June 2026. Scale B in terms of Rule 67A, read with Rule 69, shall apply.

181.2. The applicant has had substantial success on the legal issue as to the interpretation of Item 41(e)(i) and the Table which is at the core of this matter. It is also its most important facet and in line with the founding purpose of the applicant as articulated in the preamble to its constitution and a declarator will be issued in accordance therewith. The Plans have survived in the exercise of a discretion. In these circumstances, the respondents will pay, jointly and severally, the costs of the application, with scale B in terms of Rule 67A, read with Rule 69, applying.

182. In the premise, it is ordered as follows:

- 182.1. In the exercise of the court's discretion, the 180 day period in section 7(1) of PAJA is extended in terms of section 9(1) thereof to the date of the institution of this application.
- 182.2. The third respondent's decisions dated 3 June 2024 to approve the second respondent's building plans (case numbers ID 1700508230 and ID 1700507104) for Erf 1[...] Sea Point East and Erf 1[...]2 Sea Point East are reviewed and declared not to be in compliance with Item 41(e)(i) of the Development Management Scheme of the City of Cape Town, as read with the Table 5 thereof, but are not set aside in the exercise of the discretion of the court.
- 182.3. It is declared that, in terms of Item 41(e)(i) of the Development Management Scheme of the Municipal Planning By-law of 2015 of the City of Cape Town, as read with the Table 5 thereof, for the purposes of General Residential 4 (GR4), in respect of a common boundary which does not intersect a street boundary:
- (1) no building shall be erected nearer than 4.5 metres to a common boundary which does not intersect a street boundary;
 - (2) this is notwithstanding that a common boundary building line which does intersect a street boundary may be allowed at 0.0 metres up to 18 metres measured perpendicular from such street boundary;
 - (3) in the event of, and to the extent of, a conflict between (1) and (2) above, the former 4.5 metres prevails insofar as a common boundary building line which does not intersect a street boundary is concerned.

182.4. The applicant shall pay the wasted costs of 11 June 2026, with Scale B in terms of Rule 67A read with Rule 69 applying.

182.5. The first respondent and the second respondent shall, save as ordered in paragraph 182.4 above, pay the costs of this application jointly and severally, with Scale B in terms of Rule 67A read with Rule 69 applying.

A Kantor
Acting Judge of the High Court

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