IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 18184/2024

In the matter between:

THE CONSTANTIA VALE RESIDENTS GROUP	Applicant
and	
THE CITY OF CAPE TOWN	1st Respondent
MASON PROPERTY DEVELOPMENTS (PTY) LTD	2nd Respondent
CONSTANTIA RATEPAYERS AND RESIDENTS ASSOCIATION	3rd Respondent

Heard: 22 November 2024

Delivered: 10 April 2025

JUDGEMENT

ADAMS AJ

A. Introduction

[1] The applicant seeks the review and setting aside of approval granted by the first respondent ('The City) in terms of section 7 (1)(a) of the National Building Regulations and Building Standards Act (NBR Act) 103 of 1977 together with declaratory and interdictory relief. The review is aimed at setting aside the following approvals, namely:

- The decision on 9 July 2024 to grant an application for approval of a building plan in respect of ERF 2180 Constantia; and
- The decision on 7 August 2024 to grant an application for approval of a building plan in respect of ERF 14134 Constantia,

[2] The declarator and interdictory relief is consequential upon the success of the relief sought in relation to the review and setting aside of the decisions as outlined. The declarator and interdictory relief sought is set out in the notice of motion as amended in the following terms:

- Declaring that the second respondent's proposed development on remainder erf 2180 Constantia and erf 14134 Constantia (the properties) in a sectional title scheme which the second respondent intends establishing on the properties in terms of the provisions of the Sectional Titles Act 95 of 1986 (the sectional title scheme) will be contrary to the zoning of the properties as provided for in the Development Management Scheme of the City of Cape Town, being schedule 3 of the City of Cape Town Municipal Planning By-Law, 2015.
- Interdicting the second respondent from taking any steps to establish the sectional title scheme.

B. The parties

[3] The applicant (the Constantia Vale residence group), an association with legal personality distinct from its members who is capable of suing or being sued in its own name, and which operates from 10 Duckitt Avenue Constantia, Cape. The applicant was ostensibly established with the aim of preserving the character of the Constantia Valley including the precinct between Duckitt Avenue, Sebastian Road and Thatcher Road (the CRG precinct).

[4] The first respondent is the City of Cape Town (The City), a municipality as contemplated by Chapter 2 of the Local Government: Municipal Systems Act 32 of 2000, established in terms of the provisions of Chapter 2 of the Local Government: Municipal Structures Act 117 of 1998, of Civic in 12 Hertzog Boulevard Cape Town.

[5] The second respondent is Mason Property Development (Pty) Ltd (registration number 2015/155770/07), a company duly incorporated in accordance with the company law provisions of South Africa (Mason). Mason conducts business as a property developer, with its principal place of business at the first floor, Constantia Emporium, corner of Ladies Mile and Spaanschemat River Road, Constantia.

[6] The third respondent is the Constantia Ratepayers And Residents Association, an association with legal personality which operates from Alphen Centre, Constantia Main Road, Constantia, Cape Town. The third respondent has as one of its main

objects the preservation of the unique character and heritage of the Constantia Valley. It has been joined to this application because of its interest in these proceedings. The applicant does not seek any relief against it.

C. Factual Background

[7] Mason is the registered owner of ERF 14134 Constantia and the remainder of ERF 2180 Constantia (the properties) which are located within the CRG precinct. The properties are held under the Title Deed number TO31133/22. Mason proposes to develop these properties which are located within the CRG precinct. They aim to develop the properties with the construction of six 3- and 4- bedroom dwellings/houses in what is described as a secure estate, namely Bannerman Close Estate. Bannerman Close estate has been conceptualised, designed and marketed as a single, integrated security estate.

The subdivision

[8] ERF 2180 Constantia, the parent property was originally 384 4 m² in extent. The property, also known as Bannerman Close, was located on the corner of Bannerman Close and Van Reenen Road Constantia. On 13 April 2011, a subdivision of the property was approved by the City in terms of the Land Use Planning Ordinance 15 of 1985 to form ERF 14134 (177 4 m² in extent) and the remainder of ERF 2180 (2070 m² extent). Together with the approval of the subdivision, departure from the provisions of the applicable zoning scheme in respect of minimum ERF sizes were granted by the city. The subdivision was approved without conditions regulating and limiting the extent of permissible development on ERF 14134 and the remainder of

ERF 2180. The subdivision was confirmed by the applicants' Attorney when it was established that the certificate of registered title in respect of ERF 14134 was registered in the deeds office on 18 February 2022. It is contended by the applicant that the relevant departures, which were necessary for a lawful subdivision to take place had expired and that registration of ERF 14134 under a separate title was unlawful. These aspects were pointed out to the City by the applicant in its objection to Mason's application.

[9] This matter concerns not a single estate, but rather two properties (erven) for which subdivision approval was granted by the City in 2011. The subdivision has not been challenged by the applicant. Counsel for the applicant has indicated that they are no longer pursuing challenges to the subdivision or the contentions previously advanced in respect of it.

Approval of the building plans

[10] On application by the second respondent, Mason, the City approved building plans for two adjacent SR1-zoned properties: ERF 14134 and the remainder of ERF 2180 in Constantia. The building plans approve three dwelling units on each ERF, consistent with the three dwellings permitted as an additional use right in the SR1 zoning in Item 21 of the City's Development Management Scheme ('the DMS'). Mason intends selling the three units on each ERF as part of a sectional title scheme. These plans, which allow for three dwelling units on each ERF, are impugned in these review proceedings.

[11] The applicant's membership consists of eight properties in a small portion of Constantia. These are large properties within an area identified as a low-density zone by the building control officer. Notably, members of the applicant's group include its legal representatives. Despite claims that properties in this precinct predominantly consist of single-story dwellings, it is submitted by the respondents that the deponents to the founding and supplementary founding affidavits failed to disclose that their own properties have been subdivided by the City, with a second dwelling now established on one of their properties. This undermines the assertion that the precinct solely comprises single-dwelling and large properties. It appears there has been some densification in the area, particularly at the applicant's request

[12] This dispute concerns decisions made by the City Council in 2016 and 2019 when it amended the By-law to increase the number of dwelling units permitted on SR1-zoned properties. In 2016, Item 21 of the DMS was amended to allow for a second dwelling, and in 2019, it was further amended to allow for a third dwelling as an additional use right. The applicant argues that these amendments have led to "unintended consequences," but the respondents contend that these are in fact intended consequences designed to expand development rights, not just for Constantia, but for all SR1-zoned properties in Cape Town.

D. The concession made by the Respondents in respect of 2180 Constantia

[13] The first and second respondent have conceded the review and setting aside of the approval in respect of 2180 and for the matter to be remitted back for

consideration by the city. In relation to relief sought in this instance, the only issue that stands to be determined, therefore, is the question of costs.

E. The review in respect of ERF 14134

Issues for determination

[14] The primary issue for determination pertains to whether the amendments to the city zoning scheme, specifically, the 2016 amendment permitting the construction of second dwelling houses and the 2019 amendment allowing third dwelling houses on Single Residential 1 (SR1) zoned properties, authorizes the establishment and registration of a sectional title scheme. Additionally, it must be determined whether the Building Control Officer (BCO), in compiling a report and formulating recommendations, duly considered the relevant factors and requirements as prescribed by the applicable legislation, and whether such consideration accords with the pertinent legal principles and statutory provisions.

The provisions of the By-law

[15] Item 21(b)(ii) of the City of Cape Town's DMS grants additional use rights that permit the development of a second and third dwelling unit on SR1-zoned properties across the City. This aligns with the City's policy to encourage densification and development. No precinct or suburb within Cape Town is exempt from this By-law.

[16] Item 21(a) specifies the primary uses for dwelling houses, private roads, and additional use rights, as detailed in paragraph (b). The additional use rights specified

in item 21(b) are primary entitlements under the zoning scheme, including the right to establish second and third dwellings, subject to specific conditions.

[17] In relation to second and third dwellings, consideration must be given to the provisions of Sections 25A and 25B of the DMS, which set out the limitations for the second and third dwelling regarding floor space, style and height in relation to the main dwelling. The entitlement to second and third dwellings permitted as additional use rights are primary in nature and do not require separate approval from the City, provided there is compliance with certain conditions.

[18] The provisions of item 21 of the DMS have not been challenged in these proceedings. If the applicant wished to challenge these provisions, they had the opportunity to do so during the amendment process. Similarly, the subdivision of these properties was approved, and ownership was transferred to the current owners. None of these decisions were challenged by the applicant. Counsel for the applicant has conceded that the subdivision stands as a matter of law, and they are no longer pursuing that challenge.

F. The challenge to the approval of the building plans

[19] The applicant raised several objections to the proposed densification, particularly the development of three dwellings on SR1-zoned properties. Their primary arguments can be summarized into three main points:

- The first argument is that item 21(b)(ii) of the DMS does not permit the

development of three dwellings on an SR1 property to be sold in a sectional title scheme.

- The second argument relates to the notarial tie agreement registered over the properties.
- The third main challenge sets out the other grounds of review - relating to the LAO/3 overlay zoning, compatibility with the surrounding area, and the so-called disqualifying factors in section 7(1)(b)(ii) of the Building Act.

[20] The averments which pertains to the City and its officials, particularly the BCO, obtaining and relying on the advice and input of external attorneys and counsel on the draft recommendation of the BCO for purposes of s 6 of the Building Act was not taken further in argument before me by the applicant.

G. The Submissions before this Court

The Applicant

[21] The applicant contends that Mason's conduct is in line with recent conduct of property developers who have increasingly, in the wake of the amendments, turned their attention to the Constantia Valley. The applicant indicates that the method of operation is generally as follows:

- Properties in excess of 2000 square metres are acquired, notably where the property consists of single dwelling reasonably old and dated houses in need of renovation.
- Plans are submitted for two or three dwelling houses on the property, which are tightly fitted onto the property. A sectional title register is opened, and each

house is marketed and sold on the basis of a separate title. The applicant attached some photos depicting the type of development in question located in Evergreen Lane, Constantia, as well as similar development elsewhere in the area.

[22] The applicant expresses the view that this form of development is likely to have significant consequences for the character of the Constantia Valley. The applicant concedes that appropriately planned densification within the city and suitable areas of the Constantia Valley is desirable and inevitable. However, the applicant opine that it is neither appropriate nor desirable if densification is brought about in a manner inconsistent with the intent of the city zoning scheme and applicable planning instruments such as the Southern District Plan adopted as part of the City's Municipal spatial development framework (MSDF) and the City's densification policy.

[23] It is submitted on behalf of the applicant that the pattern of sectional title development as outlined is being enabled as a result of unintended consequences of certain amendments to the city zoning scheme and the failure to apply the SR1 zoning provisions properly when considering building plan applications.

[24] The applicant contends that the failure to properly consider the application for approval of the building plans in line with the relevant legal principles is most apparent in the following respect:

- The city does not accept that the right under the SR1 zoning to construct a second dwelling house and the third dwelling house does not permit sectional title ownership of each house erected on the property;
- Additionally, the crucial limitation of the three dwelling house right, namely that the dominant use of the property shall be the main dwelling house, and for the second and third dwelling house being subsidiary to such dominant use is largely ignored by the city.
- The area surrounding Bannerman Close is a low-density area, consisting generally of substantial properties ranging in size in the main from 2500 m^2 to 4500 m^2 and zoned SR1. For the most part, a single dwelling house stands on each of these properties.

[25] It is contended that these additional rights to erect further properties is being employed to subvert the subdivision procedures of the zoning scheme as well as applicable land use restrictions in the zoning scheme. In the process, material provisions of the zoning scheme are being invaded and subverted.

[26] The applicant submits that the amendments permitting a second and third dwelling are 'unintended consequences' of those decisions.

[27] The further submission of the applicant mainly centres around their opinion that densification in their area through the erection of three dwellings on SR1 zoned properties in question is inappropriate.

The Respondents

[28] The City contends that what the applicant finds objectionable are, in fact, intended consequences to enhance development rights, not just for this small precinct in Constantia but for all SR1 zoned properties in the City's jurisdiction. In addition, the City contends that the applicant's arguments are flawed as it is premised on land ownership and this argument is not in line with the provisions of the applicable bylaw and the City's densification policy which is clearly aimed at land use and not ownership. It is submitted by the City that the applicant seeks to distance themselves from the provisions of the Development Management Scheme (DMS) as outlined in item 21, employing a convoluted interpretative approach. They rely on analogies and various examples of approvals granted for subdivisions or consolidations, but what they are ultimately seeking from the court is the creation of a new entitlement under the zoning scheme for Single Residential 1 ('SR1') -zoned properties.

[29] The City advanced an additional argument based on section 7(1)(a) of the National Building Regulations and Building Standards Act ("the Act"), which empowers a local authority to approve building plans if it is satisfied that the application complies with applicable legal requirements. It was argued that this introduces a subjective element into the decision-making process, requiring the authority to form an opinion on legal compliance. The City contended that its officials acted reasonably and in accordance with a long-standing practice in interpreting the applicable law, most notably the DMS and other considerations such as the disqualifying factors , thereby fulfilling this requirement.

[30] The second respondent aligns with the City's submissions and the heads of argument filed. The following additional points are raised by the second respondent.

[31] The second respondent contends that this application primarily concerns the issue of densification. The applicant and its members seek to prevent the implementation of densification within a specific area that lies in immediate proximity to their residential properties. However, it is submitted, the applicant is not entitled to isolate themselves from the broader process of urban densification, as contended by the City and as noted in the report by the Building Control Officer (BCO).

H. Discussion of the relevant legal principles

The Permissibility of Three Dwellings Under Item 21(b)(ii) of the DMS and the Irrelevance of Sectional Title Ownership

[32] A central issue in this case is the proper interpretation of Item 21(b)(ii) of the DMS, which permits the construction of three dwelling units on SR1-zoned properties. Item 21 of the DMS explicitly allows for three dwelling units on such properties, as outlined in the relevant provisions of the By-law.

[33] This policy decision was made by the City Council to encourage development and densification, first in 2016 with the addition of a second dwelling and again in 2019 with the inclusion of a third dwelling as an additional use right. The applicant's interpretation of this provision centres on whether the dominant use of the property

must always be a single-family dwelling. They argue that for three dwellings to be permitted, the main dwelling must remain the dominant use. However, this interpretation is flawed. Item 21(b)(ii) permits second and third dwellings as long as the main dwelling is designed to accommodate a single family, but it does not preclude these dwellings from being sold as separate units under a sectional title scheme. The applicants contention that Item 21(b)(ii) of the DMS does not allow the development of three dwellings on an SR1 property to be sold under a sectional title scheme is based on a misinterpretation, as the DMS does not impose any restrictions on the form of ownership for SR1 properties. The rights to develop the properties are tied to land use, not ownership structure. Thus, the DMS permits the construction of three dwellings, irrespective of whether they are sold under sectional title or otherwise.

[34] The applicant's challenge to the approval in this regard, is founded in the main upon the provision in item 21 (b)(ii) of the DMS to the effect that the dominant use of the property shall be a dwelling house for accommodation of a single family. The applicant contends that this requirement is not satisfied where the three dwellings on the property are held under separate title in a sectional title scheme. The definition of dominant use provides that the dominant use may consist of "primary uses, consent uses or other lawful uses permitted on the property."[1] Item 21 of the DMS expressly permits the construction of three dwellings on a property zoned SR1 with a dwelling house permitted as the primary use and the second and third dwellings as additional use rights. There is no requirement that the

[1] Definitions section in Chapter 1 of the Municipal Planning Bylaw, 2015 as amended

primary and the additional use rights all be exercised by the owner of the main dwelling or a single family

[35] On the contrary, item 21(b) contemplates the exercise of use rights by an *"occupant"*. Items 25A and 25B of the DMS clearly contemplate that the additional use rights exercised by way of the second and third dwellings as being determined by the limitations imposed by items 25A and 25B. 22. There is no dispute that the second and third dwellings on erf 14134 are compliant with those limitations and thus permitted additional uses under item 21 of the DMS.

[36] While the applicant argues that the DMS requires all three dwellings to accommodate a single family, the City's interpretation that it is not a requirement for the same family to occupy all three dwellings is in my view consistent with the intent of the By-law, namely, to promote appropriate densification. The City's longstanding practice of approving such developments demonstrates that this approach is both reasonable and aligned with the DMS's objectives. The dominant use of the property was thus correctly determined by the BCO with reference to the main dwelling house on the property.

Ownership and Land Use Rights

[37] The second aspect of the applicant's argument revolves around the claim that SR1 zoning restricts sectional title ownership. However, the DMS does not place any restrictions on the form of ownership for SR1-zoned properties. The right to build multiple dwellings is tied to land use, not ownership structure. The suggestion by the

applicant that sectional title ownership constitutes a subdivision of the property is incorrect, as the By-law allows for the development of three dwellings on subdivided erven, which may then be sectionalized without violating the DMS.

The applicant's contention is founded primarily on the dominant use requirement. The DMS provides that the SR1 Zoning provides for predominantly (but not exclusively) single- family dwelling houses and additional use rights in low to medium density residential neighbourhoods, on small or large erven. Item 21 of the DMS neither prescribes nor proscribes any form of ownership of the property in question. There is no basis to read in any proscription of that nature and the applicant did not make out a case therefor.

The applicant's case relies on the submission that sectionalising the development must be taken to have effected a subdivision of the land. There is no provision in any of the applicable law upon which the applicant placed reliance onto the effect that a property that has been sectionalised is to be considered for planning purposes as one that has been subdivided. In addition, there is no requirement that the primary and additional use rights on the property must be exercised by the same owner or a single family. Item 21(b)(ii) of the DMS refers to the effect that the *"proprietor"* of the additional use right must live on the property. Such proprietor may therefore be the owner of a second or third dwelling which has been sectionalised. Thus, on a proper construction in the absence of an express prohibition in the legislation, nothing has been placed before me to warrant a basis to read in a prohibition against sectional title ownership. This would be contrary to the City's densification policy.

[38] Therefore, there is no evasion of the DMS, and the applicant is not entitled to the declaratory or interdictory relief sought, which would preclude the second respondent from exercising existing rights.

[39] This argument also overlooks the fact that a property can be subdivided, and the new erven developed in compliance with the DMS. Therefore, sectional title ownership does not violate the intent of the DMS, as the land use rights remain consistent with what is permitted under the By-law.

[40] The applicant has ownership over a limited area and seeks to challenge this matter solely within a very narrow scope. The founding affidavit[2] contends that appropriately planned urban densification within the City is desirable and will continue to take place in suitable areas. Densification in areas inconsistent with the City's zoning schemes is objectionable, but densification in accordance with those schemes is not. It is in this context that one must assess the current plan approvals and the applicant's challenge

[41] The applicant objects to the development of two adjacent properties. However, what is immediately clear, upon setting aside the form of the development for the moment, is that what is permitted by right on these two properties is the development of three dwelling houses on each of them. Irrespective of the form of the development, this will result in the densification of the properties through the construction of six

[2] Record at page 17

dwelling houses, which is a permitted use. Therefore, the densification is not an unintended consequence of the scheme amendment, as suggested by the applicant, but rather the intended outcome to promote the development of these properties in line with the City's densification policy.

The Notarial Tie Agreement: Planning Implications

[42] The applicant, having failed to challenge the subdivision of the parent ERF, now seek to attribute to the notarial tie agreement a broader implication than what is expressly stated. They claim, contrary to the clear content of the BCO recommendations and the evidence provided by the BCO and the decision-maker, that these officials were unaware of the notarial tie agreement.

[43] The applicant asserts that a notarial tie agreement between the properties requires them to be treated as a single ERF for planning purposes, essentially consolidating them. This submission is at odds with the purpose and terms of the notarial tie agreement and is not supported by the facts inherent in this matter. The applicant's case in relation to the notarial tie is founded upon a erroneous construct of its terms and import.

[44] The notarial tie agreement was designed solely to facilitate the registration of a sectional title scheme under the Sectional Titles Act of 1986. It does not require the properties to be treated as a consolidated ERF for planning matters. The City's Senior Land Use Planning official confirmed that the terms of the notarial tie agreement were

not intended to consolidate the properties. A notarial tie agreement does not address planning matters, nor does it alter the use rights of the properties.

[45] There is no provision in the agreement to the effect that the properties shall be considered as one for planning purposes and as second respondent pointed out in the answering papers[3], the City's section head for Land Use Management, Mr. Hoffa, stipulated in his e-mail of 18 May 2023 that the notarial tie did not provide for a consolidation as the applicant suggests. To that end he specifically required the removal of the reference to 'planning matters' from the agreement.[4] ERVEN 2180 and 14134 are subdivided, held under separate title and for planning purposes they must be considered as such. The notarial tie agreement does not purport to provide or require otherwise and does not amend or restrict the owner's rights under the By-law or the DMS.

What the Notarial Tie Agreement Provides

[46] The notarial tie agreement was concluded between the City and Mason solely to enable the registration of a sectional title scheme over both properties, as required under section 4(2) of the Sectional Titles Act 95 of 1986. This is clearly stated in both the text of the agreement and in contemporaneous correspondence placed before this Court.

[3] Record p.310 Mason AA, paras 87 and 88
[4] [4] Record p. 364, Annexure "MDP13"

[47] The notarial tie agreement explicitly states the following:

"WHEREAS the OWNER proposes to register a Sectional Title Scheme over the PROPERTIES, and it is necessary for this purpose in terms of Section 4(2) of the Sectional Titles Act 95 of 1986 that the OWNER'S PROPERTIES shall be tied together."

[48] The body of the document further elaborates:

"That the PROPERTIES be tied together and regarded as ONE property for the purposes of Section 4(2) of the Sectional Titles Act 95 of 1986, and that none of the PROPERTIES shall be separately sold, leased or otherwise disposed of to any person other than the same transferee without the written consent of the City of Cape Town first being obtained, and the City of Cape Town shall have an absolute discretion to grant or withhold such consent."

[49] The agreement's sole purpose is clearly stated to facilitate the registration of a sectional title scheme, not to alter planning rights. Any interpretation extending the agreement's purpose to planning matters would be an improper reading of the document.

[50] Additionally, as corroborated by contemporaneous correspondence, Mr. Hoffa (Section Head for Land Use Management in the Southern District) explained that the City could not accept the inclusion of "and any related planning matters" in the draft agreement. Mr Hoffa stated as follows:

"The notarial tie is ok in principle, but the wording 'and any related planning matters'... is not acceptable. This would make the notarial tie tantamount to a consolidation, which it is not. Even with a notarial tie, the Municipal Planning By-Law, 2015 regards the two erven as separate." [5]

The Subdivision and Its Legal Status

[51] ERF 2180 and ERF 14134 were originally part of a single ERF, but a subdivision was approved in 2011. The subdivision and the decisions related to it, including those made by the City and the Registrar of Deeds, have not been challenged by the applicants, despite their prior objections to the subdivision. Therefore, the subdivision stands as a legal fact, and the properties are now treated as separate entities.

[52] The applicant's attempt to use the notarial tie to undo the subdivision is an attempt to alter the development rights associated with the properties retroactively. However, as the notarial tie agreement does not alter the properties' planning status, this argument is without merit.

[53] The effect of the subdivision is that, as a matter of right, these properties are entitled to a first, second, and third dwelling under the zoning scheme. If the applicant's approach in relation to the area which must be considered by the BCO were to be adopted, it would create ambiguity, as the BCO would be confined to a very small precinct, such as Bannerman Close and the immediate surrounding area, where large

[5] MPD13 attached to the second respondent's answering affidavit found on page 364 of the record

properties with a single dwelling currently exist. The applicant's position would hinder the BCO from approving building plans for second and third dwellings due to concerns about the existing streetscape and the environment of the small precinct. However, this contradicts the core purpose of item 21, which is to facilitate densification.

[54] The City submits that the applicant has misunderstood the role of the DMS in the zoning scheme, particularly regarding ownership and the interpretation of the provisions in a manner contrary to the consistent interpretation by the City.

[55] The approach advocated by the applicant contradicts well-established principles of statutory interpretation, as enunciated in the Endumeni case.[6] The interpretation must not lead to impractical or oppressive consequences for the legislation or contract under consideration.

Declaratory and Interdictory Relief:

[56] It follows from the aforegoing that the relief sought in the form of a declaratory and interdictory order cannot be granted. Such relief is contingent upon the incorrect assertion by the applicant that a sectional title scheme cannot be registered on SR1 zoned properties. Contrary to this assertion, allowing for such registration would not deprive these properties of the development rights outlined in the By-Law.

[6] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010)[2012] ZASCA 13

The determination made by the BCO

[57] The remaining arguments raised by the applicants concern a number of criticisms levelled against the report compiled by the BCO with reference to Section 7(1)(b)(ii) of the Building Act and the "disqualifying factors" thereunder. Once satisfied that the application for plan approval complies with applicable law, the decision-maker must be positively satisfied before the plan can be approved, that none of the so-called disqualifying factors under section 7(1)(b)(ii) of the Building Act are present. In relation to the test to be applied in this regard, the Constitutional Court said the following in *Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Dacruz and Others*[7]

> *"It requires the decision maker to consider the impact of the proposed development on neighbouring properties, from the perspective of a hypothetical neighbour.*[8]

Compatibility with the residential character of the area

[58] The applicant argue that the proposed development is not compatible with the residential character of the area.

[59] In support of this argument, the applicant focus narrowly on the immediate precinct around their properties, contending that the properties are all substantial and that, for the most part, each property contains a single dwelling house. This description appears in the founding affidavit.

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[7] 2019 (3) SA 78 (CC)
[8] Simcha supra at para 31

[60] There are two critical flaws in this approach:

[60.1] Firstly, when assessing the compatibility of a proposed development with the surrounding area, the decision maker cannot consider only the immediate vicinity or block. A broader consideration of the area is necessary. In this case, the Constantia Vale area and greater Constantia should be considered.

[60.2] Secondly, the neighbours' description of their precinct as "almost without exception" consisting of single-dwelling units on large properties, or as exclusively a single-dwelling residential area, is inaccurate. In the papers filed by the second respondent reference is made to the response to objections regarding a proposed subdivision on Ms. Pickford's property, where she pointed out that Ms. Roeland, the neighbours' attorney and a member of the association, has two dwelling units on her property.[9] This fact was not disclosed. Additionally, the deponent to the founding affidavit failed to mention this. The annexure MPD9 to the answering affidavit of the second respondent is a letter relating to an application for subdivision wherein the deponent to the founding affidavit states inter alia that there are two dwellings on her property and in response to a claim regarding derogation from value she responds as follows:

> Concerning Mrs Roeland's point 13 b iv of the Letter of Appeal to Decision in Application for Subdivision and Departures erf 2183 Constantia, where she states that "This type of development pattern is completely against the current urban character of Constantia. There are no properties here with 0m setbacks

[9] Second respondent answering affidavit on page 320 -321 and annexure MPD9 attached to the answering affidavit

between properties*, it warrants mentioning that there is a Om setback between the two dwellings which share a party wall at No.11 The Pinehurst, Pinehurst Road, Constantia, a mere 450m from Bannerman Close. Concerning Mrs Roland's claim that living next to a subdivided dwelling will devalue her property (points 6 - 10 of the Letter of Appeal to Decision in Application for Subdivision and Departures erf 2183 Constantia), she has clearly not done her homework. We requested the opinion of three leading estate agents in our area, all of whom agree that our subdivided dwelling would in fact increase Mrs Roeland's property value given their experience of other dwellings and

sales in the Constantia Valley.

Please find attached letters from Seeff, Pam Golding, and The Realty Company estate agents

in support of our plans."

[61] As this is a review application, this Court's role is not to second-guess every factual determination or evaluation made by the City. The City and its officials exercised judgment regarding whether the proposed development would align with the surrounding area. They considered the existence of subdivided and sectionalized properties in Constantia, as well as developments in close proximity.

[62] The BCO considered examples of similar developments in the Constantia area which the applicant took issue with as it is some distance from the proposed

development in issue in this present matter. Disagreement with the City's evaluation of these factual matters does not give rise to a reviewable irregularity. As Baxter stated:

"The legal and factual qualifications attaching to the power conferred are subject to final determination on review only if they are matters which the court is equally competent (from a functional and evidential point of view) to evaluate. If instead they are matters which are best left to the final decision of the public authority, the court may still examine the decision to determine whether, in the light of the evidence before the public authority or the legislation governing it, the decision is one which can reasonably be supported."

[63] Further, a mere mistake of fact is not reviewable by the Court unless it is uncontentious and objectively verifiable. In *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government and Another*[10], the SCA stated:

'In sum, a court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would

[10] 2020 (4) SA 453 (SCA) at para 23

have reached a different view on these matters were it vested with original competence to find the facts.'

[64] However, the applicant has not demonstrated that the evaluation of these matters by the City and its officials is unreasonable or irrational.

[65] In the BCO's report[11], it is pointed out that the development is compatible with the residential character of the area, as it is strictly a residential development. In, the applicant's papers, the complaint clearly centres primarily on the issue of densification with the focus on the Bannerman Close precinct.[12] The BCO , notes that consideration must extend beyond the immediate precinct and encompass the broader Constantia area.[13] The BCO identified other developments within a 500-meter to 750-meter radius of the CRG precinct, which further exemplify the compatibility of the proposed development with the surrounding area.

[66] Having considered both the immediate and wider Constantia area, the BCO concluded that the proposed development is not inconsistent with the surrounding area[14]. This determination was made after a thorough review of the street appearance of the residential dwellings and their compatibility with the neighbourhood.

[11] Page 117 of the record at paragraph 38.4 of the report
[12] page 37 of the record paragraph 91
[13] in paragraph 4 of its report found on page 136 of the record
[14] page 117 of the record

[67] The BCO's factual determinations must be respected, and there is no basis for second-guessing them. This court's role is not to substitute its judgment for that of the BCO but to assess whether any irregularities have occurred in the process.

The Disqualifying Factors (Section 7(1)(b)(ii) of the NBR Act):

[68] Section 7 of the Building Act provides for a two-part inquiry:

1. Whether there has been compliance of the plans with the requirements of the Building Act and other applicable laws (including the DMS) must be considered, as per section 7(1)(a).
2. It must be determined whether the proposed building will likely or actually disfigure the area, be unsightly or objectionable, or degrade the value of adjoining or neighbouring properties, or be dangerous to life or property (section 7(1)(b)(ii)). The so-called disqualifying factors.

[69] In *Turnbull-Jackson*[15], the Constitutional Court confirmed that, under section 7(1)(b)(ii), the relevant decision-maker must be positively satisfied that none of the disqualifying factors are present before approving the building plans.

[70] This approach strikes a balance between the landowner's rights and the rights of neighbouring property owners, promoting both sets of rights. The City is tasked with moderating these potentially conflicting rights and obligations. In *Simcha,*[16] the

[15] *Turnbull-Jackson v Hibiscus Court Municipality and Others* 2014 (6) SA 592 (CC) at para 95.
[16] Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz and Others (CCT125/18) (CCT 128/18) [2019] ZACC 8; 2019 (3) SA 78 (CC); 2019 (5) BCLR 648 (CC) (19 February 2019)

Constitutional Court ruled that the decision-maker must apply the legitimate expectation test to assess the disqualifying factors. The test requires determining whether a hypothetical purchaser of a neighbouring property would have legitimate expectations that the proposed development would be denied due to its unattractiveness or intrusiveness.

[71] The applicant has not demonstrated that the development violates any disqualifying factors.

[72] The BCO correctly notes that mere densification does not automatically trigger the disqualifying factors set forth under the Act. Each case must be assessed individually, with the test focusing on whether the proposed development would disfigure the area, render it unsightly, or otherwise be objectionable. The BCO's report[17] (clarifies that densification, in and of itself, does not necessarily result in disfiguration or unsightliness.

[73] In paragraph 74 of the BCO's report, it is emphasized that the building's appearance was carefully considered, and it was found that the proposed development does not render the area objectionable. The applicant's objection is primarily based on densification, as reflected in paragraph 103 of the founding affidavit, but this does not address the actual appearance or design of the building, which is not in dispute.

[17] Page 119 of the record

[74] In paragraph 57 of the BCO's report, it is explained that the officer applied the relevant test by conducting a site inspection and evaluating the merits of the application. The BCO concluded that, while the proposed development would bring about change, it would not trigger any disqualifying factors and would be compatible with the area. The BCO considered compliance with applicable laws and regulations, as well as whether the proposed development would violate any disqualifying factors.

Disfigurement of the Area

[75] The BCO recommendation addresses the neighbours' concerns regarding disfigurement, unsightliness, or objectionability.

[76] He emphasizes the following:

- The development is designed for the high-end market, with professional design, materials, and finishes, and is compatible with the surrounding residential area.
- While there may be some change to the area, it is not objectionable, as the development adheres to the rules and is consistent with the City's spatial planning policies promoting sensitive densification.
- The development is not unique; other properties in Constantia have already been developed in similar ways.

[77] The neighbours argue that the BCO did not consider the overall impact of developing the adjacent erven. However, the BCO reports clearly refer to both sets of

plans and address the applicant's concerns regarding group housing and the development's full history. It is evident that the possibility of development on each ERF was considered when the building plans were approved. There is no basis to dispute the statements in the answering affidavit on this issue.

The legitimate expectations test is not a subjective test determined by the whim of a sensitive neighbour. The test is objective and based on relevant facts, which would, in the ordinary course, be placed at the disposal of the decision maker.[18]
The decision maker should consider whether the proposed building will probably, or in fact, be so disfiguring of the area, objectionable or unsightly that it would exceed the legitimate expectations of a hypothetical owner of a neighbouring property."[19]

In fact, as the second respondent pointed out, the deponent to the founding affidavit preferred not to disclose that she has subdivided her own property and has two dwelling units on her property while the applicant's attorney also appears to have two dwellings on her own property, also not disclosed but apparent from correspondence exchanged in relation to the deponent, Ms Pickford's sub-division of her property.[20] The second respondent points out that the character of the area is not as applicant contends and that on a consideration of the broader Constantia area, the BCO's were correct in their assessment and their recommendations.

[78] The applicant has not made out an "objective" case "*based on relevant facts*" to the effect that the dwellings to be constructed on erf 14134

[18] Simcha supra at para 32

[19] Simcha supra at para 33

[20] See Record p.320 -321, Mason Answering Affidavit paragraph 130 - 133

will be erected in such a manner or be of such nature and appearance that the area will be disfigured, that they will be unsightly or objectionable or result in a derogation in the value of neighbouring properties. Even if it were accepted that the development may bring about some change in the character in the area, that does not justify an assumption that that the results contemplated by section 7(b)(11) will eventuate. Change on its own and without more is not sufficient to trigger the disqualifying figures without any of the mentioned factors/triggers being present.

Change is inevitable and acceptable where it takes place within the applicable development restrictions and adherence to the requirements as set out in the legislation referred to elsewhere, it cannot in the absence of any objective evidence that the development will disfigure the area or be unsightly or objectionable be said to have triggered the disqualifying factors. This aspect was accepted by the applicants.

Derogation from Value

[79] The applicant has failed to demonstrate that the proposed building will reduce the value of adjoining or neighbouring properties, as required under section 7(1)(b)(ii). The only evidence it offers to support the claim consists of the deponent's opinions in the founding and supplementary affidavits. These opinions fail to apply the objective legitimate expectations test regarding market value, as established by the Constitutional Court in Simcha and Camps Bay.

> *"Market value' is the price that an informed willing buyer would pay to an informed willing seller for the property, having regard to all its potential at the time of sale, both realised and unrealised.*

> From all this it is obvious that the hypothetical informed buyer and seller will always be aware of inherent advantages and disadvantages flowing from the lawful exercise of rights and will build them into market price according as they assess the likelihood that they will occur.[21]

[80] The legitimate expectations test requires considering the price that an informed buyer and seller would agree upon, taking into account the potential risks associated with the property, including the possibility of future development on neighbouring properties. Since the applicant did not challenge the amendments to the DMS that permit three dwelling units on SR1 erven, it can be assumed that an informed seller would consider the possibility of such development when pricing their property. The new development does not contravene legal restrictions, nor is it so unattractive or intrusive as to exceed the legitimate expectations of the parties in a hypothetical sale.

[81] No relevant evidence has been filed to substantiate a claim of derogation from property value due to the proposed development. The mere fact of densification, without additional evidence, does not, by itself, lead to a reduction in property values. As noted in of the founding affidavit, the focus of the applicant's argument is on densification and its purported effect on the value of neighbouring properties.[22] However, there is no evidence provided to show how the construction of this development will specifically reduce the value of surrounding properties. In fact, there are indications that upscale, modern developments of this nature tend to enhance

[21] True Motives 84 (Pty) Ltd v Madhi and Others 2009(4) SA 153 (SCA) at para [30]
[22] Para 114 on page 42 of the record.

property values, as was the case when the deponent to the founding papers developed her own property.[23]

[82] The BCO's report[24], on, outlines the factors considered in assessing the potential impact of the proposed development on surrounding properties. However, no evidence has been presented to demonstrate how this development would negatively affect the amenities or values of adjacent properties.

These issues and the neighbours' objections were considered in the BCO'S reports with references to both sets of plans and there no basis established on which the

BCO's findings should be rejected. The challenge under item 21(b)(v) of the DMS must therefore also fail for the reasons stated.

The Impact of the Densification Policy and Overlay Zoning

[83] The applicant's challenge to item 21 appears to be a broader challenge to the City's densification policy, which is explicitly permitted under the zoning scheme and the City's urban planning policies. The founding affidavit[25] () acknowledges that the dominant use of the properties will be residential, as referenced in the development of the properties. This reinforces the notion that the City's policies on densification are legally sound and should be upheld.

[23] This is also evident from the extract taken from MPD9 referred to earlier in this judgment
[24] page 120 of the record
[25] page 34, of the record at paragraph 32

[84] In light of the above, the second respondent submits that the applicant's objections fail to meet the necessary legal criteria and falls to be dismissed. The development complies with the applicable planning regulations and policies, and the BCO's assessments and recommendations are supported by the evidence presented.

[85] The applicant argues that the City failed to apply the legitimate expectations test correctly by not considering the Densification Policy and overlay zoning. However, they misunderstand the role these factors play in the disqualifying factors.

[86] Mason, in applying for building plan approval, did not seek any rights beyond those already granted under the DMS. It did not request any departures or rezonings. The Densification Policy is a policy, not primary legislation, and cannot override the rights granted under the DMS.

[87] The inevitable densification, resulting in six dwelling houses, must meet the legitimate expectation test. The impact of this densification is controlled or limited by restrictions under the scheme, specifically item 25 and item 25B, which regulate the size and height of the properties. There is no suggestion in the papers that the proposed dwellings will not comply with these restrictions. Consequently, the applicant's challenges must be assessed in light of these considerations.

[88] The BCO correctly determined that the building plans complied with the By-law and were consistent with the DMS. The Densification Policy could not have influenced

the decision-maker to refuse the application, as doing so would contravene the rights granted under the DMS.

[89] Regarding the overlay zoning for Constantia-Tokai, the subdivision of ERF 2180 occurred before the DMS came into effect. Departures were granted at that time, and when the building plans were considered, no further departures were required.

The Sewer Connection

[90] The applicant has raised the issue of a sewer connection for ERF 14134, alleging non-compliance with subdivision conditions. However, this issue has already addressed with reference to the July 2024 approval from Water & Sanitation Services, which approved the sewer connection for ERF 14134.

[91] The applicant's new arguments regarding the sewer connection, presented for the first time in reply, are impermissible. The City has already provided a full response to the sewer connection issue, and the plans comply with the necessary requirements.[26]

In *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)*[27].where it was stated:

> *'It is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits, or the Courts will*

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[26]

[27] *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)*[27]1978 (1) SA 173 at 177

not allow an applicant to make or supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavits to be struck out.'

"This is not however an absolute rule. It is not the law of Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances.[28] *The respondent in casu was not afforded an opportunity to deal with the new matter."*

The Environmental Section's Support

[92] The environmental section's approval of the subdivision was granted with conditions requiring that all building plans be to the satisfaction of the director of environmental services. The Applicant's contention that the approval was subject to a binding landscape plan is unfounded. The environmental section did not impose such a requirement.

[93] The applicant argue that the Environmental Section's support was subject to a condition requiring Mason to make the landscape plan a binding requirement of the approval. However, this misrepresents the actual memorandum of support from the Environmental Section, which simply noted Mason's duty to ensure compliance with

[28] *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)*[28] *supra at at 177I-178A*

relevant environmental decisions. The Environmental Section did not impose any binding conditions regarding the landscape plan.

I. Conclusion

[94] The City's legal position as set out in the reasons underpinning the approval of the building plan is firmly grounded in the facts and the applicable law. The notarial tie agreement does not alter the planning status of the properties, and the City's decision-making process, including the preparation of the BCO recommendations, was both lawful and appropriate. The City's interpretation and approval of the building plans for ERF 14134 is entirely consistent with the DMS and the City Council's policy of encouraging densification. The challenge brought by the applicant, including those regarding sectional title ownership and the interpretation of Item 21(b)(ii), are without merit. The City's decision to approve the building plans for these properties was based on a proper understanding of the By-law, and the applicant have not demonstrated any grounds for overturning the determination and recommendation of the BCO and subsequent approval by the decision maker.

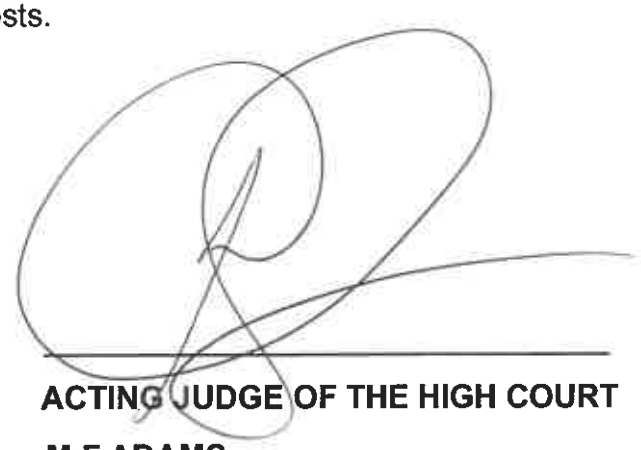
J. Costs

[95] Regarding costs, the applicant has had limited success in challenging the building plan for erf 2180, which the City has conceded should be set aside. This does not entitle the neighbours to the full costs of this application. The most appropriate order in my considered view is for each party to bear its own costs.

K. The order

[96] In the result the following order is issued:

1. The building plan approval in respect of ERF 2180 dated July 2024 (ref 1700483367) is reviewed and set aside, and the building plans are remitted to the City for consideration;
2. The remainder of the relief sought in the application is dismissed.
3. No order as to costs.



ACTING JUDGE OF THE HIGH COURT

M F ADAMS

Appearances

For the Applicant	: Adv. S P Rosenberg (SC)
	Fisher Roeland Attorneys
For the Respondents	: Adv. M O'Sullivan
	Adv. E Grobbelaar