IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 5485/2000

In the matter between:

MINISTER OF FINANCE AND DEVELOPMENT PLANNING OF THE PROVINCE OF THE WESTERN CAPE Applicant

and

MICHAEL LOUIS 1st Respondent
SOUTH PENINSULA MUNICIPALITY 2nd Respondent
BAKOOR (PTY) LTD 3rd Respondent

JUDGMENT DELIVERED THIS 15th DAY OF OCTOBER 2002

LOUW, J: In this application the applicant, who is the erstwhile Minister of Finance and Development Planning of the Province of the Western Cape, seeks an order reviewing and setting aside the decision of his predecessor, the first respondent, taken on 5 March 1999, in terms of section 16 of the Land Use and Planning Ordinance 15 of 1985 ("LUPO"), to approve the rezoning of Portion 7 of the Farm Dassenberg No. 940, Noordhoek, Western Cape ("the property"), from agricultural purposes to sub-divisional area (single residential, private open space, public open space and road purposes).

The property is currently undeveloped and is located on the southern slopes of Dassenberg Mountain in the Noordhoek/Fish Hoek Valley. It is registered in the

name of the third respondent and measures 78,7 hectares with 31,2 hectares falling within the Cape Peninsula Protected Natural Environment ("the CPPNE").

The first and second respondents do not oppose this application which is opposed only by the third respondent.

In October 1997 a firm of town, regional and project planners known as the "Planning Partnership", submitted an application on behalf of the third respondent, to the second respondent, South Peninsula Municipality ("SPM"), in terms of section 17 and 25 of LUPO, for the rezoning of the property from agricultural purposes to sub-divisional area for single residential, private and public open space and road purposes.

Sections 16(1) and 17(1), (2) and (4) of LUPO are relevant to this application and read as follows.

"*Rezoning on application of owner of land.*

16. (1) Either the Administrator or, if authorised thereto by the provisions of a structure plan, a council may grant or refuse an application by an owner of land for the rezoning thereof.

Applications for rezoning

17. (1) An owner of land may apply in writing to the town clerk or secretary concerned, as the case may be, for a rezoning of the land under section 16.

(2) The said town clerk or secretary shall –

(a) Cause such application to be advertised;

(b) *Where objections against the said application are received, submit them to the said owner for his comment;*

(c) *Obtain the relevant comment of any person who in his opinion has an interest in the application;*

(d) *Where his council may act under section 16(1) –*

(i) *submit the application and all relevant documents to his council, and*

(ii) *notify the owner of the council's decision and where applicable furnish him with a copy of any conditions imposed by the council, and*

(e) *where the Administrator may act under section 16(1), obtain the relevant comment of the council of the said town clerk or secretary and furnish the director with a copy thereof and with any document required by the director.*

(3) . . . .

(4) *The director shall, in relation to an application in respect of which the Administrator may act under section 16(1) –*

(a) *obtain such comment and information as in his opinion are still required, and*

(b) *notify the applicant and the local authority concerned of the Administrator's decision thereanent and where applicable furnish them with a copy of any conditions imposed by the Administrator."*

The third respondent proposed to divide the property into 176 single residential erven ranging from 750 to 2 290 square metres in extent. The housing units to be built on them were restricted to the lower and mid slopes of the Dassenberg with no development above the 65 metre contour on the upper portion of the property and above the 13 metre contour on the lower eastern portion thereof. Land within the CPPNE would be donated to the National Parks Board if acceptable

development rights were approved in relation to the lower part of the property. Approximately 5,5 hectares of the property comprising a wetland was earmarked as private open space.

The application was advertised by SPM in terms of section 17(2) of LUPO. Opposition to the application came from two sources. The first was in the form of 22 letters of objection that were submitted by various environmental action groups, property owners and other interested parties. The second was from the Cape Metropolitan Council, a state institution, who opposed the third respondent's application for the rezoning of the property.

The third respondent responded to the letters of objection in a document dated 6 May 1998 prepared by the Planning Partnership on its behalf.

SPM derives its authority to grant or refuse a rezoning application in terms of section 16 of LUPO from section 16 itself, read with the provisions of the applicable General Structure Plan approved by the Administrator of the erstwhile Cape Province in terms of section 4(6) of LUPO. Paragraph 1(f) of the General Structure Plan provides that a local council such as SPM shall not have authority to grant or refuse an application for rezoning

". . . where a state institution, . . . is not in favour thereof."

SPM was therefore not authorised to grant or refuse the third respondent's application for rezoning. SPM nevertheless went ahead and after hearing oral

representations on behalf of the third respondent and by representatives of the objectors, on 8 September 1998 resolved that the application for the rezoning of the property from agricultural to sub-divisional area be refused.

On 13 November 1999 the Planning Partnership, on behalf of third respondent, lodged an appeal in terms of section 44(1) of LUPO, against the decision taken by SPM to refuse the application for the rezoning of the property.

Section 44(1) (a) of LUPO is the relevant provision and reads as follows:

> *"Appeal to Administrator*
>
> *44(1)(a) An applicant in respect of an application to a council in terms of this Ordinance, and a person who has objected to the granting of such application in terms of this Ordinance, may appeal to the Administrator, in such manner and within such period as may be prescribed by regulation, against the refusal or granting or conditional granting of such application."*

It is common cause that an appeal under section 44(1)(a) laid to third respondent in his erstwhile capacity as Minister of Finance and Development Planning in the Western Cape Government.

The appeal, which did not raise SPM's lack of authority to decide the issue, but was based essentially on the same grounds as those advanced in the application before SPM was submitted to the Department of Planning, Local Government and Housing of the Province of the Western Cape ("the Department"). The Department prepared a memorandum, which is undated. The Department pointed

out that SPM did not have the authority, in view of the opposition raised to the application by the Cape Metropolitan Council, to take a decision on the application. The Head of the Department expressed the view that the proposed development was desirable in terms of section 36 of LUPO and recommended to the first respondent that the application for the rezoning be approved subject to the conditions set out in paragraph 12.2 of the memorandum. Condition 12.2.5 specified that the approximately 31 ha of the property which falls within the CPPNE be zoned Public Open Space (Conservation Area) and be ceded to the authority responsible for the management of the Table Mountain National Park, at the cost of the third respondent.

On 5 March 1999 the first respondent, now not acting on appeal in terms of section 44(1) but acting under section 16 of LUPO as if the application had been brought directly to it, approved the application for the rezoning of the property, subject to the conditions contained in paragraph 12.2 of the Department's memorandum.

I pause to point out that it is not clear when the Department came to realise that SPM lacked the necessary authority – in an internal document in the form of a memorandum by the acting director planning services of the Department dated 15 January 1999, the matter was still being dealt with as an appeal under section 44(1) of LUPO.

The applicant has raised three grounds of review of first Respondents' decision:

(a) The condition that the remainder of the property be ceded to the authority responsible for the management of The Table Mountain National Park is *ultra vires* his powers under section 42 of LUPO;

(b) The rights of objectors to the application to lawful and procedurally fair administrative action under section 33 of the Constitution Act 108 of 1996 read with Item 23(2) of Schedule 6 to the Constitution were infringed in two respects: the first respondent failed to consider the 22 letters of objection and, the objectors were not informed of, nor given an opportunity to be heard on, the application before the first respondent; and

(C) In coming to his decision to approve the rezoning, the first respondent failed to apply his mind to the matter.

The third respondent opposed each of the grounds of review raised by the applicant and has in addition, raised the point *in limine* that the applicant has delayed unreasonably in launching these review proceedings.

I turn to the point *in limine*. There is no statutory time limit within which proceedings for review must be brought. Such proceedings must be brought within a reasonable time. In deciding the issue of delay, the court has to decide whether the proceedings were in fact instituted after the passing of a reasonable time; and if so, whether the unreasonable delay should be overlooked. To determine whether the lapse of time is reasonable or not all the circumstances in which the delay occurred and all the relevant facts of the case must be

considered. In deciding whether an unreasonable delay ought to be overlooked, the court exercises a judicial discretion taking into account all the relevant circumstances including prejudice to the other party.

> **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad,** 1978 (1) SA 13 (A) op 39 C
> **Mamabolo v Rustenburg Regional Local Council,** 2001(1) SA135 (HHA) in par 11
> **Lion Match Company Ltd v Paper Printing Wood and Allied Workers' Union and Others,** 2201(4) SA 149 (HHA) in par 25

I proceed to consider the facts and circumstances in regard to the delay. The first respondent's decision was taken on 5 March 1999 and the application was launched on 27 July 2000, a delay of some 16 months.

On 1 April 1999 the Urban and Environmental Services Committee of SPM resolved to request reasons for the first respondent's decision, and an opinion from senior counsel. The opinion obtained by SPM was made available to the Department during September 1999.

Pursuant to the opinion obtained by SPM the Department sought advice from its internal legal advisors which was furnished in a confidential memorandum date 21 September 1999.

On 15 October 1999 counsel was instructed to advise on certain aspects relating to the decision taken by the first respondent. The documentation that had to be considered was voluminous and consultations had to be held with the

Department's legal advisers and officials. Counsel furnished his advice on 11 November 1999.

In January 2000, the possibility of dealing with the matter by way of mediation was considered and in February 2000 further consultations were held with counsel before the matter was referred to the Executive Council of the Western Cape Province for its consideration. On 5 April 2000 the Executive Council resolved to launch the application for review.

Thereafter the State Attorney and counsel were instructed to settle the Notice of Motion and founding affidavit in consultation with Minister Markowitz and officials and legal advisers of the Department. Time was spent on this because the documentation that had to be considered was voluminous.

Finally, some two and a half months after the Executive Council took its decision, the application was launched on 27 July 2000.

Having regard to these facts, I am not certain that the institution of these proceedings was unreasonably delayed. However, even if there was an unreasonable delay, such delay should in my view, in the exercise of this court's discretion, be condoned. A number of factors give rise to this conclusion. The third respondent's application for rezoning and subdivision of the property gave rise to considerable public interest and debate. It would be prejudicial to sound government and proper administration of LUPO were an invalid decision be

permitted to stand. It is therefore of importance that the regularity or otherwise of the first respondent's decision be determined and that clarity and in any event, that certainty be obtained as to the proper manner of dealing with objections and successful objectors. The objections to the third respondent's proposals to develop the property in essence, concerned the protection of the environment. In regard to these consideration, the *dictum* by Olivier JA in **Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others** is apposite:

> *"Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with a change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns."*

A further consideration is the possible prejudice to the third respondent as a result of the time taken for the application to be brought. The highwater mark of the prejudice to the third respondent's case raised by it is that it may suffer *"extensive additional application costs"* and *"inevitable losses and increased holding costs"*. These relate to expenses such as the purchase price of the property, legal fees, auditors' fees and costs associated with contour plans, travelling and subsistence and telephone services. It seems that the bulk of these costs would have been incurred in any event. The third respondent alleges that it will suffer a delay in the finalisation of the application. The third respondent has not commenced with any development or works on the property.

The third respondent's contends that it would be prejudiced if the rezoning application were to be re-advertised and the environmental scoping report redone. Requiring these steps to be taken would be no more than the consequence of a lawful exercise of public power. The fact that third respondent may in the event that the first respondent's decision is set aside, have to comply with legislation which has come into force after the date that its first application for rezoning was lodged, cannot in my view legitimately be taken into account in assessing the potential prejudice the first respondent may suffer as a result of the setting aside of the first respondent's decision at this stage. The duty to comply with environmental legislation that has been enacted in the public interest, such as the Environmental Conservation Act 73 of 1989 or the National Environmental Management Act, 107 of 1998, affects all environmentally sensitive developments. In any event the above legislation came into operation before 5 March 1999, the date of first respondent's decision.

The third respondent's point *in limine* based on the contention that this application was not brought within a reasonable time, must consequently be rejected.

I turn to the grounds of review raised by the applicant.

In view of the conclusion to which I have come in regard to the second ground of review referred to above, namely the failure to afford the objectors lawful and

procedurally fair administrative action, it is not necessary to consider the first and third grounds of review raised by the applicant.

I proceed to consider whether there has been an infringement of the objectors' right to lawful and procedurally fair administrative action. At the time the first respondent took the decision to approve the application for the rezoning of the property, the Promotion of Administrative Justice Act, no 3 of 2000 had not yet been enacted and the question of the lawful and fair administrative action must be considered in the light of the common law and the provisions of section 33 of the Constitution.

Section 33 of the Constitution reads as follows:

> "*Just Administrative action*
>
> *33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
>
> *(2) Everyone whose rights have been adversely affected by administrative action had the right to be given written reasons.*
>
> *(3) National legislation must be enacted to give effect to these rights, . . ."*

Item 23(2) of Schedule 6 to the Constitution provides *inter alia* that until the legislation envisaged in section 33(3) of the Constitution is enacted, section 3(1) and (2) must be regarded to read as follows:

> "*Every person has the right to-*

(a) *lawful administrative action where any of his rights or interests is affected or threatened;*

(b) *procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;*

(c) *be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and*

(d) *administrative action which is justifiable in relation to the reasons given of it where any of their rights is affected or threatened."*

In my view the process followed by the first respondent infringed the right to lawful and fair procedural administrative action in a number of respects.

The first respondent took the decision to approve the rezoning of the property in his capacity as the authority considering an application for rezoning under section 16 of LUPO and not in his capacity as an authority making a decision on an appeal under section 44(1)(a) of LUPO against an existing decision of SPM to refuse the application. The decision by SPM to refuse the application was regarded as *pro non scripto*.

It is not in dispute between the parties to the present application that SPM did not have the authority to take a final decision on the application and that it should have referred the matter to the Western Cape Provincial Government for decision by the first respondent, instead of deciding the matter itself.

It is not clear from the papers before this court when it was decided that the matter should no longer be dealt with as an appeal under section 44(1)(a) of LUPO and that it should be dealt with as an original application for rezoning. As is pointed out earlier, the memorandum by the Department to first respondent is undated and it appears that, as at 15 January 1999, the matter was still being dealt with internally by the Department as an appeal.

When first respondent did come to consider the application for rezoning, he did not personally read and consider the 22 letters of objection that were put up by the objectors to the proposed development. The letters make up approximately 37 pages in the record before this court. There is no reason in principle why the first respondent should not himself have perused the letters and have considered every objection raised in the letters of objection. It is not suggested that it was impracticable for him to do so. It would certainly not have taken the first respondent long to read the 37 pages involved. In this regard the first respondent states that he spent a number of hours studying the material placed before him, which included not only the various documents drawn up by the third respondent, the Department and the second respondent, but also 'numerous submissions and reports from a variety of professionals' some of whom are listed in the affidavit filed by the first respondent.

He did however, have regard to a summary of the objections raised in the letters of objection. This summary was contained in the departmental memorandum that was placed before him. Whilst the letters run to 37 pages, the summary of the

objections, which is included under the heading PUBLIC PARTICIPATION in the memorandum, condensed the contents of the letters to nine points taking up no more than a single page.

In my view the applicant has in argument convincingly demonstrated that the summary of the objections compiled by the departmental officials is inadequate and that it does not reflect all the concerns of the objectors. On behalf of the third respondent the following points are set out in the written heads of argument. I adopt the formulation thereof.

The letter of objection dated 12 February 1998 by T. Acey and J. Grandt contains the following objections:

> "5. *The proposal is not compatible with the existing development of rural small holdings with form an attractive visual backdrop for the valley.*
>
> 6. *The proposal will also tend to depress values for existing larger properties as it will lower the environmental quality of the area."*

Neither of these objections are contained in the departmental summary.

The letter of objections dated 16 February 1998 by Mrs CIM Auret contains the following objection:

"2. *Pollution of the adjacent vleis is already evident in this sensitive environmental area, proof of this being the disappearance of the wild fowl and the rare leopard toad."*

This objection is described as follows in the departmental summary:

"The traffic and pollution increases will destroy the rural appearance and atmosphere of the local area."

The letter of objection dated 20 February 1998 received from the Botanical Society of South Africa contains the following objections:

"1. *This property is one of the crucial links on the Cape Peninsula for Maintaining the continuity of the proposed Cape Peninsula National Park. It is ecologically essentially that the reserve is not fragmented. For this reason alone we feel that the site should not be rezoned and subdivided for residential purposes. ....*

It should be borne in mind that the peninsula mountain chain is of extreme local, national and international importance for the conservation of biodiversity. It is the opinion of the Flora Conservation Committee of the Botanical Society that the development of this property may seriously compromise the viability of the proposed National Park. Would the development of the above site jeopardise the possibilities of the park becoming a world heritage site?

7. *There is some concern regarding the advertisement of the rezoning application. Was the application advertised in any of the major newspapers (eg Cape Times or Die Burger)? We would appreciate it if the Municipality could furnish us with the details.*

Finally, although we are not clear as to the development rights of the owner at this stage, we would like to recommend that the council give serious consideration to finding an alternative site of less conservation importance that could be traded for Farm 940/7. Every effort should be made to incorporate Farm 940/7 into the proposed park."

These objections do not appear in the departmental summary.

The letter of objection from the Fishhoek & Clovelly Residents' Association dated 30 January 1998 contains *inter alia* the following objection:

"2. *We disagree with the applicant's assumption in which he bases the potential number of units on the 78,8 ha, as he is aware that 31,2 ha is within the CPPNE and could not be developed. Therefore on the remaining 47,5 ha he could expect to achieve 118 units, based on the existing minimum subdivision sizes of 4000m², less road area ect."*

This objection also does not appear in the departmental summary.

The letter of objection dated 12 February 1998 by the Kommetjie Environmental Awareness Group contains the following objection:

"The proposal includes large, busy trees and shrubs along Ou Kaapseweg to visually screen the development from the south. This is completely unrealistic as no vegetation of that size could possibly be established in

the exposed, windy conditions of the site – particularly its southern edge along Ou Kaapseweg which is a wind channel for the South-Easter."

This objection too, does not appear in the departmental summary.

The letter of objection received from Ms Kim Kruyshaar dated 12 February 1998 contains *inter alia* the following objections:

"3.4 *STRANDVELD BUFFER AREA – The Report does not demonstrate that the developer and/or future owners have a means or skill to manage this area appropriately. This area should be included into the CPPNE to ensure that in the future, development rights are not requested here as well.*

3.5 *ARCHAEOLOGY – "The Environmental Base Line Report on the Silvermine Corridor" prepared as part of the FH Structure Plan shows three archaeological sites on Dassenberg Farm. This is not picked up by the Rezoning Report!"*

These objections also do not appear in the departmental summary.

The letter of objection dated 12 February 1998 received from Redhill Landowners Conservation Group contains *inter alia* the following objection:

"3. *IN CONTRADICTION WITH THE SOUTHPENINSULA SUB-REGIONAL PLAN (SPSP): This Plan recommends that Erf 940/7 be included within the Primary Nature Area. This land use designation does not permit subdivision (unless it is proven to be in the interest of conservation), and only permits a primary*

dwelling if it cannot be located elsewhere. For confirmation of the recommended land use designation, please see Appendix 1, copy of fax from VKE to Sandy Barnes dated 15 September 1997

The SPSP is in the final stages of approval. This plan was meticulously executed through an exemplary process, which included wide and substantial public participation. The intention of this plan is to guide the development and sustainable utilisation of the South Peninsula for the next 15 to 20 years. We are convinced that it does indeed provide sound guidelines for land use decisions in the sub-region and urge the South Peninsula Municipal Council to adhere to its recommendations in the interests of the sustainable utilisation of this world renowned sub-region."

This objection does not appear at all in the departmental summary.

The third respondent, however, seeks to rely on the fact that other documents, containing summaries of issues and concerns raised by interested parties not only before the initial application was brought in October 1997 but also of the objections raised against the proposed rezoning after it was brought, were placed before the first respondent at the time he made his decision. These summaries are contained in:

- the original application prepared on behalf of third respondent by the Planning Partnership (referred to in argument as the application document) wherein issues and concerns raised by interested and affected parties during the

scoping process carried out by the applicant before the application was brought, are summarised and addressed;

- Third respondent's response to the objections set out in a document dated 6 May 1998 which was prepared on its behalf by the Planning Partnership (referred to in argument as the response document);
- a report dated 8 August 1998 prepared by the Executive Director: Urban and Environmental Services on behalf of SPM in respect of the application for rezoning (referred to in argument as the second respondent's report), wherein in the objections are summarised.
- the appeal brought by the third respondent raised 13 grounds of appeal against the decision of SPM in terms of section 44(1)(a) of LUPO (referred to in argument as the appeal document), and incorporated the original application document, the second respondent's report and the response document, but does not include a fresh summary of the objections.

The first respondent says the following in regard to the various summaries of the written objections he considered:

> *"I did not then, nor did I now, attempt to ascertain whether these summaries of the objections were reasonably accurate reflections of the letters of objection. This I believe is one of the very issues this Honourable Court may have to determine and I will abide its determination in this regard."*

It may be that a meticulous examination of all the summaries of objections as they appear in the various documents and a comparison thereof with the objections as they appear in the letters of objection, might reveal that all the

points made in the letters of objection were indeed raised and covered in the various documents that served before first respondent. This is in my view be a futile and unrewarding exercise based on an unrealistic approach to the problem. The documents relied upon to reflect the objections are all different in the sense that they were compiled at different stages of the process (e.g. the application document was compiled before the letters of objection were submitted, while the appeal document was drawn up after SPM had made its abortive decision); they come from diverse sources (the developer as original applicant, SPM being the local authority concerned who came out against the application, the developer as appellant and the Department advising the decisionmaker in favour of the application) and they reflect the different interests and perspectives of the parties that prepared the documents and the different purposes to be served by each document. Moreover, these documents each deal with a variety of other issues apart from the objections raised by the objectors and the objections are set out in different terms in each of these documents. They cannot all be accurate and complete in their rendition of the objections. By their very nature, these documents cannot adequately convey the strength of feeling and strong concerns expressed in letters of objection.

The remarks by Denning LJ in **R v Minister of Agriculture and Fisheries, Ex Parte Graham,** 1955 [2] All ER 129 (CA) at 134 F-G, were cited with approval in **Camps Bay Ratepayers and Resident's Association and Others v The Minister of Planning, Culture and Administration and Others,** 2001(4) SA 294(C) at 320 B-C, and are apposite:

> *"The ordinary principles of fair dealing require that a farmer should be able to put his case in his own words before the very man who is to take action against him, rather than that he should have to put it before an intermediary, who in passing it on may miss out something in his favour or give undue emphasis to things that are against him. This is so manifestly just and reasonable that the Minister would, I think, in all cases have been bound to hear the representations himself, unless the Act authorised him to appoint someone else."*

It is correct as was pointed out by Mr Carstens on behalf of third respondent, that the court in the **Camps Bay Ratepayers** case was concerned with the application of different legislation (section 4(1) of the Removal of Restrictions Act, 84 of 1967), with different peremptory provisions, evaluation criteria and requirements, not applicable to the present matter. Also, the facts were different and the report submitted to the Minister in that matter, according to the judgment, contained misrepresentations. Nevertheless, the approach of the court in finding, after applying the above *dictum*, that the Minister's failure to consider the actual objections (together with other irregularities) meant that the decision should be set aside, should in my view be followed in this case. See also **Hayes and Another v The Minister of Housing, Planning and Administration (Western Cape) and Others,** 1999(4) SA 1229 (C) at 1235 A-B, where a decision taken on appeal in terms of section 44(1) of LUPO by the Minister who, in considering the appeal did not read the letters of objection filed against the original application, was brought on review. The point was not fully canvassed on review, but van Zyl, J expressed the *prima facie* view that the letters of objection do form part of the relevant documentation and should, under normal circumstances, be read by the authority

considering the appeal although, on the other hand, a reasonably accurate summary may eliminate unnecessarily prolix and repetitive matter.

The first respondent's decision is attacked as being in conflict with fair and just administrative action on a further basis.

It does not appear from the record of the proceedings placed before this court that the objectors were informed firstly, that the matter was being taken on appeal to the first respondent and later, that SPM's decision refusing the third respondent's rezoning application was being regarded as a nullity and that the first respondent would be dealing with the matter as an original application to be considered and decided upon by him under section 16 of LUPO.

Further, when the application came before the first respondent, it was in the form of an amplified application consisting not only of the original application and comments thereon which served before SPM when it made its abortive decision on 8 September 1998. The documents that served before SPM on that occasion were:

- the original application referred to in argument as the application document;
- the response document, dated 6 May 1998, being the third respondent's response to the written objections received by SPM; and
- the second respondent's report dated 8 August 1998.

In addition to the above, the papers before first respondent consisted also of the appeal brought by the third respondent against the decision of SPM in terms of

section 44(1)(a) of LUPO (referred to in argument as the appeal document), wherein the third respondent presents written submissions in support of it appeal. In a letter dated 14 January 1999, the Planning Partnership provided details in writing to the Department of how the third respondent would assist with the environmental management of the wetland and the mountain buffer zone, and included an offer by the third respondent to allocate R1,2 m to be spent for that purpose, should the application be approved. This offer was incorporated in the final approval as one of the conditions of approval.

In addition to the documents placed before first respondent, he visited the property on two occasions. The first visit took place on an unspecified date, it seems, prior to the application being placed before him. The second visit took place on 20 January 1999 well after the appeal had been lodged. First respondent, who abides the decision in this matter, has filed an affidavit setting out a number facts, including that, on 20 January 1999 he attended *"a formal site meeting"* on the property after the Department had arranged

> *"for the site to be fully marked out by the Third Respondent's professional consultants, to enable me to get a better idea, during the course of my site inspection, of the contemplated development of the property."*

During the course of the meeting, he

> *"carefully inspected the property from several different vantage points, spending over an hour on the property."*

The objectors were not informed of the inspection nor were they given an opportunity to comment on what would be shown to the first respondent. There is

no record of the first respondent's observations at this inspection and the objectors were not given an opportunity to comment on the observations made by the first respondent at the inspection.

The **Hayes** matter concerned the review of the Minister's decision on appeal in terms of section 44(1) of LUPO against the refusal by the Municipality of Stellenbosch to grant certain departures from the zoning scheme applied for by the owner of property to which the restrictions applied. The original application to the local authority had attracted 75 letters of objection from owners of nearby properties. The Municipality considered and refused the application. The owner of the properties lodged an appeal in terms of section 44(1) of LUPO. None of the objectors were given notice of the appeal. The Minister considered and upheld the appeal without reading the original letters of objection. The applicants, a couple married in community of property, who were two of the original objectors to the application then brought an application to review the Minister's decision on appeal. I have already referred to the ground of review based on the failure to read the objections. One of the other grounds of review was that the first respondent's failure to give them, or any of the other objectors, notice of the appeal constituted an infringement of their constitutional right to procedurally fair administrative action in terms of s 33(1) of the Constitution. The owner of the properties was afforded the right to address extensive written argument in support of the appeal, including new matter not placed before the Municipality when the application was originally considered by it.

In considering whether the procedure adopted in the matter amounted to fair and just administrative action, van Zyl, J (who wrote the judgment, Blignault, J, concurring) considered the South African authorities setting out the principles relating to fair and just administrative action. After pointing out that there is, unfortunately, no South African case with facts and circumstances similar to those in the matter before him, van Zyl, J turned to consider English administrative law. He referred (at 1246 G – 1247 G) with approval to a passage in the work, **De Smith, Woolf and Jowell: Judicial Review of Administrative Action** 5th ed (1995) (by Lord Woolf and Professor Jowell) wherein the authors point out (at 401 para 8-001) that *"(t)he term 'natural justice' is being increasingly replaced by a general duty to act fairly, which is a key element of procedural propriety"* and to a case **Wilson v Secretary of State for the Environment; Castle Point District Council and W J Martin & Sons (Builders) Ltd** [1988] JPL 540, heard on 14 December 1987 in the Queen's Bench Division, reported in the Journal of Planning and Environment Law (JPL) and referred to by **De Smith, Woolf and Jowell** (at 416 para 8-034), where it was held that a prominent objector to a proposed development had a right to be positively consulted prior to the holding of an appeal. The English Court held (at 542) that:

> *"(t)here could be no doubt that the requirements of fairness applied to procedures of a planning appeal, and fairness required that persons who made representations to a local planning authority at the application stage should be notified of any appeal."*

The facts in the Wilson case were, briefly, that an application for a certain residential development was turned down by the District Council on the grounds of dangerous vehicular access. An appeal to the Inspector (the appropriate

authority) by the developer was successful. The decision on appeal was challenged by a local resident, one Wilson, on the ground that he had not been notified of the appeal and had hence been deprived of the opportunity of making representations against the development. The right on which he relied was the legitimate expectation that he would be told of the appeal, alternatively, the failure to notify him was in conflict with the requirements of natural justice and equity. He submitted that, had he been notified of the appeal, he would have made representations in regard to the appropriate traffic studies. He also complained that the Inspector had visited the site during school holidays, when he was unable to attend. It was held that the failure to give Wilson notice of the appeal, was in breach of the rule of fairness, particularly in view thereof that Wilson was a prominent objector to the development who was substantially prejudiced by such failure to give him notice. The application was granted and the Inspector's decision on appeal was quashed.

Turning to the case before him, van Zyl, J (at 1247H-1249D) considered two issues. The first is whether the successful objectors should have been given notice of the pending appeal. The second is whether the first respondent should have given the objectors the opportunity to make representations, at the hearing of the appeal, as to why their erstwhile objections, and the decision by the municipality to refuse the departure application, should not be upheld on appeal.

Noting that neither section 44 of the ordinance, nor the regulations issued in terms of the ordinance, provide for notice to be given to the successful party

should the unsuccessful party appeal to the Minister against the decision of a Municipality, Van Zyl, J followed the approach of the Queen's Bench in the **Wilson** case and held that the absence of a specific provision in the ordinance or accompanying regulations as to the right of a successful party to be apprised of, and to make representations in, an appeal to the first respondent by the unsuccessful party cannot deprive the successful party of his constitutional right to administrative justice.

The learned judge then proceeded to hold as follows (at 1248 D – 1249 B):

> *"There is no doubt that the applicants, who were among the objectors who voiced their concerted disapproval of and opposition to the proposed development, do have a substantial interest in the outcome of the appeal, since it will have a direct effect on the residential area in which they live and where they hold property. It cannot be sufficient for the first respondent simply to take cognisance of a summary of the objections raised by the applicants and other objectors. The appellant (third respondent) was fully entitled to place new matter and submit new arguments before the first respondent. It would be unjust, unfair and unreasonable if the applicants and other objectors should not be given the opportunity to respond fully thereto.*
>
> *Even if there should be no new matter or arguments raised by the appellant (third respondent), I believe that the applicants and other objectors still have a right to be heard. It cannot be expected of them to be satisfied that their objections have been adequately canvassed in the aforesaid summary. There is also no reason why they should not be allowed to present new matter or raise new arguments in order to persuade the first respondent to dismiss the appeal. There is no merit in the submission that an unreasonably heavy administrative burden would be created for the first respondent's department if he should be required*

to give notice of the appeal to, or to allow representations to be made by, the successful objectors. It is accepted that it will be inconvenient, and even burdensome, but no amount of inconvenience should deprive the applicants and other objectors of their fundamental right to be heard on appeal.

There is likewise no merit in the submission that the recognition of a right to be heard on appeal will protract the proceedings endlessly. Giving notice of the appeal to some 67 objectors, who submitted 75 letters of objection, should not be particularly time consuming nor expensive. The hearing of the appeal may be somewhat protracted if all the objectors should wish to make representations. It is highly unlikely, however, that they will appear at the appeal hearing en masse with a view to having their day in court, as it were. It can be reasonably anticipated that the majority of them will club together and appoint only one or two representatives to present their case.

The right of the objectors to be given notice and to be heard on appeal is, in my view, not only consonant with the fundamental right to lawful and fair administrative action as envisaged in s 33 of the Constitution, but it also accords with the fundamental common law principles of (natural) justice, fairness and reasonableness. I am furthermore of the view that public policy demands the recognition of this right, provided it is justified, as in the present case, by the applicable facts and circumstances."

In my view the approach adopted by van Zyl, J in the **Hayes** matter should be followed in this case. The fact that in this case the matter was not heard by the first respondent on appeal under section 44(1) but as an application under section 16 LUPO, if anything, renders the *ratio* of that decision even more applicable. Section 17 of LUPO sets out the procedure to be followed in the case of an application under section 16. It recognises the right of members of the public to be heard by way of written representations. The fact that in this case

there was in effect a rehearing of the original application by a different authority does not affect the principle that notice of the application and an opportunity to be heard should be given to members of the public, especially where it is known that the proposed development is controversial and has attracted objections. More so, where it was known that the original application to SPM was refused, notice should have been given to the known objectors of the fact that the application would again be heard in an amplified version.

It follows that the application should succeed and that the decision of the first respondent be set aside. It is consequently ordered as follows:

1. The decision of first respondent to approve the rezoning of Portion 7 of the farm Dassenberg No 940, Noordhoek, Western Cape, from agricultural purposes to subdivisional area (single residential private open space, public open space and road purposes), taken in his capacity as the former Minister of Development Planning of the Province of the Western Cape on 5 March 1999, is set aside;

2. Third respondent is ordered to pay the cost occasioned by its opposition to this application, such costs to include the costs occassioned by the employment of two counsel.

W. J. LOUW, J.

I agree and it is so ordered.

H. C. NEL, J