

TO: **CORNÉ NELL INC ATTORNEYS**

REF: C NELL

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RE: **IRENE FARM VILLAGES**

OPINION

1. **DEFINITIONS**

- 1.1 **“AG”**: Architectural Guidelines
- 1.2 **“AGM”**: Annual general meeting
- 1.3 **“ASC”**: Architectural Sub-Committee, as is defined in clause 2.1 of the current articles of association and as *“Aesthetics Sub-Committee”* in clause 1.6 of the current rules and regulations, being a panel consisting of Consultant’s directors acting in this capacity, together with any other persons nominated by the directors to assist them in exercising the functions of an architectural sub-committee
- 1.4 **“Companies Act”**: Companies Act 61 of 1973
- 1.5 **“Consultant”**: Irene Farm Villages Home Owners’ Association, an association incorporated in terms of Section 21 of the Companies Act 61 of 1973

1.6	“Current articles of association”:	Consultant’s current articles of association
1.7	“Current rules and regulations”:	The rules and regulations, dated 22 July 2010, and which include the architectural guidelines
1.8	“Developer”:	Irene Land Corporation Ltd, a company incorporated in terms of the provisions of the Companies Act, with Registration No. 97/19751/06
1.9	“Development period”:	The period from the establishment of Consultant until all stands of Irene Extension 32 and any stand in any residential township established on the Farm have been sold, <i>alternatively</i> until the developer notifies the Consultant that it waives the rights conferred upon it during the development period, as is contained in clause 2.1 of the initial articles of association, read with clauses 10.1 and 10.3 thereof
1.10	“Estate”:	Irene Farm Villages, which are situated on a portion of the Farm, which consist of Irene Extensions 33 – 44 Townships
1.11	“Farm”:	The erstwhile Portion 540 (a Portion of Portion 335) of the Farm Doornkloof 391, Registration Division J.R., Gauteng Province
1.12	“Initial articles of association”:	The articles of association dated 2000
1.13	“Initial rules and regulations”:	The rules and regulations which existed in 2000 when Consultant was established and which were contained in a document titled “DEVELOPMENT AND ARCHITECTURAL GUIDELINES”
1.14	“Members”:	Registered owners of erven situated within the Estate, being members of Consultant
1.15	“NBRBSA”:	National Building Regulations and Building Standard Act 103 of 1977
1.16	“Second set of rule and regulations”:	The rules and regulations, dated 15 April 2009

2. **BACKGROUND**

2.1 The developer established the Estate over a period of years by having phased the establishment of the individual townships constituting the estate.

2.2 The Estate is located north of the Cornwall Hill Estate and west of the Irene Village Shopping Complex.

2.3 The residential component of the Estate consists of some 640 full title erven with an average size ranging between 500m² to 700m².

2.4 The Estate envisaged by the developer at the time would have consisted of a mixed use Estate with the following primary rights anticipated:

2.4.1 A residential component, consisting of Irene Extensions 33, 34, 35, 36, 37, 39 and 44;

2.4.2 "*Business 2*" for private school and retirement village on Irene Extension 38;

2.4.3 "*Special*" for purposes of constructing the proposed PWV6 road on Irene Extension 41;

- 2.4.4 *“Business 2”* on Irene Extensions 42 and 43; and
- 2.4.5 *“Institutional and Special”* for purposes of lock-up storage on Irene Extension 40.
- 2.5 Five of the residential townships forming part of the Estate are located north of the proposed PWV6 Road, being Extensions 33, 34, 35, 37 and 39, whilst Extension 36 and 44 are located south of the proposed PWV6 Road.
- 2.6 The residential component of the Estate has become well established since there are only approximately 20 residential erven within the Estate remaining undeveloped.
- 2.7 Not all uses anticipated by the developer materialised. This issue, however, according to instructions, became settled.
- 2.8 The developer established Consultant during 2000 by the incorporation of Consultant and the registration of its memorandum of association and articles of association at the Registrar of Companies in terms of the provisions of the Companies Act.
- 2.9 According to clause 3 of Consultant’s initial articles of association, the objects of Consultant shall be:

- “3.1 To ensure compliance by members with the Conditions of Establishment of any township on the property, with particular reference to the conditions dealing with the aesthetic and building regulations and requirements, and where necessary to ensure that the Local Authority enforces such Conditions of Establishment.
- 3.2 To act as a liaison between the members of the Local Authority regarding the landscaping and aesthetic usage of the property and the buildings erected or to be erected on the stands or any other matter.
- 3.3 To exercise control over the rights created and still to be created over the stands on the property and to formulate rules and by-laws for the control of buildings, walling, fencing, exterior lighting, signage, aesthetic planning and landscaping of the property and the stands, and to ensure compliance with such rules and by-laws by members of the Association.
- 3.4 To implement and control the principal concepts of the development relating to the security, architecture, landscaping, parking, signage and advertising, exterior finishing and maintenance, as detailed by urban designers, landscape architects and ecological planners of the property appointed by the Architectural Sub-Committee.
- 3.5 To implement and ensure compliance by members with a co-ordinated landscaping plan for the property, as approved by the Developer of the townships on the property.
- 3.6 To ensure that each member maintains his/her/its stand in a clean and tidy condition and adheres to the specifications imposed by the Association relating to the landscaping and ecological planning. In the event of any member failing to adhere to the specifications and maintenance of his stand, the Trustees shall be entitled, but not obliged, to perform the necessary acts and services and recover from such member the costs thereof.
- 3.7 To undertake the maintenance of street verges and the areas of stands situated within building line reserves as defined in 3.5 and, where required by members, to maintain the vegetation and landscaping on any individual stand against payment to the Association of a special levy.
- 3.8 To administer the general security arrangements on the property, with particular reference to controlling access, and the nature and type of security to be provided from time to time, excluding the security arrangements of any particular

building on the stand.

3.9 *To consent or declare any proposed consolidation, subdivision/rezoning of any stand and to stipulate the landscaping and certain aesthetic conditions, which shall apply prior to such rezoning and sub-division, if approved.*

3.10 *To administer and ensure compliance by its members with the provisions of the Site Development Plan of the townships which have been approved by the Local Authority.”*

2.10 Every registered owner of an erf within the Estate automatically becomes a member of Consultant by virtue of the provisions of clause 4.3 of the initial articles of association and by virtue of the following title condition, which is recorded in each and every title deed of an erf comprising the Estate:

“Upon transfer the owner of the portion must automatically become a member of the Section 21 Company and remain a member until he or she ceases to be a registered owner of the erf, and will be subject to the following:

(a) *Any owner of a Stand, or any sub-division thereof, or any other interest therein, or any unit as defined in terms of the Sectional Titles Act, shall become and shall remain a member of the IRENE FARM VILLAGES HOME OWNERS' ASSOCIATION, (A company incorporated in terms of Section 21 of the Company's (Act) Registration No. 2000/030502/08) (hereinafter referred to as “the Association”) and be bound by its Resolutions in terms of the powers as set out in the Memorandum and Articles of Association until such time as he/she ceases to be an owner as aforesaid. No stand or any subdivision thereof, or interest therein, or any unit therein, shall be transferred to any person who has not committed himself/herself to become a member of the Association, and who has irrevocably agreed in writing to abide by the Memorandum and Articles and Rules of such Association.*

(b) *The owner of the Stand or any sub-division thereof, or any interest therein, or any unit as defined in the Sectional Titles Act, shall not be entitled to transfer the Stand or any subdivision or any interest therein, or unit thereon, without a*

Clearance Certificate from the Association that all moneys owing to the Association have been paid, and that at date of transfer the transferor is not in breach of any of the rules of the Association.”

- 2.11 The developer intended for Consultant to only take effect and control of the Estate once it has sold all the erven within the Estate. This the developer achieved by virtue of the provisions of clauses 2.1, 10.1 and 10.3 of the initial articles of association.
- 2.12 The developer therefore exercised total control over the development of the Estate and over the appointment of Consultant's directors until such time as the last erf in the Estate was sold, *alternatively* until the developer indicated to Consultant in writing that it waives its right to, *inter alia*, appoint at least three of Consultant's directors. The term of office of the directors appointed by the developer was also not limited to the one-year period between AGM's, as is the position with all other directors.
- 2.13 According to writer's instructions, the developer controlled all aspects of the Estate until it relinquished power during 2007. This event coincided with the conclusion of a written settlement which was entered into between the developer and Consultant, dated 24 May 2007, and which, *inter alia*, in terms of clause 9.1 thereof, resulted in the resignation of the directors which had been appointed by the developer.
- 2.14 The Estate, as it appeared at 2007, resulted from a legacy of dictatorial and autocratic control exercised by the developer since inception and

thereafter manifested itself in the appointment of directors, the making of rules, aesthetic approvals, deviations from rules and aesthetic guidelines, as well as the selective enforcement and generally favouritism shown towards certain of Consultant's members.

2.15 Consultant wishes to be advised on the way forward of managing the Estate and enforcing its rules and regulations. Consultant posed a number of questions, which will be addressed under the captions which follow hereunder.

3. **THE RULEMAKING AUTHORITY**

3.1 Clause 28.1 of the initial articles of association empowered the "trustees" (directors) to, from time to time, make rules which must be equitable, with regards to various issues, including architectural design.

3.2 Clauses 28.2 – 28.7 of the initial articles of association empowered the directors to enforce the rules.

3.3 In clause 28.8 of the initial articles of association, it was, however, stated that Consultant, in general meeting, may make any rules which the directors may make and Consultant may also, in general meeting, vary or modify any rules made either by it or by the directors from time to time.

3.4 The initial rules and regulations were embodied in a document titled

“DEVELOPMENT AND ARCHITECTURAL GUIDELINES” which were compiled by the developer and which were provided to all prospective purchasers of erven within the Estate.

- 3.5 Paragraph 1 of the initial rules and regulations contained an extremely important arrangement pertaining to the future amendment thereof, wherein it was stated:

“It is important to realise that these guidelines, as contained in this document, will, from time to time be updated to satisfy specific needs or to comply with any new regulations, laws or by-laws. These amendments can be effected by either the township owner or the Home Owners Association.”

- 3.6 In a second set of rules and regulations, dated 15 April 2009, it was indicated, in clause 1.4 thereof, that the directors may from time to time make rules which shall be binding on all members and in clause 1.6 thereof, it was stated that the ASC has formulated the AG contained therein and had the right to amend and supplement these guidelines from to time.

- 3.7 Clauses 28.1 – 28.8 of the initial articles of association were retained in the current articles of association.

- 3.8 In the current rules and regulations, dated 22 July 2010, the same rule-making authority as was contained in the 2009 rules and regulations, was retained. In terms of clause 1.4 thereof, Consultant’s directors may from

time to time make rules, subject to any restriction imposed by or direction given at an AGM. In terms of clause 3.5 thereof, the directors are empowered to amend or add to the rules and regulations from time to time as may be deemed necessary and any rule or regulation so accepted and amended, will be published and circulated by way of insert in the monthly in-house magazine which circulates within the Estate, on condition further that all amendments and additions so effected during a particular financial year, should be made available at every AGM.

- 3.9 The mere fact that there exist two independent rulemaking bodies, has in the past, and will no doubt in future, lead to conflict and friction between members.
- 3.10 Given the far-reaching effect these rules and regulations may have on individual homeowners (members) and their financial investment and interest in their properties, a singular rule-making body is proposed, being the AGM.
- 3.11 Consultant's current articles of association should be amended in order to reflect this change and all conflicting provisions in the current articles of association and in the current rules and regulations should be removed therefrom simultaneously.
- 3.12 A public participation process should be engaged upon, limited to Consultant's members, prior to the AGM and voting on any new rules and

regulations should be conducted strictly in terms of the current articles of association.

4. **ENFORCEMENT / RELAXATION / DEVIATION OF THE RULES**

4.1 When regard is had to clauses 4.1.1 and 4.1.4 of the current rules and regulations, the interpretation given to the rules and regulations seems to be the prerogative of Consultant's board of directors.

4.2 When regard is had to clause 4.6.2.2 of the current rules and regulations, the rules and regulations are not negotiable and will be enforced by the board of directors and no exceptions will be made and no compromise will be allowed.

4.3 As far as the architectural guidelines are concerned, clause 5.2.4.1 of the current rules and regulations seem to permit a relaxation of the architectural guideline upon application by a member, which application must be evaluated on merit, having regard to its potential impact.

4.4 What is, however, not clear, is who the decision-making body is in respect of an application for the deviation from the architectural guidelines.

4.5 It is suggested that all applications for relaxation of the rules and regulations be submitted to the AGM for consideration and not to Consultant's board of directors. Members must be given the opportunity

to oppose any request for a relaxation on the basis that such a relaxation may cause a derogation in the value of their properties or of the Estate in general and that equal treatment and uniformity should prevail. They may resist same on the basis of any other relevant and valid consideration.

- 4.6 Such a process will also result in far less applications for relaxation being made annually, with the resultant benefit that the rules and regulations will be religiously adhered to as members will find the relaxation process rather cumbersome.
- 4.7 Clause 17.3 of the current articles of association specifically tasks Consultant's directors to ensure adherence to the provisions of the articles of association by Consultant's members and to further do all things reasonably necessary for the enforcement, management, control and administration of the Estate.
- 4.8 Clause 3.1 of the current rules and regulations, mirror the arrangement that the board of directors is responsible for the administration of the Estate.
- 4.9 In terms of clause 3.7 of the current rules and regulations, Consultant has the right to introduce and enforce payment of penalties against transgressors of any of the rules and regulations.
- 4.10 When regard is had to clause 4.6.2.2 of the current rules and regulations,

it is stated therein that the rules are not negotiable and will be enforced by the board of directors and no exceptions will be made and no compromise will be allowed.

- 4.11 Clause 6 of the current rules and regulations contains a list of transgressions and financial penalties each transgression should carry.
- 4.12 The enforcement of the rules and regulations therefore seems to be the prerogative of Consultant's board of directors and not of any individual member. A member could, however, bring an application to Court in order to compel Consultant and its board of directors to enforce the rules and regulations should Consultant's board of directors neglect its duties in this regard.
- 4.13 It is, however, doubtful whether an individual owner has the right to enforce compliance with the rules and regulations against a co-member. Such a member will have to rely on either a common law derivative action or Section 266¹ of the Companies Act. The common law derivative action

¹ Section 266 of the Companies Act reads as follows:

"266. Initiation of proceedings on behalf of company by a member. –

- (1) *Where a company has suffered damages or loss or has been deprived of any benefit as a result of any wrong, breach of trust or breach of faith committed by any director or officer of that company or by any past director or officer while was a director or officer of that company and the company has not instituted proceedings for the recovery of such damages, loss or benefit, any member of the company may initiate proceedings on behalf of the company against such director or officer or past director or officer in the manner prescribed by this section notwithstanding that the company has in any way ratified or condoned any such wrong, breach of trust or breach of faith or any act or omission relating thereto.*
- (2)(a) *Any such member shall serve a written notice on the company calling on the company to institute such proceedings within one month from the date of service of the notice and stating that if the company fails to do so, an application to the Court under paragraph (b) will be made.*

was derived from the so-called rule of **Foss v Harbottle** and which entails the following. First, the proper plaintiff in an action in respect of a wrong allegedly done to a company or association of persons is *prima facie* the company or association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a majority of the members, no individual member of a company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then it should be the end of the matter.

4.14 The statutory derivate action which is contained in Section 266 of the Companies Act, however, only has limited application in the sense that it only finds application when the offending conduct constitutes either a

- (b) *If the company fails to institute such proceedings within the said period of one month, the member may make application to the Court for an order appointing a curator ad litem for the company for the purpose of instituting and conducting proceedings on behalf of the company against such director or officer or past director or officer.*
- (3) *The Court on such application, if it is satisfied –*

 - (a) *that the company has not instituted such proceedings;*
 - (b) *that there are prima facie grounds for such proceedings; and*
 - (c) *that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,*

may appoint a provisional curator ad litem and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.
- (4) *The Court may on the return day discharge the provisional order referred to in subsection (3) or confirm the appointment of the curator ad litem for the company and issue such directions as to the institution of proceedings in the name of the company and the conduct of such proceedings on behalf of the company by the curator ad litem, as it may think necessary and may order that any resolution ratifying or condoning the wrong, breach of trust or breach of faith or any act or omission in relation thereto shall not be of any force or effect.”*

delict or breach of trust or breach of faith.

4.15 The position of individual members wishing to enforce the rules and regulations therefore seem to differ from that of the owner of an erf in a traditional township in which a certain title condition prohibiting certain conduct had been included. In such an event, any resident within the township would have the necessary *locus standi* to enforce such a title condition against an offending owner².

4.16 Clause 19 of the current articles of association, however, empowers directors to delegate their functions, powers and duties to committees consisting of outsiders, including a managing agent, as they deem fit. This would also include the function of enforcement of the rules by a managing agent on its behalf. A proper delegation would, however, be required before any committee or person or managing agent can enforce the rules on behalf of the Consultant's board of directors.

5. **RETROSPECTIVITY OF RULES AND REGULATIONS**

5.1 Due to the fact that the rules and regulations get amended from time to time, Consultant poses the question whether new rules and regulations apply retrospectively.

5.2 The answer to this must be in the negative, as there exists a general

² *BEF (Pty) Ltd v Cape Town Municipality* 1983 (2) SA 387 (C) at 401B

presumption that legislation³ will not apply with retrospective effect, unless specifically authorised⁴.

5.3 The most common explanation for the existence of the presumption against retrospective effect is that a retrospective interference with vested rights or the creation of new obligations or an imposition of new duties by the Legislature, is not likely to be assumed⁵.

5.4 The *crux* of the matter is not prospectivity or retrospectivity of legislation as such, but fair treatment befalling those subject to the legislation should the legislation be held to apply retrospectively⁶.

5.5 Section 12(2) of the Interpretation Act⁷ determines that in the case of repeal of legislation, the repeal will not, unless the contrary intention appears, affect the previous operation of such law or any rights acquired or accrued or duties imposed in terms of the law so repealed.

5.6 A deviation from the rules and regulations, especially regarding architectural guidelines, must thus be interpreted by having regard to the

³ which is equated with the rules and regulations of a private body

⁴ See *Mohamed v Union Government (Minister of Interior)* 1911 AD 1 8; *Principal Immigration Officer v Purshotam* 1928 AD 435 443; *Jockey Club of SA Ltd v Tvl Racing Club* 1959 (1) SA 441 (A) at 415F-G; *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 (4) SA 123 (C) at 129A-B; *Genrec MEI (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry* 1955 (1) SA 563 (A) at 572E; *DVB Behuising (Pty) Ltd v North West Provincial Government* 2000 4 BCLR 437 (CC) at para [65]

⁵ *Curtis v Johannesburg Municipality* 1906 (TS) 308 311; *Petersen v Cuthbert & Co Ltd* 1945 AD 420 430; *Bartman v Dempers* 1952 (2) SA 577 (A) at 580A-E; *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission* 1999 (4) SA 1 (SCA) at para [12]

⁶ *National Director of Public Prosecutions v Carolis* 2000 (1) SA 1127 (SCA) at para [42]; *Women's Compensation Commissioner v Jooste* 1997 (4) SA 418 (SCA) at 424F-H

⁷ 33 of 1957

rules and regulations which were in force at the time when a particular relaxation or an approval was granted.

- 5.7 It would therefore be considered unlawful and unfair to act against members who were granted relaxations in terms of the rules and regulations which governed the Estate at the time when the relaxation was granted, if the particular act is now prohibited by the current rules and regulations.

6. **FAILURE TO ENFORCE THE RULES AND REGULATIONS**

- 6.1 Approvals and deviations from the rules granted in the past should remain in the past and not be revisited. The fact that rules may not have been strictly enforced in the past will, however, not preclude Consultant from enforcing the current rules and regulations or any new rules and regulations. Consultant should not fear the possibility of being met with a defence of selective prosecution, as this will render Consultant obsolete and will result in the Estate becoming ungovernable in future.

- 6.2 Consultant should enforce its rules and regulations without any fear, favour or hesitation against all transgressors for the better good that will result for the Estate in doing so.

- 6.3 Failure by Consultant to enforce the rules and regulations against a particular member may possibly lead to the defence of acquiescence

being raised by such a member. Acquiescence, in its proper legal sense, implies that a person abstains from interfering while a violation of his or her legal right is in progress. Furthermore, it implies that a person defrays from seeking redress when a violation of his or her rights is brought to his or her knowledge⁸. The prejudice caused to a particular member resulting from the failure or delay in taking action earlier, may result in Consultant being barred from effectively enforcing its rules and regulations. For this reason, it is of paramount importance that Consultant hastens itself in the enforcement of its rules and regulations immediately once a transgression is brought to its attention.

7. **CLEARANCE CERTIFICATES**

7.1 Consultant wishes to be advised whether a clearance certificate can be withheld if a member is in transgression of the rules or whether same can solely be utilised to ensure the payment of levies.

7.2 In terms of clause 4.6.3.15 of the current rules and regulations, the estate manager may issue a clearance certificate after the completion of raft/foundations if all rock and rubble have been removed and no brickwork may be allowed prior to the issuing of such a clearance certificate. This does signal an intention that clearance certificates may be used as a mechanism to enforce compliance with the rules and regulations, although limited to a specific rule in this instance.

⁸ *Dunbar v Rossmaur Mansions (Pty) Ltd* 1946 (WLD) 235 at 248

- 7.3 Title Condition E(b) registered against all title deeds of erven forming part of the Estate, in clear and unambiguous terms, allows for Consultant to withhold the issuing of a clearance certificate in the event of a member being in breach of any of Consultant's rules.
- 7.4 Clause 1.2.4.1 of the current rules and regulations authorises Consultant to withhold its written confirmation that all building rules have been complied with, without which written confirmation no transfer of an erf should be possible.
- 7.5 In terms of clause 4.8.2.4.1, Consultant is obliged to issue a clearance certificate only once all requirements issued by Consultant from time to time, are duly met.
- 7.6 It therefore seems to be abundantly clear that the withholding of a clearance certificate by Consultant in the event of breach of the rules and regulations or of the articles of association is expressly permitted and can be utilised, in addition to the imposition of other sanctions provided for in the current rules and regulations, which includes the imposition of penalties⁹ and other penal measures, to enforce compliance.

⁹ See *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C), where the authority of the home owners association to impose a system of fines became the subject of an action for a reduction of a fine imposed in terms of the provisions of the Conventional Penalties Act 15 of 1962.

8. **BOUNDARY WALLS**

- 8.1 When regard is had to Section 1 of the NBRBSA, a wall is considered to be a *“building”*.
- 8.2 Section 4 of the NBRBSA determines that no person shall without the prior approval in writing of the local authority in question, erect *“any building”* in respect of which plans and specifications are to be drawn and submitted in terms of the NBRBSA.
- 8.3 Section 13 of the NBRBSA, however, determines that an owner of a building may be exempted from the obligation of submitting a plan in terms of Section 4 of the NBRBSA. Such an exemption is only in respect of a *“minor building”*.
- 8.4 A *“minor building”* is defined in the South African Bureau of Standards Code of Practice (SABS 0400-1990), which forms part of the NBRBSA, as, *inter alia*, *“any free-standing wall constructed of masonry, concrete or timber or any wire fence where such wall or fence does not exceed 1,8m in height”*.
- 8.5 If the boundary wall thus exceeds the height of 1,8 metres, building plans need to be approved in terms of the provisions of the NBRBSA by the relevant local authority.
- 8.6 On a proper interpretation of the provisions of Section 13 of the NBRBSA,

even a wall which is lower than 1,8 meters needs an approved building plan prior to its construction, save in the event of the building control officer having exempted the owner thereof on application to him/her from submitting a building plan in respect thereof in terms of Section 13 of the NBRBSA.

8.7 In terms of the current rules and regulations, the following restrictions are imposed upon members pertaining to boundary walls:

8.7.1 Clause 4.5.2.4 imposes the obligation upon members, whose stands face the outside of the Estate or parklands, to plaster the outside of their garden walls. The outside of such garden walls will be maintained and painted by Consultant and in the event of such garden wall consisting of face brick, Consultant will “*slush*” same and paint same in a uniform colour;

8.7.2 Clause 5.2.13.7.1 determines that no walls higher than 1 metre will be allowed on corner stands within the street splays created by a street intersection;

8.7.3 Clause 5.2.13.12.1 determines that boundary fencing must consist of brick work or any other material approved by the ASC;

8.7.4 Clause 5.2.13.12.1 seems to prohibit the construction of any boundary wall or fencing upon erven with street frontage;

- 8.7.5 Clause 5.2.13.12.1 further seems to restrict the height of side boundary fencing to 0,5 metres.
- 8.8 In terms of the conditions of establishment of the various townships constituting the Estate, building plans may only be submitted to the local authority for approval once same have been evaluated and approved by Consultant.
- 8.9 In terms of clause 4.6.3.5 of the current rules and regulations, no building may be erected or altered without the approval from the ASC, which application for approval will not be considered in terms of clause 4.6.3.8 thereof if a member is in arrears with levies, penalties or other moneys due to Consultant.
- 8.10 In terms of clause 4.6.3.11 of the current rules and regulations, building plans have to be approved by the ASC and the local authority before commencement of construction.
- 8.11 In terms of clause 4.8.2 of the current articles of association, all deeds of sale in respect of an erf within the Estate must also contain a term to the effect that no improvement of any nature may be effected thereupon without the prior written approval of Consultant.

9. **HEIGHT RESTRICTIONS**

- 9.1 Clause 5.2.7.1 of the current rules and regulations seem to restrict the height of any building to 2 storeys, which shall be erected vertically above each other with the ultimate height of any part of the structure being restricted to 8,5 metres above the natural ground level measured vertically below that point.
- 9.2 The fact that the ASC first has to approve building plans prior to submission thereof to the relevant local authority, also allows Consultant the opportunity to enforce its own height restrictions which may in effect be more stringent than the height restrictions which are contained in the prevailing town planning scheme in operation in the area .
- 9.3 In the event of the ASC having allowed the erection of buildings exceeding the 8,5 metres limitation, Consultant may be met by a defence of constructive authorisation or acquiescence should it attempt to secure a demolition order.
- 9.4 Consultant should, however, attempt at avoiding any conflict between its own guidelines regarding height of buildings and the limitations imposed in the relevant town-planning scheme.
- 9.5 This Consultant should achieve by incorporating the relevant height restriction provisions of the relevant town-planning scheme in operation

from time to time into its architectural guidelines.

10. **THE BUILDING PLAN APPROVAL PROCESS AND RESPONSIBILITY**

10.1 It is recommended that no decision-making powers should be delegated to the ASC. Instead, it is suggested that the ASC should only make a recommendation for approval or disapproval to the board of directors.

10.2 This will ensure that the decision-making power of the board of directors to approve building plans, remains intact. This will also serve as a deterrent against the ASC showing favouritism or allowing the arbitrary relaxation of building rules and regulations.

10.3 Should a building plan be submitted for approval which evidences a relaxation of an existing architectural guideline, same should be submitted to the AGM for consideration and approval in line with the recommendations made above.

11. **DEADLOCK**

11.1 The current articles of association, in clause 10.1 thereof, determines that Consultant's board of directors shall consist of not less than 2 and not more than 6 members.

11.2 In terms of clause 21 of the current articles of association, only two

directors need to be present at a meeting of directors in order to constitute a quorum.

11.3 In terms of clause 21 of the current articles of association, decisions are being taken by a majority of directors and in the event of equality of votes, any resolution proposed shall be deemed to be defeated.

11.4 In order to avoid a deadlock situation and to avoid or remove the risk of directors not exercising the will of its ordinary members, it is suggested that the current articles of association be amended, so as to provide for the appointment of an uneven number of directors and also to increase the number of directors. Nine directors would be considered to be ideal for an estate of this size and should such an amendment be effected, it is suggested that the quorum requirement also be adjusted upwards to at least 5 directors to be present at any meeting of directors.

12. **FINES**

12.1 During the AGM held on 22 July 2010, Consultant and members were presented with an updated list of fines and penalties for transgressions of the rules and regulations, as is provided for, *inter alia*, in paragraph 3.8 of the current rules and regulations.

12.2 The motion tabled at the said AGM seems to have only been concerned the increase in the monetary extent of fines and not the introduction of a

list of new transgressions or a change in the enforcement policy. As such, Consultant's members proposed and accepted the increase in fines for transgressions of the current rules and regulations.

12.3 Writer has been instructed that after the said AGM, the current rules and regulations were amended in paragraphs 3.8 and 6 thereof by the addition of the words "*which could be applied per day*" to the end of the first sentence in paragraph 3.8 and in the introduction to paragraph 6.

12.4 The addition as aforesaid seems not to have been put to vote and therefore seems to constitute an unauthorised, unlawful and invalid addition to the current rules and regulations.

12.5 It is suggested that this attempted amendment be resubmitted to the next AGM for proper consideration.

A handwritten signature in black ink, appearing to read 'A Liversage', with a large, stylized initial 'A'.

A LIVERSAGE

10 March 2011