6-4-70 24/70

G.P.-S.33967—1968-69—1,000. J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

CITY COUNCIL OF JOHANNESBURG *Appellant,*

versus

1. ADMINISTRATOR OF THE TRANSVAAL; 2. SONIA MAYOFIS *Respondent*

Appellant's Attorney
Prokureur vir Appellant Davidson & Marais

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate
Advokaat vir Appellant

Respondent's Advocate
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op 14-9-70 —— 18-9-70

2-4-7-8-10.

(T.P.D.)

APPEAL DISMISSED WITH COSTS. THE FEES OF TWO COUNSEL AUTHORISED.

REGISTRAR.
1.10.1970.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.		Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the appeal between:

CITY COUNCIL OF JOHANNESBURG..... Appellant,

and

THE ADMINISTRATOR OF THE TRANSVAAL .. 1st Respt.

and

SONIA MAYOFIS

(formerly Kamber, born Levin) ..... 2nd Resp.

Coram: OGILVIE THOMPSON, HOLMES, JANSEN, TROLLIP, JJ.A., et MULLER, A.J.A.

Heard: 14th, 15th and 16th September 1970.

Delivered 1-10-1970.

J U D G M E N T.

OGILVIE THOMPSON, J.A.:

Appellant appeals, by consent, direct to this Court against the decision of the Transvaal Provincial Division dismissing, with costs, review proceedings instituted, pursuant to the provisions of Rule 53, by it against the two respondents. In the court below appellant sought

an...../

an order setting aside first respondent's decision, given under section 35 (1) of the Town-planning and Townships Ordinance, 1965 (No. 25 of 1965 (T), hereinafter referred to as "the Ordinance"), rejecting appellant's town-planning amendment scheme No. 1/259 (vide 1970 (2) S.A. 94 (T)).

I shall refer to the first respondent as "the Administrator" and, save where the context indicates otherwise, shall throughout do so as designating the holder of that office acting on the advice and with the consent of the Executive Committee of the Province of Transvaal (sec. 1 (i) of the Ordinance). The Director mentioned in this judgment is the Director of Local Government appointed in terms of section 9 of Ordinance 21 of 1958 (T). All references to "the Townships Board", or, more briefly, to "the Board", relate to the body established and functioning under Chapter I of the Ordinance.

Second respondent is the registered owner of stands 247 and 248 - together measuring 7500 square feet and now consolidated as stand No. 1355 - situate on the

northwest corner of the intersection of Abel Road and Tudhope Avenue, Berea, Johannesburg. Tudhope Avenue runs from north to south towards the central city area, and Abel Road from west to east. Both streets carry a considerable volume of traffic which becomes very heavy at peak hours. Berea has a high density of residential population and in the vicinity of the abovementioned intersection there are a considerable number of large buildings designed for and used as flats. The aforementioned stands 247 and 248 were under the City Council's town-planning scheme No. 1/1946 originally zoned as "general residential", which, inter alia, includes flats. During January 1965 the second respondent applied to the City Council for the stands to be re-zoned to "general business". The City Council refused the application. An appeal under the provisions of the Townships and Town-planning Ordinance, 1931, was, however, successful; and in July 1965 the City Council was directed to prepare an amendment scheme re-zoning the

stands...../

stands to "general business". The City Council, as it was obliged to do, complied with this direction and prepared an amendment scheme, known as No. 1/215, to which it, however, itself lodged an objection, dated 15th December 1965, the material portions of which read:

> "These two stands measuring 100' x 100' are situated in a purely residential area which has been developed with large blocks of flats.
>
> The applicant's contention that there is a need for business premises in the flat area is refuted, as no part of Berea is further than a quarter of a mile from adequate shopping facilities, provided in the Hillbrow and Yeoville area.
>
> Furthermore, the site is at an intersection on two main arterial roads leading to the northern and eastern suburbs and the erection of business premises would cause serious traffic congestion.
>
> The Council is strongly opposed to this application."

After the advertisements prescribed by the 1931 Ordinance had been complied with, a committee of the Townships Board investigated scheme No. 1/215 on 29th April 1966. At this investigation, whereat the City Council was represented by its senior legal adviser, an inspection in loco of the site and its environs was held and the oral submissions of the parties were received, but no evidence was led. No record of the proceedings was kept. In August 1966 the Adminis-

trator...../

trator, functioning under section 46 of the 1931 Ordinance, approved scheme No. 1/215. The decision re-zoning the stands to "general business" was notified to the City Council by letter from the Director dated 23rd August 1966 and was subsequently proclaimed in the Provincial Gazette of 28th September 1966. One of the conditions, framed by the City Council itself, of scheme No. 215 was that:

> "A servitude 10' wide for parking purposes shall be vested in the Council, free of all cost along the Tudhope Avenue and Abel Road frontages of the site".

On 22nd November 1966 the City Council resolved to proceed with an amendment scheme - subsequently known as scheme No. 1/259 - to re-zone the aforementioned two stands from "general business" to "general residential". This resolution was taken by the City Council adopting a recommendation of its relevant committees which read:

> "Although the rezoning of the two stands from "General Residential" to "General Business" took place only recently ..... the said amendment of the Town-planning Scheme was, it is submitted, a mistake, and the "General Business" zoning which the two stands now enjoy is on re-examination so contrary to sound town planning that the Scheme should be rectified before the new use is acted upon and a wrong use of land becomes established not only in isolation but also as the precedent for a wrong pattern of development in the area."

Second respondent unsuccessfully sought to interdict the City Council from proceeding with scheme No. 1/259. The claim for an interdict was dismissed on 15th June 1967 by Trollip, J., for the same reasons as appear in the judgment delivered by him the previous day in a virtually identical claim against the City Council, namely, the case of The Firs Investments (Pty.) Limited v. Johannesburg City Council, 1967 (3) 549 (W). The City Council's attitude towards the zoning of these stands in issue was further elaborated in an undated memorandum which was subsequently put before the committee of the Board enquiring into the scheme. The opening paragraph of this memorandum read:

> "In 1966 these stands were rezoned from "General Residential" to "General Business" despite objections from the Council. Since the rezoning was first considered by the Townships Board and Administrator, additional facts have materially altered the situation with regard to additional shopping facilities and traffic congestion".

The memorandum then continued to discuss, at some length, the shopping facilities available to the residents of the area and the traffic congestion therein. In regard to

traffic..../

traffic, it was inter alia averred in the memorandum that:

> "The erection of shops on this most critical corner can only aggravate an already serious traffic bottleneck and is sufficient reason in itself to justify the steps taken to re-zone the property from "general business" to "general residential".

The memorandum went on to concede that the impracticability of the aforementioned 10' wide servitude was not appreciated at the time it was drafted and to aver that parking facilities at the site were grossly inadequate. The final paragraph of the memorandum read:

> "To summarise the argument, the Council is of the opinion that because there is no need for further shops or other business in the area, the serious consequences of aggravating the traffic problems at this particular intersection and the fact that the site is too small to provide adequate parking facilities, the zoning of the sites for "General Business" uses is most undesirable quite apart from the objections in general to the creation of isolated business developments in residential areas. It considers that the views expressed in this memorandum are valid, necessary and urgent reasons for bringing about an amendment to the Town Planning Scheme which would be not only in the interests of the Council itself and the general public, but also of the owner of these two stands."

The second respondent lodged an objection, dated 30th November 1967, to scheme No. 1/259, inter alia claiming that a shopping centre on the two stands would be a great amenity and would benefit the "thousands of flat-dwellers in the immediate vicinity" and who would thus "as pedestrians" have shopping

facilities.../

facilities within easy reach. More specifically, second respondent's objections - which clearly appear to have been compiled in reply to what had been said in the City Council's resolution of 22nd November 1966 and in the aforementioned undated memorandum - read as follows:

> "(i) The City Council has applied for the re-zoning of the said stands within several weeks after the Administrator and Executive Council have seen fit to zone the said stands to general business.
>
> (ii) The basis upon which the Municipality saw fit to make this application was based upon the allegation that the Administrator had made a mistake in zoning the said Stands to General Business.
>
> (iii) In fact no such mistake was made.
>
> (iv) The proposed rezoning disregards the needs of the community and the desirability of having the amenities allowed by a General Business zoning in the area in question.
>
> (v) The merits of the premises being zoned as General Business were fully canvassed before the Townships Board in April, 1966 when an application was heard to zone these stands from "General Residential" to "General Business" which application was successful. No circumstances exist or have come into being which justify a reversal of the decision of the Administrator that "General Business" zoning was the appropriate zoning for the stands in question.
>
> (vi) The zoning of the stands to "General Business" is not contrary to good Town Planning principles."

The procedure prescribed by the Ordinance (which had, in the meantime, repealed the 1931 Ordinance) having been duly followed, Scheme No. 1/259 was investigated by a

committee...../

committee of the Townships Board at a hearing held on 12th January 1968 and continued on 10th - 11th April 1968. At this hearing, both the City Council and second respondent were represented by senior counsel. After an opening address setting out his client's contentions, counsel for the City Council called several expert witnesses in support of those contentions, namely, Mr. Dorfman, the City Council's Chief Traffic Officer, Dr. Kruger, a Traffic Engineer, Mr. Floyd, a Consultant Town-Planner, and Mr. Reinecke, the Chief Town Planner of the City Council. These witnesses were examined and cross-examined at considerable length. No witnesses were called on behalf of the second respondent, despite the fact that two experts were in attendance throughout the hearing. At the conclusion of the hearing, full written arguments were handed in by counsel on both sides.

In addition to enclosing a verbatim record of the above hearing, the Board's report to the Administrator, made in terms of section 34 (4) of the Ordinance, reproduced second respondent's above-cited objection, gave a summary,

extending.../

extending over some 5 closely typed pages, of the evidence and of the conflicting contentions of the parties, and also annexed counsels' aforementioned written arguments. The concluding paragraph of the report read:

> "The Townships Board recommends that the objections be upheld and that the scheme be not approved for the following reasons:-
>
> (a) The reasons submitted by the objector;
>
> (b) There has been no material change in the evidence now before the Townships Board and the evidence at the previous hearing."

In a report to the Administrator dated 13th September 1968 the Director gave a short history of the zoning of the stands in issue, mentioned the interdict proceedings, briefly summarised the evidence and contentions at the hearing before the committee of the Townships Board, and annexed the whole of the latter's report and recommendation. In mentioning the interdict proceedings, the Director pointed out that the Court had decided that "there was nothing in the Ordinance which implied that once the Administrator had given his decision that that decision should be final". The three concluding paragraphs of the Director's report read:

"10. I agree with the recommendation of the Townships Board.

11. The matter is submitted for consideration with the recommendation that Johannesburg Town-planning Scheme No. 1/259 be not approved.

12. It is obvious that there is a shortcoming in the Ordinance in that the City Council is in a position to re-apply ad infinitum to prevent the decision of the Honourable the Administrator becoming final and I accordingly recommend that steps be taken to amend the Town-planning and Townships Ordinance, 1965 to prohibit the amendment of an approved Town-planning Scheme, within 2 years of its approval by the Administrator, unless the prior approval of the Administrator is obtained, on new facts submitted, to take steps to amend such scheme."

On 2nd October 1968 the Administrator decided to reject scheme No. 1/259 and to amend the Ordinance as suggested by the Director. By letter dated 7th October 1968 the City Council was informed by the Director of the rejection of the scheme. In due course, the Ordinance was amended, as from 27th August 1969, but with the substitution of the Director's prior approval for that of the Administrator as originally suggested (vide section 46 A introduced by section 3 of Ordinance 16 of 1969).

By notice of motion dated 22nd January 1969 and at a time when it was still unaware of the Townships Board's recommendation to the Administrator regarding scheme

No. 1/259, the City Council launched the present review proceedings praying that the Administrator's decision rejecting the scheme be set aside. Contained in the notice of motion was a further notice, in terms of Rule 53 (1) (b), calling upon the Administrator to furnish the Registrar of the Provincial Division with "the entire record of all the proceedings which led to the aforesaid decision .... together with such reasons as he desires to give." The founding affidavit averred that no reasonable man, paying due regard to the provisions of section 17 of the Ordinance, could come to any conclusion other than that it "could not possibly be to the advantage of a town-planning scheme to permit business to be conducted on the two stands in question" and that, in the interests of proper town-planning, the only proper and reasonable conclusion on the evidence was that these stands should be zoned "general residential". Paragraph 21 (a) of the founding affidavit, signed by Mr. S.D. Marshall, read:

"It...../

> "It is therefore submitted that, since on the facts known and disclosed to the First Respondent no reasonable man could have come to a decision to reject the Applicant's application, it must be assumed that the First Respondent was moved to reject the Application by improper motives, or that in rejecting it he failed to apply his mind properly to the application".

The documents comprising the record of the proceedings were duly furnished by the Administrator, who filed a brief affidavit. The material paragraphs of that affidavit read:

> "3. Die beslissing, vir die tersyde-stelling waarvoor die Applikant nou aansoek doen, is deur my geneem handelende op advies en met die toestemming van die Uitvoerende Komitee van die Provinsie in die bona fide uitoefening van die magte wat verleen is aan my ingevolge die bepalings van die Ordonnansie op Dorpsbeplanning en Dorpe 1965, Nr. 25 van 1965 en wel nadat ek, handelende soos voormeld, alle getuienis wat aan my voorgelê is, deeglik oorweeg het en aan alle aspekte daarvan aandag gegee het soos vereis word deur die bepalings van gemelde Ordonnansie. Ek meld spesiaal dat ek die bepalings van Artikel 17 van gemelde Ordonnansie behoorlik in ag geneem het.
>
> 4. Ek is egter nie van voorneme om hierdie aansoek te bestry nie, en ek berus by die uitspraak van die Agbare Hof. Gevolglik ag ek dit nie nodig om te antwoord op die bewerings gemaak in die beëdigde verklarings geheg aan die Applikant se Kennisgewing van Mosie nie, behalwe deur spesifiek die bewerings te ontken wat vervat is in paragraaf 21 (a) van S.D. Marshall se beëdigde verklaring."

Opposing affidavits were filed by second respondent and by her attorney, Mr. Levin. The latter's affidavit inter alia made it clear that the

composition of the committee of the Townships Board which investigated scheme No. 1/259 in 1968 was the same as that which investigated scheme No. 1/215 in April 1966 and that Mr. Van der Hoven, a Town Planner in the service of the Province of the Transvaal, had attended both hearings.

The bona fides of the City Council in pursuing its amendment scheme No. 1/259 are not questioned. It can readily be appreciated that the City Council, holding the views it does regarding business rights on the stands in issue, should feel aggrieved at the Administrator's decision rejecting that scheme. In terms of the Ordinance, however, the approval or rejection of an interim scheme rests with the Administrator. That aspect of the matter is fully discussed in the judgment of this Court, delivered contemporaneously with this judgment, in the appeal of The Administrator of the Transvaal and The Firs Investments (Pty.) Limited v. City Council of Johannesburg - hereinafter for convenience called the Firs case - and I shall not here repeat what is there said. The Firs case raised several other issues which also arise in the present appeal.

For the reasons stated in that judgment, the City Council has locus standi to bring the present proceedings to review the Administrator's decision rejecting scheme No. 1/259, and the practice of the Director's reporting to the Administrator upon an interim scheme may be considered a salutary one. Concerning the City Council's complaint in the present case that the Administrator has furnished no reasons for his decision, I do not wish to add anything to what is said on that question in the Firs case, save this: having regard to the general nature of the charges formulated in the City Council's founding affidavits, it is readily understandable that the Administrator's answering affidavit should [redacted] only have been couched in general terms. I accordingly see no reason to differ, as counsel for the City Council invited us to do, from what was said by the learned Judge a quo on this question at page 100 (A - C) of 1970 (2) S.A.

Inasmuch as the City Council did not review the Administrator's decision on scheme No. 1/215 granting business rights to the stands in issue, the case it had to establish in 1968 was that, having regard to the provisions of section

17 of the Ordinance, it would be for the benefit of the Johannesburg town-planning scheme in operation to re-zone these two stands to "general residential". As appears from the various documents I have cited above, that, indeed, was the gravamen of the City Council's contentions. The City Council, however, failed to convince either the Townships Board or the Administrator. Because of the Administrator's powers under the Ordinance, more particularly because of the discretionary nature of the Administrator's function under section 35 (1) of the Ordinance, the City Council can only succeed in the present review proceedings if it establishes that the Administrator's decision in rejecting scheme No. 1/259 was "unreasonable" in the extended meaning of that term propounded in Union Government v. Union Steel Corporation (South Africa) Limited, 1928 A.D. 220. The principles governing this vital aspect of the enquiry are fully discussed in the Firs case and it is unnecessary to reproduce them here. Nevertheless, in order to avoid any possible misunderstanding regarding what the City Council

has...../

has to establish before it is in law entitled to succeed in the present proceedings, I set out the well-known passage in the judgment of Stratford, J.A., in the Union Steel Corporation case (supra) at page 237, viz:

> "There is no authority that I know of, and none has been cited, for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness. It is true the word is often used in the cases on the subject, but nowhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is 'inexplicable except on the assumption of mala fides or ulterior motive', see African Realty Trust v. Johannesburg Municipality (1906; T.H. 179) or that it amounts to proof that the person on which the discretion is conferred, has not applied his mind to the matter. See Crown Mines Limited v. Commissioner for Inland Revenue (1922, A.D. 91)."

The City Council sought to establish the charge, formulated in the above-mentioned paragraph 21 (a) of its founding affidavit, that the Administrator had rejected scheme No. 1/259 either because of improper motives or because he failed to apply his mind properly to the scheme, by making the case that virtually each and every town-planning consideration required these stands to be

zoned..../

zoned "general residential" as distinct from "general business". Initially - vide the opening paragraph of the undated memorandum cited earlier in this judgment - the City Council set out to show that the situation had, because of "additional shopping facilities and traffic congestion", materially altered since the stands were granted business rights. That contention was rejected by the Townships Board - see the second of its above-cited reasons for its recommendation to the Administrator - and, having considered the evidence, I remain unconvinced that the Townships Board erred in so rejecting the contention. The contrary submissions advanced by counsel then appearing for second respondent to the committee of the Board in opposing the City Council's abovementioned contention were, however, sought to be relied upon by Mr. Reichman, in his argument for the City Council in this Court, as tending to show that the Townships Board had fallen into the error of adopting a wrong approach to the enquiry, namely, that it was incumbent upon the City

Council.... /

Council to prove that the 1966 decision granting business rights to these stands was a wrong decision. I am unable to agree. The submissions in question were made in reply to the City Council's abovementioned initial contention of a material alteration in the situation since business rights were granted. Moreover, in my opinion, the record of the proceedings at the 1968 hearing sufficiently clearly reveals that the committee did not labour under any erroneous impression regarding the true nature of the enquiry before it.

Apart, however, from this allegation of changed circumstances, the expert evidence given on behalf of the City Council at the 1968 hearing before the committee of the Townships Board directly supported the City Council's contentions as advanced in its objection dated 15th December 1965, in its resolution of 22nd November 1966, and in the aforementioned undated memorandum - all of which I have cited above. A fairly full summary of that evidence is to be found in the judgment of Claassen, J., in the court

below..../

below (vide 1970 (2) S.A. pp. 96 A - 97 H). Counsel for second respondent devoted a substantial portion of his argument before this Court to a criticism of that evidence. Without pursuing all the details of that criticism, it suffices to say that it would appear that - unlike the City Council's other witnesses who mainly confined their opposition to shops at this particular site - the witness Floyd harbours a somewhat inflexible antipathy towards shops anywhere in Berea. I also incline to the view that, in their endeavours to impress their convictions on the committee of the Townships Board, at least some of the other expert witnesses who testified on behalf of the City Council at times permitted themselves to fall into the error of exaggeration and over-emphasis of otherwise sound and tenable contentions. However that may be, their evidence was, as already mentioned, not contradicted by any contrary testimony, and it would be difficult to dissent from the opinion expressed by the learned Judge a quo (vide 1970 (2) S.A. at 97 ad fin.)

that...../

that:

> "A court of law would not have ignored such expert evidence based on learning and practical experience".

This notwithstanding, it is, however, important to bear in mind that, in review proceedings such as the present, entirely different criteria prevail from those which obtain in appeals against the decision of a lower court, and that - as was also pointed out by Claassen, J., (vide pp. 100 H. - 101) - the members of the committee of the Townships Board who investigated the matter are themselves very experienced in town-planning matters (cf. Administrator Cape Province v. Ruyteplaats Estates (Pty.) Ltd., 1952 (1) S.A. 541 (A.D.) at 553 - 554). Although canvassed very much more fully at the 1968 enquiry, substantially the same issues were raised at the previous enquiry in 1966. The evaluation of the expert evidence and the ultimate decision of what recommendation should be made upon the relatively straightforward and simple issues raised

would..../

would manifestly have been greatly aided by the Committees' inspection in loco (cf. Scottes & Gallinicos v. City Council of Johannesburg, 1935 W.L.D. 101). Such inspections were held at both enquiries. Furthermore, not only were both schemes investigated by the same tribunal, but at the 1968 investigation the tribunal was furnished with the full written arguments of counsel on both sides. Before reaching its decision to recommend rejection of scheme No. 1/259, the Board was thus very fully apprised indeed of all relevant considerations.

According to the evidence, the second respondent proposes to establish seven shops on these stands, such shops being designed to attract customers from the immediate neighbourhood, as distinct from customers from afar or merely passing by. At the 1968 hearing, a somewhat surprising divergence of opinion revealed itself between Floyd and Reinecke regarding the number of persons estimated to be living within a radius of one block around stands 247 and 248 as is reflected in the circle drawn on exhibit "G". Floyd estimated approximately 10,000, whereas Reinecke first

supported only half that figure but ultimately conceded that 7,500 might be nearer the mark. Whatever the correct figure may be, it is, I think, clear that, having regard to the large number of people resident in the vicinity, shops on the stands in issue would undoubtedly be a convenience. Bearing in mind current, and probable future, flat-development in the area, such convenience would, in all probability, only become greater with the passage of time. Mr. Reichman did not, indeed, seriously dispute this; but, emphasising the smallness of the site, its inadequate parking facilities, the traffic hazards attendant upon the presence of shops at this particular intersection, which latter is but some 400 yards away from the eastern end of the very extensive Hillbrow shopping area, submitted that any reasonable Board would regard the cumulative effect of those considerations as obviously over-riding the element of convenience which, he said, was in any event much exaggerated by second respondent. While this submission is not without some force, counter-considerations

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are not wholly lacking. Thus, although it is true that some of the residents living in the western quadrant of the aforementioned circle reflected on exhibit "G" may be actually nearer to the Hillbrow shopping area than they are to second respondent's stands, anybody proceeding westwards towards Hillbrow must cross the heavy traffic of Catherine Avenue. Regarding the traffic passing the stands in question, two points must be borne in mind, namely, that the intersection is robot-controlled and that it is really only at peak hours that traffic constitutes any serious problem. In this Court it was argued by counsel for second respondent with some persuasiveness that, contrary to the assertions of the City Council's Chief Traffic Officer at the hearing before the committee of the Townships Board, the respective alterations of Kotzé Street to one-way proceeding west, and of Pretoria Street to one-way proceeding east, must inevitably reduce the volume of traffic in Abel Road. The Townships Board may well have shared the view thus advanced by counsel for the second

respondent..../

respondent. Again, while it is not disputed that, speaking generally, shops attract more vehicles than flats, it is at least debatable whether these particular shops will attract any appreciable additional number of vehicles; for, as mentioned above, the contemplation is that the shops will primarily cater for residents living nearby who may be expected to approach the shops on foot, either from their homes or from the bus terminus in Olivia Road. The view of the City Council's Chief Traffic Officer that shops on these stands will inevitably cause homeward-bound motorists to stop in order to make purchases, with resultant aggravation of severe traffic congestion at the peak evening hour, is essentially a matter of opinion. Having regard to the relative proximity of the shops to the central city area, the Board may have taken a less pessimistic view of the probabilities. This all the more so, having regard to the evidence that Abel Road is likely to be made a one-way street proceeding west which would, in relation to the stands in issue, transfer

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the relevant peak period to the morning, city-bound, traffic. Moreover, in assessing the validity of Mr. Reichman's aforementioned submission, it is important to bear three features in mind. First, the weight to be attached to any particular factor relevant to the enquiry was primarily a matter for the decision of the Board and, postulating bona fides, is not a matter with which the court can in any way interfere (cf. Durban Rent Board & Ano. v. Edgemount Investments Ltd., 1946 A.D. 962 at 974). Secondly, merely to show that the Board's decision was against the weight of evidence would not assist the City Council; the latter must go so far as to show that the Board's decision was unreasonable in the extended sense of that word explained above. Thirdly, although Mr. Reichman's further submission that the Administrator, by failing to state his reasons, must be assumed to have adopted the reasoning of the Board, has rendered it necessary to make some reference to the evidence placed before the Board, it is not the recommendation of the Board, but the decision of the Administrator, which is under review.

As...../

As clearly appears from what I have said earlier in this judgment, the information placed before the Administrator was very comprehensive indeed. According to paragraph 3 of the Administrator's affidavit, set out above, he carefully considered that information and with due regard to the provisions of section 17 of the Ordinance. Prima facie, therefore, there is no room whatever for the contention that the Administrator failed to apply his mind to the City Council's interim scheme. His decision to reject scheme No. 1/259 was in conformity with the recommendation of both the Townships Board and of the Director. The suggestion advanced, albeit somewhat tentatively, by Mr. Reichman that the adoption of the Director's recommendation to amend the Ordinance and the subsequent enactment of section 46 (A) of the Ordinance, serve to indicate some measure of ulterior motive directed against the City Council is, in my opinion, without any sound foundation. Inasmuch as the Ordinance renders the Administrator's opinion decisive in regard to town-planning schemes - see the discussion on that aspect of

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the matter in the Firs case - the desirability of a provision such as that contained in the new section 46 (A) is, from the Administrator's point of view, readily intelligible. I am therefore unable to ascribe any ulterior motive either to the Director's recommendation or to its adoption by the Administrator. There is thus a total absence of any direct evidence of any improper or ulterior motive. On the contrary, the Administrator has said on oath that he carefully considered all the information placed before him with due regard to the provisions of section 17 of the Ordinance. The City Council is thus perforce obliged to contend that, in the light of sound town-planning principles, the decision to reject scheme No. 1/259 is, notwithstanding the recommendations of both the Townships Board and the Director, so inherently unsound as itself to warrant the inference of a failure to apply the mind or of improper motive averred in paragraph 21 (a) of the City Council's founding affidavit. For the reasons I have indicated above, that contention is,

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in my opinion, unsound. Furthermore, as is reflected in the papers before the Court, in the field of town-planning there is room for considerable divergence of opinion; and, as is more fully explained in the Firs case, in terms of the Ordinance the Administrator's opinion is decisive. At the risk of wearisome repetition, it must once again be emphasised that the question before the Court is not whether, in rejecting scheme No. 1/259, the Administrator made a sound or unsound decision. The only question is whether his decision has been shown to have been "unreasonable" within the meaning of the above-cited passage from the Union Steel Corporation case. The onus is on the City Council to establish that the Administrator's decision was "unreasonable" in that sense. That - as is more fully explained in the Firs case - is an extremely difficult onus to discharge. In my judgment, it has not been discharged in the present case, and the appeal must, accordingly, fail.

This conclusion renders it unnecessary to express any view upon the circumstance that the Townships Board was

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not joined as a party in these proceedings.

The appeal is dismissed with costs. The fees of two counsel are authorised.

N. D. Grieve Thompson

HOLMES, J.A.)
JANSEN, J.A.)
TROLLIP, J.A.) Concur.
MULLER, A.J.A.)