CULLINAN & ASSOCIATES
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OPINION

APPROVAL OF BUILDING PLANS SINCE COMMENCEMENT OF 2019 AMENDMENTS TO CITY OF CAPE TOWN'S MUNICIPAL PLANNING BY-LAW, 2015

This legal opinion is confidential and subject to legal privilege.

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1. INTRODUCTION

1.1 We have been instructed by the Cape Institute for Architecture ("CIFA") to provide our opinion regarding the implications of certain amendments to the City of Cape Town's Municipal Planning By-law, 2015 ("the By-law") for the submission and approval of building plans. Proposed amendments to the By-law were approved by Council on 31 October 2019. The amendments were promulgated in Provincial Gazette Extraordinary No. 8185 on 6 December 2019 and came into operation on 3 February 2020 ("the amendments").

1.2 Of particular concern to the CIFA is the impact of the amendments on the approval by the City of Cape Town ("the City") of building plans for projects where an application for a land use approval (which has or has not been accepted) had been made prior to the amendments becoming effective, or land use clearance has been given (i.e. where no land use approval is required).

1.3 Before the City approves a building plan under the National Building Regulations and Building Standards Act, 1977 ("the Building Standards Act") it must be satisfied that the application must comply with other applicable legislation, including the By-Law. As explained more fully below, in our view the City is incorrectly deciding building plan applications which were submitted to the City prior to 3 February 2020, on the basis of their compliance with the amended By-law instead of their compliance with the un-amended By-law.

1.4 This opinion will consequently consider the amendments and relevant City guidelines, and seek to explain their application, and why this has resulted in an incorrect application of the relevant law.

2. AMENDMENTS TO BY-LAW

2.1 The two amendments to the By-Law which are of particular relevance to this opinion are the following:

2.1.1 The insertion of section 142(9) – "*Notwithstanding any amendment to this By-Law which may come into effect, an application that has already been accepted by the City in terms of section 74(a) before the date that the amendments become effective, will be processed and considered in terms of the legislation as it existed at the time of acceptance.*"[1]

2.1.2 Item 41(c) of the Development Management Scheme ("DMS") relating to building height – *"(i) The maximum height of a building, measured from the [base] existing ground level to the top of the roof, shall be determined in accordance with the following 'Table of coverage, height and floor factor in General Residential Subzonings GR2-GR6'*."

2.2 The provisions of section 74 (Acceptance of application and call for additional information) is also relevant. It reads as follows:

"If the City accepts the application, the City Manager must –

(a) acknowledge receipt of the application;

[1] Inserted by section 24 of City of Cape Town: Municipal Planning Amendment By-Law, 2019.

(b) within 7 days after acknowledgement of receipt of the application or such further period as may be agreed in writing either –

(i) call for additional information or fees; or

(ii) notify the applicant that the application is complete.

2.3 Section 142(9) therefore means that if the City acknowledged receipt of an application under the By-law prior to 3 February 2020, then the application must be decided as if the amendments had not been made, and the contrary applies if receipt of the application is only made after that date.

2.4 Although the By-Law does not define the term "application", the types of application that may be made are listed in section 42 (see Annex 1). When read within the context of Part 5 (General Requirements for An Application) is it is clear that the term means an application referred to in section 42.

2.5 The situation becomes more complex when considering applications for building plan approval made under the Building Standards Act (discussed below), because these are closely interrelated with applications under the By-Law and the City has established procedures to ensure that these processes are dealt with in an integrated manner. However it is important to appreciate that the transitional provisions in section 142(9) of the By-law do not apply to applications for building plan approval because they are made under the Building Standards Act and not under the By-Law.

3. RELATIONSHIP BETWEEN BY-LAW AND BUILDING STANDARDS ACT

3.1 Section 7(1) of the Building Standards Act states that "if a local authority, having considered a recommendation referred to in section 6 (1) (a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof." (Our emphasis.)

3.2 Section 6(1)(a) in turn provides that "a Building Control Officer shall make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4(3)." Section 4(3) sets out what must be contained in a building plan application.

3.3 Insofar as the building control officer ("BCO") must make a recommendation in support of an application for building plan approval, the Constitutional Court has found that a "recommendation" is a jurisdictional fact for the decision under section 7(1).[2] The contents of the recommendation (which would include compliance of plans with the DMS and thus the By-law), together with all the other information at the decision-maker's disposal, must be sufficient to enable him or her to make a proper decision in the light of all the facts and circumstances of the particular case.[3]

3.4 "Any other applicable law" referred to in section 7(1) includes the By-law. Consequently the local authority (in this case the City) must consider the building plan application and the BCO's recommendation, and if it is satisfied that the building plan complies with the requirements of the By-

[2] In *Da Cruz and another v City of Cape Town and another* [2017] 1 All SA 890 (WCC) at page 905, the Court observed that the Standards Act places an obligation on the Local Authority to satisfy itself that the plans comply with all the applicable statutory requirements and that none of the disqualifying factors will be triggered. The legislative scheme consequently envisages that the building control officer will undertake the enquiries required to those ends and treat of them in the recommendation. The decision-maker is, of course, required to apply his or her own mind independently.

[3] *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (2) BCLR 121 (CC) page 135.

law, it must approve it.[4] In practice, when deciding whether or not to approve a building plan the City also has regard to other information uploaded into its land use management system ("LUMS"), including whether or not the plan has received clearance (a process described in the following section) and the minutes of any pre-application consultations between the City and applicant.[5]

3.5 A building plan will comply with the requirements of the By-law if either: (a) the proposed building requires an approval in terms of the By-law, and such approval has been obtained,[6] or (b) the proposed building already complies with the requirements of the By-law,[7] and consequently no approval is required. Should either of these two scenarios be present, the Local Authority must be satisfied that at least insofar as the By-law is concerned, the requirement that "*any other applicable law*" as required by section 7(1), has been complied with. Furthermore, section 7(1) is peremptory. If the Local Authority is satisfied that an application complies with the requirements of the Standards Act, an application must be approved.

4. APPLICATION PROCESS

Integrated decision-making process

4.1 The City has (correctly) established integrated processes for considering whether or not to authorise building projects, which include considering both whether or not the proposed project complies the land use restrictions in the By-Law and with the Building Standards Act. In order to comply with the requirements of the City's land use management system ("LUMS") a prospective applicant for building plan approval must first submit the plan to the City, and pay a scrutiny fee, in order for the City to determine whether (a) the plan complies with the City's Development Management System or (b) the applicant must first apply for and obtain land use management authorisation(s) under the By-law in order for the plans to be compliant. If the City determines that the plans comply with the DMS and consequently no application under the By-Law is required, the plans are "cleared". (This is sometimes referred to as "zoning clearance".)

4.2 Section 42 of the By-Law does not refer to applications for clearance (see Annex 1) and consequently the submission for LUMS clearance cannot be considered to be an application under the By-law. It is a procedural step in the City'sdecision-making process under both the By-Law (i.e. to determining whether or not the project requires land use management approval) and under the Building Standards Act (i.e. to determine whether or not the building plans comply with the By-Law).

[4] In relation to the requirement that a Local Authority must "be satisfied", the Constitutional Court observed in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC), in relation to section 7(1) that: "*the section requires that the decision-maker himself or herself must be satisfied that the protection requirements are met…The relevant section requires the decision-maker to bring his or her mind to bear on the non-existence of the disqualifying factors*."

[5] The By-law provides for pre-application consultations between the City and applicants or prospective applicants (section 70). The City may require a prospective applicant to consult with an authorised official prior to submitting an application under By-Law (section 70(1)) and a prospective applicant may write to the City to request a pre-application consultation (section 70(3)).

[6] For example, where a departure is required in terms of section 45 of the By-law, read with the relevant Item in the Development Management Scheme.

[7] In other words, the building conforms to the envelope of the relevant zone as set out in the Development Management Scheme without the need for a departure, for example.

Date on which compliance with other legislation must be determined

4.3 This raises the question of whether a plan that was cleared (i.e. in compliance with the By-Law) prior to 3 February 2020, must be re-evaluated to determine compliance with the amended By-law. In other words, must compliance with the By-law for the purposes of building plan approval under the Building Standards Act be determined with reference to the By-law as it was at: (a) the date on which the application was made; (b) the date on which LUMS clearance was given; or (c) the date on which the decision to approve or deny the application is made?

4.4 Section 4 of the Building Standards Act stipulates that "no person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act". The section then sets out the form an application must take, and the information an application must contain as "may be required by the local authority in question for the carrying out of the objects and purposes of this Act".

4.5 Accordingly, whatever information and plans are submitted to the Local Authority for approval must be sufficient to satisfy the Authority, at the time of submission, that the plans comply with the requirements of the Building Standards Act and any other law, such that it may approve an application. What is critical, therefore, is that at the time building plans are submitted to the Local Authority for approval, they comply with the requirements of the By-law. The corollary is that presented with plans that are legally compliant (in this instance, where no land use approval is necessary), the Local Authority is bound by the peremptory provisions of section 7 of the Building Standards Act to approve an application.

4.6 In our view, the Building Standards Act should be interpreted as requiring that compliance with any other applicable law means compliance with those laws as at the date the application was made. In other words, if the application was compliant when it was made, a subsequent change in the other applicable laws does not render the application non-compliant. Our opinion is based on the following.

4.6.1 This interpretation is consistent with the presumption that statutes should not apply retrospectively, which is well-entrenched in our law.[8] The law should be applied as it was at the time a building plan was submitted.

4.6.2 Determining whether or not a building plan application complies with other applicable laws (in this case the By-Law) as at the date that the decision is made, would be administratively unfair because this would mean that whether or not the application were approved would depend on how long it took the City to decide the application. For example, if two building plan applications were made on the same day but one was decided prior to 3 February 2020 and the other on or after that date, the former would be decided with reference to the un-amended By-Law and the latter with reference to the amended By-Law. It would be arbitrary, unreasonable and irrational to make such a distinction.

4.6.3 This approach is consistent with the leading Supreme Court of Appeal decision on the proper approach to interpretation which held that "*An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration*"[9]

4.7 As explained below, the City's approach is that if a land use approval for a project was granted before 3 February 2020, when considering whether or not to approve the building plans for that project on or

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[8] *DVB Behuising (Pty) Ltd v North West Provincial Government* 2000 4 BCLR 347 (CC) par 65; *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 9 BCLR 929 (CC) pars 27 68.

[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).*

after that date, the City will not determine compliance with reference to the amended By-Law. However, if prior to 3 February 2020 the project does not require a land use approval, when considering the building plan application after 3 February 2020, the City now proposes to determine compliance with reference to the amended By-Law. In our view this is anomalous and unreasonable.

5. CITY OF CAPE TOWN STAFF CIRCULAR

5.1 In order to guide application of the relevant amendments, the City released a Circular entitled: Transition arrangements regarding land use and building plan applications, resulting from the Municipal Planning Amendment By-law, 2019, which is dated 6 December 2019 ("the Circular"). The Circular purports to "*set out the transitional arrangements linked to the amendments, and the implications for both land use applications and building plans where:*

- *decisions have already been made*
- *applications are currently being processed*
- *future applications are still to be made*."

5.2 The Circular then proceeds to detail four scenarios in which section 142(9) and other amendments (including in relation to height), which came into effect on 3 February 2020, will or will not be applicable to land use applications, depending on the status of the application.

Land use scenarios

5.2.1 Land use Scenario one – an approval, where final notification has been issued, that has not been acted upon and is still within its validity period (amendments **not** applicable).

5.2.2 Land use Scenario two – land use applications for extension of validity where acceptance in terms of section 74(a) has not yet been issued (amendments applicable). [10]

5.2.3 Land use three – applications still being processed where section 74(a) acceptance has been issued prior to the effective date of the amendments (amendments not applicable).

5.2.4 Land use Scenario four – land use applications still being processed, where section 74(a) acceptance has not been issued prior to the effective date (amendments applicable).

Building plan scenarios

5.3 In relation to the applicability of the amended By-law to building plan applications made on or after 3 February 2020, the Circular details four scenarios.

5.3.1 Building plan scenario one – building plan approval already granted (and still within its validity period) (amendments **not** applicable).

[10] The Circular gives content to section 74(a) by advising that "*acceptance of a land use application in terms of section 74(a) is the date that the letter is generated on DAMS and recorded in Case Header. Standard letter BLUM003 has been amended to indicate that the date of the letter is the date of acceptance.*"

5.3.2 Building plan scenario two – applications for extension of validity of a building plan (unless the plan is based upon a land use approval that was finalised in terms of the By-law before the amendments took effect) (amendments applicable).

5.3.3 Building plan scenario three – building plan submitted to act upon a land use approval finalised in terms of the By-law as it existed prior to the amendments (amendments **not** applicable).

5.3.4 Building plan scenario four – a building plan (including minor deviations) submitted that was not the subject of a land use approval (amendments applicable).

5.4 In addition to the distinctions made between applications in the above scenarios, it is immediately apparent from the Circular that the following also need to be distinguished:

5.4.1 first, proposed developments which require land use approvals because they deviate in some manner from the parameters of the Development Management Scheme ("DMS"); and

5.4.2 secondly, proposed developments which do not require land use approvals because they comply with the stipulations of the DMS.

5.5 The above distinction is relevant because it has a direct bearing on the application of the Building Standards Act, and the requirements in that Act which must be met prior to a Local Authority (in this instance, the City) being able to satisfy itself that all statutory requirements have been met such that a building plan must be approved (discussed above).

6. APPLICATION OF THE LAW TO THE SCENARIOS

6.1 The amendments have brought about certain changes in development rights which may, depending on the status of a land use application (and whether one is necessary in the first place), have a bearing on building plan applications that have yet to be approved. Below we will consider each of the scenarios put forward by the City, and examine whether (in light of the legal position set out above), its interpretation is correct.

Land use approval granted prior to 3 February 2020

6.2 Land use scenario one and building plan scenario three contemplate a situation where land use approval has been granted prior to 3 February 2020. In both scenarios, the decision regarding a land use application has been made, and consequently rights in terms of the By-law as it stood before the amendments have been entrenched. The Local Authority can therefore be satisfied, in the course of rendering its decision on a subsequent building plan application, that the requirements of the By-law have been met for the purpose of section 7(1) of the Building Standards Act. This is the case even if the building plan application is considered after 3 February 2020. In these scenarios, the City's interpretation is correct.

Land use approval not accepted prior to 3 February 2020

6.3 With regards to land use scenarios two and four, where section 74(a) acceptance has not yet been issued prior to 3 February 2020, then section 142(9) applies, and those land use applications will need to be revised in order to comply with any applicable amendments under the By-law (should this be necessary in the circumstances). The City's interpretation in these scenarios is likewise correct.

Land use approval accepted prior to 3 February 2020

6.4 With regards to land use scenario three, an application in respect of which section 74(a) acceptance has been issued prior to 3 February 2020 falls squarely within the ambit of section 142(9), and will be dealt with in terms of the By-law as it stood at the time of acceptance. The City's interpretation in this scenario is correct.

Building plans approved prior to 3 February 2020

6.5 With regards to building plan scenario one, the amendments will have no impact on building plans approved prior to 3 February 2020. This is because the section 7(1) decision by the Local Authority would already have been made.[11] The City's approach in this scenario is consequently correct (although the amendments to the By-law have no bearing on this scenario at all, and the inclusion in the Circular of a reference to section 142(9) of the By-law is entirely misplaced and misleading).

Building plan applications for projects that received land use approvals prior to 3 February 2020

6.6 Building plan scenario three addresses the situation in which a building plan application is made after 3 February 2020 but relates to a project that received land use approval prior to that date. We agree with the conclusion in the Circular that the amendments are not relevant to this situation. However in our view this is because the determination about compliance with the By-Law (the section 7(1) determination) was made before the amendments came into effect.

Building plan applications decided after 3 February 2020 for projects without land use approval

6.7 The Circular distinguishes between those applications that do not relate to a land use approval that was finalised in terms of the By-law before the amendments took effect (amendments apply) and those that do relate to such a land use approval (amendments are not applicable.) Although the Circular does not explain the City's reasoning, it appears to be based on the view that once the City has decided to grant land use approval for a project it has fulfilled that function in relation to the project and may not revisit the issue (i.e. is *functus officio*). However if no land use approval is required because at the time of submission, a building plan complied in fact and in law with the requirements of the By-law, there is no exercise of a statutory power which binds the City when it later decides the issue of compliance with the By-Law.

6.8 Building plan scenario two and four concerns building plan applications for projects that do not have land use approvals that were granted before 3 February 2020. Scenario two concerns application for the extension of validity of a building plan approved prior to that date and scenario four concerns new building applications (including for minor deviations). The Circular indicates that in both cases the City must make the section 7(1) determination with reference to the amended By-Law. In our view that is only correct if the applications for building plan approval were made on or after 3 February 2020.

6.9 As explained above, in our view for the purposes of the Building Standards Act the City must determine compliance with the By-Law as it is on the date of application and must take account of prior decisions of the City in relation to the project. A new or amended land use approval would only need to be determined in accordance with the amended By-law if it were accepted by the City on or after 3 February 2020. In our view if a building plan application is made after 3 February 2020 in relation to

[11] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26, the Court held that until an approval … is set aside by a court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked.

a project that did not require land use approval prior to that date, the City must make the section 7(1) determination in relation to the amended By-Law. We agree with the City in that regard.

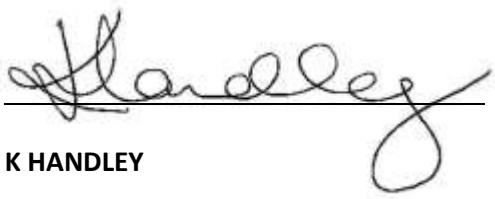
6.10 However, if a building plan application was made before 3 February 2020, the issue of whether or not it complied with the By-Law should be determined with reference to the By-Law as it existed prior to the amendments. This means that the City must adjudicate building plan applications submitted prior to 3 February 2020 in accordance with the law as it applied at the time of submission. If such building plans did not require land use approval prior to 3 February 2020, amendments effective from the latter date cannot be applicable retrospectively.

7. CONCLUSIONS AND RECOMMENDATIONS

7.1 This opinion has sought to consider the amendments, and examine the City's interpretation of the By-law and the Building Standards Act as each statute applies to the scenarios detailed in the Circular. We are of the view that building plans submitted prior to 3 February 2020, and which complied with the By-law as it existed at the time of submission to the City (either because the necessary land use approval had been obtained, or because such approval was not necessary) must be adjudicated in accordance with the law as it existed at the time of submission.

7.2 We would recommend that affected applicants engage further with the City on this point.

DATED at CAPE TOWN on this 26th day of March 2020.



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ANNEX 1: EXTRACT FROM BYLAW

"42 Types of applications

A person may make application for the following in terms of this By-Law –

(a) rezoning of land, including rezoning to subdivisional area overlay zoning;

(b) permanent departure;

(c) temporary departure;

(d) subdivision of land;

(e) implementation of a subdivision approval in phases;

(f) consolidation of land;

(g) amendment, suspension or removal of a restrictive condition;

(h) consent or approval in terms of, or the relaxation of, a restrictive condition in a title deed where the restriction relates to use, subdivision, development rules or design criteria;

(i) consent, approval or any other permission or requirement in terms of the development management scheme;

(j) amendment, deletion or addition of conditions in respect of an existing approval granted or deemed to be granted in terms of this By-Law;

(k) extension of the period of validity of an approval;

(l) amendment or cancellation of an approved plan of subdivision or general plan;

(m) permission required in terms of the conditions of approval of an application;

(n) determination of a zoning, a non-conforming use right or any other matter which the City may determine in terms of this By-Law;

(o) correction of a zoning map;

(p) [Para (p) deleted by s. 8 (a) of City of Cape Town: Municipal Planning Amendment By-Law, 2016]

(q) alteration or amendment of a street name or number as contemplated in section 136;

(r) determination of an administrative penalty as contemplated in section 129(1);

(s) to exempt a subdivision from the need for approval in terms of this By-Law as contemplated in section 67(3);

(t) permission for the reconstruction of a building or a substantial part of it within the envelope of a non-conforming use as contemplated in section 37(6);

(u) any other application which the City Manager may prescribe in terms of this By-Law or

(v) (approval in terms of section 55(4)(b) of this By-Law."