THE NATIONAL BUILDING REGULATIONS AND BUILDING STANDARDS ACT,
THE ZONING SCHEME
AND
THE NATIONAL HERITAGE RESOURCES ACT:
A NOTE ON THE SCRUTINIES AND PROCEDURES FOLLOWED WITH APPLICATIONS CONCERNING BUILDINGS IN ZONING SCHEME CONSERVATION AREAS AND MORE THAN SIXTY YEARS OLD

INTRODUCTION:

This Note is the second of a series which is intended to explain to non-specialist professionals and to their clients the complications of the overlapping effects of the National Building Regulations and Building Standards Act, the Zoning Schemes and the National Heritage Resources Act. Indeed, by informing these parties about the laws, I hope to assist in the establishment of consistency in their administration.

Each of the series is intended to be more or less self-sufficient so they will also be fairly repetitive in that the basic sections of the laws affecting these cases is repeated in each Note. Also, because the intention is to explain the procedures to non-specialists, in certain circumstances, less than exactly correct terms may be used simply because a more precisely correct term may require too much explanation.

Every property owner intending to carry out even minor building works knows that they must get plans approved by the local authority. They also know that the proposal must satisfy the requirements of the local zoning scheme and they usually know that if the proposal does not comply with the zoning scheme they will probably have to get the agreement of their neighbour(s) before the local authority's officials will approve the plans.

However, very few property owners realise that if their home is more than sixty years old the works will also have to be approved by the relevant provincial heritage resources authority. They are also often not aware that, if their property is in a declared conservation area (usually a particular type of special area designated as such in the local zoning scheme),¹ the local authority's heritage management officials are required to ensure that the proposal is appropriate to or "in keeping" with the character of the environs.

¹ It must be emphasised that conservation areas which are created by the local authority through their zoning scheme are a part of "planning" law rather than "heritage resource" law; this is important not only to explain why this is the responsibility of the local authority but also because the NHR Act specifically prohibits local authorities who have not been deemed to be "competent" (Section 8(6)) from regulating "heritage resources".
Indeed, it is also true that very few officials in the local authorities who are responsible for scrutinising and approving applications for the approval of building plans are aware of the implications of the so-called "sixty year clause", that is, Section 34 of the National Heritage Resources Act. This is both because the Act is relatively new (promulgated in 1999 and effective from April 2000) and, more importantly, because either the primary implementation agents, the provincial heritage resource authorities (the PHRAs), have not yet been established or because the functional PHRAs, the Western Cape and Kwa-Zulu Natal, have been established only relatively recently: as a consequence most local authorities are unaware of the provisions of the NHR Act or of the consequences of failing to respect the provisions of the Act.

This Note is intended to introduce the applicable sections of the building regulations law, the zoning schemes and the heritage resources law and the administration of these laws in an easily understood way. Accordingly, only the simplest general case will be used to illustrate the necessary scrutiny and approval procedures. The general case described in this Note concerns:

- building plans that satisfy the zoning regulations but which require the local authority's approval for work in a conservation area (in terms of the zoning scheme) and which concern a building more than sixty years old.

Even the most simple case of this type can be fairly complicated; but matters are inevitably considerably more complicated if the building concerned which is more than sixty years old has, in the opinion of the officials, some architectural or historical merit or if the building works proposed are, in the opinion of the officials, potentially damaging to the merit or significance of the building or to the environs or if, in the opinion of the officials, another party has rights in this regard and should be consulted. It is not intended to deal with these complications here other than to warn the reader of the likely variations of the procedures described here.

THE RELEVANT LAWS AND THE RELEVANT SECTIONS OF THOSE LAWS:

The relevant laws and the relevant sections of those laws involved in the administration of these cases are fairly straightforward. These are the National Building Regulations and Standards Act, the local authority's zoning scheme and the National Heritage Resources Act (other laws which can also be relevant are not considered here):

The National Building Regulations and Building Standards Act:
This Act, the NBR and BS Act, requires, first, that all building work must be approved by the local authority (Section 4) and, second, that the proposed work must comply with "any other applicable law" before it can be approved by the local authority (Section 7).
In other words, building plans cannot be approved unless they comply with the zoning regulations or they have been properly scrutinised and received a planning approval (for a departure or consent, for example, to carry out works in a conservation area) and, more importantly here, the plans cannot be approved if there is a building more than sixty years old on the property before the approval in that respect has been granted.

As I have said, the local authority is not empowered to approve building plans unless the plans comply with "any other applicable law" and any approval granted in the absence of such compliance must be deemed to be null and void. Indeed, the National Heritage Resources Act is clearly an applicable law if the building is more than sixty years old and, accordingly, it is clear that the local authority is required to ensure that all proposals involving buildings more than sixty years old have been approved by the applicable heritage resource authority.

**Zoning or Town Planning Schemes:**
The local authority's zoning scheme is the self-evidently most obvious "other applicable law" that must be complied with before any building plan can be approved. Zoning schemes establish the required set-backs, heights, coverage, floor areas ("bulk"), parking provisions, etc of the buildings permitted in each zone and they establish special areas where special restrictions apply as, for example, in conservation areas.

The Cape Town Zoning Scheme, for example, requires that no demolition or new building work in a declared conservation area may be "detrimental to the protection and/or maintenance of the architectural, aesthetic and/or historical significance, as the case may be, of the area" (Section 108 of the Zoning Regulations).2

As I have said, in order to facilitate understanding we shall presume that the zoning regulations are, in all other respects, complied with in the cases described here.

**The National Heritage Resources Act:**
Section 34(1) of the National Heritage Resources Act requires that "no person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority".3 Also, the Heritage Western Cape Regulations of 2003 require that

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2 Although Section 108 of the Cape Town Zoning Regulations refers to the “architectural, aesthetic or historical significance ... of the area”, most other zoning schemes refer to the “character” of the area in question: this difference should not ordinarily be important but may become so in the case of disagreement and dispute and in appeals.

3 I should note that the PHRA may exempt defined geographical areas from these requirements if the heritage resources in those areas are identified and are otherwise adequately provided for (Section 34(3) of the NHR Act). This refers, in particular, to the possibility of local authorities being deemed to be competent to regulate grade 3 heritage resources within their area of jurisdiction (Section 26 of the NHR Act). However, no local authority in the country has yet been deemed to be competent and, therefore, the decisions required in terms of Section 34 can only be made by the relevant provincial heritage resources authority. I should note, too, that in the Western Cape, the PHRA may exempt from
all applications to Heritage Western Cape (the Western Cape PHRA) must be made “on the applicable official form” (Section 2 of these Regulations).  

This is very straightforward: in the Western Cape, *only Heritage Western Cape can approve the alteration, addition or demolition of a building more than sixty years old.*

I must emphasise that we are talking about buildings that are not already formally graded as national, provincial or local heritage resources.

**THE ADMINISTRATION OF BUILDING PLANS THAT SATISFY THE ZONING REGULATIONS BUT WHICH REQUIRE THE LOCAL AUTHORITY’S APPROVAL FOR WORK IN A CONSERVATION AREA (IN TERMS OF THE ZONING SCHEME) AND WHICH CONCERN A BUILDING MORE THAN SIXTY YEARS OLD (IN TERMS OF SECTION 34 OF THE NHR ACT):**

These cases are, in essence, complex because both the PHRA and the local authority must each grant their own independent approval in terms of different legislation and powers. In this Note, however, I am assuming the simplest cases of this type, that is, relatively minor alterations and additions to ungraded buildings (that is, buildings without any special architectural or historical merit) in conservation areas.

As I have explained above, building plans cannot be approved until all applicable law has been satisfied: accordingly, the local authority’s approval for the work in a conservation area must be obtained and the PHRA’s approval for the alterations/additions to a building more than sixty years old must be obtained before the plans can be approved in terms of the NBR and BS Act.  

Given that we are assuming that the building in question is more than sixty years old, Heritage Western Cape must approve the alterations/additions and, as I have emphasised above, Heritage Western Cape can only consider and approve such a plan if an application has been made on the official Heritage Western Cape form (and satisfied all of the requirements stated on the form).

And given that we are assuming that the building in question is within a declared conservation area, the local authority must also grant the necessary special approval for work in a conservation area (such application must be...
made via a standard form and the application must be considered and approved/cleared by an official properly delegated to do so).

Given these circumstances, the architect, draftsman or technologist responsible for the plan approval would be well advised to adopt the following course of action:

- First, confirm with the local authority's officials responsible for the zoning scheme clearances (usually called the zoning administration or similar) that no departures or consents other than the conservation area approval are required and that the proposal complies with the zoning scheme in all other respects.

- Second, discuss the proposal with the local authority's heritage management officials and confirm that the property is in a conservation area, establish whether the building is graded or not and what the opinion of these officials is regarding the appropriateness, or otherwise, of the additions and alterations proposed.

We are assuming in this case that the property is in a conservation area but that the sixty-year old building in question does not merit a grading (perhaps it too ordinary, without any architectural merit and/or perhaps even it had previously been insensitively altered).

Given this, the officials should say that they have no objection to the proposal or they may make helpful suggestions that could even improve the proposal from an architectural or environmental point of view. This advice must be designed to ensure that new building work is, at least, not "detrimental to the protection and/or maintenance of the architectural, aesthetic and/or historical significance, as the case may be, of the area" (Section 108 of the Zoning Regulations). Indeed, these officials may say that unless certain criteria are satisfied they will not approve the proposal because, in their view, the proposal is detrimental to the character and/or significance of the area; and they may also say that, in their opinion, the proposals are damaging to the significance of the building itself.

Most importantly, however, these local authority officials should advise the architect/ draftsman that the local authority and the PHRA both have jurisdiction in such cases: the local authority is responsible for the character/significance of the area and the PHRA is responsible for the appropriate management of graded heritage resources and structures more than sixty years old. In these imagined circumstances where the building that is more than sixty years old is without significance, I would expect that the PHRA should grant an approval for any work to the building (including even approval of a demolition) and the local authority would ensure that the works are not "detrimental to the architectural, aesthetic and/or historical (character) significance of the area".
Whether the proponent wishes to follow the advice of these local authority officials is up to him/her:

[I must re-iterate that this account does not deal with formally graded national or provincial heritage sites, graded 1 or 2. If the property is so graded, the proponent should approach a specialist to advise or assist you with your application. If the local authority’s officials say that the building is a grade 3a, 3b or 3c the architect/draftsman should insist that these officials explain precisely why the building is deemed to be a grade 3 building because to date no formal grading of grade 3 sites has taken place yet anywhere in South Africa. Also, in these cases, where the building is deemed to have a grade-3 grading, the local authority officials’ opinions of the proposed works and the impacts on the significance of the building are often favoured by the PHRA and it may be advisable either to take that advice and amend the proposal or to get the advice or assistance of a specialist if the architect/draftsman differs with these officials.]

- Third, in those cases where the advice is accepted, the proposal should be amended to satisfy the local authority’s heritage management official who should also assist the architect/draftsman by giving him/her the appropriate official Heritage Western Cape form and advising him/her how to complete the application properly. [Those cases where the advice of the heritage management official is not accepted will be dealt with below.]

- Fourth, having completed the appropriate official Heritage Western Cape form and attached all of the necessary supporting motivation, evidence of the opinions of any party consulted (including those of the local authority’s officials) and documentation (including photographs of the building, any evidence relating to the building’s history, etc), the application for the Section 34 permit to alter or extend the building which is more than sixty years old should be submitted to Heritage Western Cape.

And, given that this application involves a building more than sixty years old but of little or no significance and given that the local authority’s heritage management officials have seen the proposal and support its approval, Heritage Western Cape should have no difficulty in approving the application.

[I should note that recently considerable confusion in the administration of even these simple cases in Cape Town has been introduced by a practice designed to facilitate the administration of these cases: the officials of the City Council’s Heritage Resources Section have permitted applicants in these cases to leave their applications in their hands and Heritage Western Cape officials with the delegated authority to approve “simple” Section 34 applications have gone each week to the City Council’s offices and approved these applications. There can, in my opinion, be no objection to the co-operation between spheres of]
government in the administration matters in which each sphere has a responsibility; indeed, it should be lauded and encouraged. However, this cannot obviate the necessity to adhere to the law: Section 34 applications must be made on the official Heritage Western Cape form and must be approved by a properly delegated Heritage Western Cape official; and if the application is submitted at the City Council offices and the permit is granted by a properly authorised official of Heritage Western Cape in the presence of City Council officials, there can be no objection to this. I must add, however, that having two places and two ways of making the same application must be confusing for all parties, unsatisfactory for most, it will almost certainly introduce inconsistencies in decision-making and in the time taken to make a decision, and it must make proper record-keeping almost impossible.]

* Fifth, once the Section 34 permit (which Heritage Western Cape calls a “Record of Decision”) has been granted, the architect/draftsman should attach the permit to the building plan application documentation and continue the process of obtaining the clearances necessary for the final building plan approval by the local authority (or start the process if all the interactions with the local authority officials to date have been informal).

This should now be a very straight-forward process because it has been confirmed that the zoning scheme is complied with, the PHRA has issued its permit (its so-called “Record of Decision”) and the heritage resources officials of the local authority have given their advice (which has been accepted) and their written clearance/approval of the proposal will already be attached to the documentation; and the plans should be quickly approved finally in terms of the BNR and BS Act (assuming that all other requirements have been satisfied, for example, having the structural engineer appointed, etc).

* However, in those cases where the proponent does not want to follow the local authority’s heritage management official’s advice, he/she should request the official to give his opinion in writing (in fact, if the application for building plan approval has been initiated the official will usually have done this already on one of the forms accompanying the application).

Given that we are presuming that the building, although more than sixty years old, is of little or no merit/significance we shall presume, for the purposes of this Note, that the local authority’s heritage management official’s criticism is a personal and unsustainable aesthetic preference.

In this case, the proponent would be well advised to have an appropriately skilled and experienced heritage practitioner make the necessary Section 34 application to Heritage Western Cape.\(^6\) In this case the application made on the appropriate official Heritage Western

\(^6\) In terms of the NHR Act.
Cape form, with all of the necessary supporting motivation, evidence of the opinions of any party consulted (including those of the local authority’s officials) and documentation (including photographs of the building, any evidence relating to the building’s history, etc), should be submitted to Heritage Western Cape with a request to be present when the matter is considered.\(^7\)

And, given that this application involves a building more than sixty years old but of little or no significance, notwithstanding the difference of opinion with the local authority’s heritage management officials, Heritage Western Cape should have no difficulty in approving the application. However, if the BEL Committee agrees with the opinions of the local authority’s officials it is likely that they will refuse the application or approve it subject to conditions that the proposal be amended.

- Whatever the case, the Heritage Western Cape approval with or without conditions does not obviate the necessity for the local authority approval for work in a conservation area; and the local authority’s heritage management officials are responsible for these approvals. Given this, the opinions of these officials is central in any application within a declared conservation area.

Given this, if the proponent of the proposal is dissatisfied with the comments of the heritage management officials he/she should engage an appropriately skilled and experienced consultant to advise him/her of the possible options. One step often helpful in breaking such an impasse is to present the proposal to an expert body for its comment, ideally in the presence of the officials so that some discussion can take place leading directly, hopefully, to approval or to a compromise solution.\(^8\)

- Ultimately, given that the proposal satisfies the zoning regulations, given that HWC has approved the application to them with or without conditions and given that the proposal as intended or with amendments has now been cleared by the local authority heritage management officials, the building plans can be approved in terms of the NBR and BS Act.

**APPEALS AGAINST DECISIONS:**

The variations of the general case discussed in this Note have suggested that dispute can very easily arise and, indeed, will frequently do so. As a

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\(^7\) In this case, given that there is dispute between the applicant and the local authority’s heritage management officials, the matter should be referred by the HWC officials to the HWC permit committee known as the BEL Comm.

\(^8\) One such body whose opinion is often sought by proponents and by the authorities is the Cape Institute for Architecture’s Heritage Committee; but there are, of course, others, most often with an interest in a particular area like, for instance, the Wynberg Village Conservation Society.
consequence, it is likely that disputes will arise during the scrutiny or decision-making processes that cannot be resolved in the processes described. In these cases, the proponent will be well advised not to prolong discussion, particularly if it is apparent that agreement is unlikely to be reached, but to request/demand a formal decision from the officials so that the formal appeal procedures can be followed.

I shall not deal with those procedures here other than to point out that there are appeal procedures for decisions made in terms of all laws; and that each law contains within it the criteria for its decision-making. It has been my experience that often the authorities (or their officials) do take proper account of the limitations of each law or of the criteria for their decision-making; this is particularly the case in matters where the criteria are often vague and/or difficult to quantify.

Given that in these cases, many of the issues will have become murky at best, it is probable that the proponent will need expert conservation advice and, possibly, legal advice. I do, therefore, also suggest, if a proponent or his/her representative has become concerned about the process or the direction that the scrutiny of a proposal is taking, that he/she either insist on speaking to the officials’ superiors or seek expert advice as early in the process as possible.

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