

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: _____

In the matter between:

OBSERVATORY CIVIC ASSOCIATION

First Applicant

**GORINGHAICONA KHOI KHOIN
INDIGENOUS TRADITIONAL COUNCIL**

Second Applicant

and

**TRUSTEES FOR THE TIME BEING OF
LIESBEEK LEISURE PROPERTIES TRUST**

First Respondent

HERITAGE WESTERN CAPE

Second Respondent

CITY OF CAPE TOWN

Third Respondent

**THE DIRECTOR: DEVELOPMENT MANAGEMENT
(REGION 1), LOCAL GOVERNMENT, ENVIRONMENTAL
AFFAIRS & DEVELOPMENT PLANNING, WESTERN
CAPE PROVINCIAL GOVERNMENT**

Fourth Respondent

**THE MINISTER FOR LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS & DEVELOPMENT
PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT**

Fifth Respondent

**CHAIRPERSON OF THE MUNICIPAL PLANNING
TRIBUNAL OF THE CITY OF CAPE TOWN**

Sixth Respondent

EXECUTIVE MAYOR, CITY OF CAPE TOWN

Seventh Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

LESLIE LONDON,

do hereby make oath and state as follows:

LSL

1. I am a professor at the University of Cape Town and Head of the Division of Public Health Medicine in the University's School of Public Health Family Medicine. I have been duly authorised to depose to this affidavit in my capacity as the chairperson of the first applicant. A copy of a resolution authorising me to do so is attached marked "LL1."
2. The contents of this affidavit are true and correct. Unless I indicate otherwise, or the contrary appears from the context, they are within my personal knowledge and belief. Legal submissions contained herein are made on the advice of the applicants' legal advisors, which advice I believe to be correct. Where I rely upon information conveyed to me by others, I state the source, which information I likewise believe to be true and correct.

PARTIES

3. The first applicant is the **OBSERVATORY CIVIC ASSOCIATION**, a voluntary association established for purposes of providing a forum for the community of Observatory to express their concerns and opinions about the range of civic issues affecting residents, with offices at 60 Trill Road Observatory.
4. The second applicant is the **GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL**, which is a voluntary association set up as a structure to promote cohesion of the Goringhaicona people
5. The first respondent is the **TRUSTEES FOR THE TIME BEING OF LIESBEEK LEISURE PROPERTIES TRUST**, cited in their representative capacities as trustees of the Liesbeek Leisure Properties Trust (the "LLPT"), whose further particulars are not known to the applicant. The trustees of the LLPT are: Allan


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James Flynn Mundell, currently resident at 41 Grosvenor Crescent, Durban, KwaZulu-Natal; James Otto Tannenberger, currently resident at 26 Albion Road, Bryanston, Gauteng; Nicholas Scott Ferguson, currently resident at 7 Dawn Road, Constantia, Western Cape; Adam John Blow, currently resident at 16 Valley Road, Kenilworth; and Jodie Aufrichtig, currently resident at 1A Logies Bay Llundudno.

6. The second respondent is **HERITAGE WESTERN CAPE** ("HWC"), established in terms of section 23 of the National Heritage Resources Act, 25 of 1999 (the "NHRA"), with offices at 3rd Floor, Protea Assurance Building, 142 Longmarket Street, Cape Town. HWC is cited in an abundance of caution given its interest in the subject-matter of this application. No relief is sought against HWC but they are invited to place any relevant information before this Honourable Court as may assist in a determination of the matter.
7. The third respondent is the **CITY OF CAPE TOWN** (the "City"), a metropolitan municipality established in terms of the Local Government: Municipal Structures Act, 117 of 1998 (the "Structures Act"), care of the Municipal Manager at 3rd floor, Tower Block, Cape Town Civic Centre, 12 Hertzog Boulevard, Cape Town.
8. The fourth respondent is the **DIRECTOR: DEVELOPMENT MANAGEMENT (REGION 1), LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT** (the "Director"), with offices at 9th floor, 1 Dorp Street, Cape Town.

9. The fifth respondent is the **MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT** (“the Minister”), with offices at 9th floor, 1 Dorp Street, Cape Town.
10. The sixth respondent is the **CHAIRPERSON OF THE MUNICIPAL PLANNING TRIBUNAL OF THE CITY OF CAPE TOWN** (the “MPT”), established in terms of section 115 of the City of Cape Town Municipal Planning By-law (“MPB”) read with section 51(2) of Spatial Planning and Land Use Management Act, 16 of 2013, care of the office of the Municipal Manager at 3rd floor, Tower Block, Cape Town Civic Centre, 12 Hertzog Boulevard, Cape Town. The sixth respondent is cited in his representative capacity.
11. The seventh respondent is the **EXECUTIVE MAYOR OF THE CITY OF CAPE TOWN** (the “Mayor”), in his capacity as the appeal authority under section 114(3) of the MPB, read with section chapter 6 of SPLUMA, with offices at 6th floor, Tower Block, Cape Town Civic Centre, 12 Hertzog Boulevard, Cape Town.

NATURE OF THIS APPLICATION

12. This application concerns a megadevelopment known as “the River Club” (“the proposed development”), which is presently in the earliest stages of construction on erf 151832, Observatory (“the River Club site”).
13. The applicants believe that the implementation of this development will result in the permanent and irreversible loss of a valuable heritage resource. These views are shared by HWC, which is the body with statutory responsibility for



regulating development that has the potential to impact upon heritage in the Western Cape. As I explain below, HWC's regulatory function (which was in this instance exercised in terms of section 38(8) of NEMA) was nullified by the unlawful actions of the fourth and fifth respondents in the environmental assessment process under the National Environmental Management Act, 107 of 1998 ("NEMA").

14. The heritage resource in question is the River Club site itself, a "virtual island" occurring at the confluence of the Black and Liesbeek Rivers. This property embodies exceptional heritage significance by virtue of its symbolic (and actual) association with early confrontations between the Peninsula Khoekhoe and the first Dutch settlers (the genesis of colonialism in South Africa), as well as its location within a broader "urban park" that has an extraordinarily high concentration of heritage sites and a very unusual character. The River Club site is also an important "green lung" in the City (and identified as such in relevant spatial plans).
15. The significance of this site is underlined by the fact that it was accorded provisional protection in terms of section 29(1) of the National Heritage Resources Act, 25 of 1999 ("NHRA") in April 2018 (which protection has now lapsed), and that the Council of HWC on 22 July 2021 recommended to SAHRA that consideration be given to its declaration as a national heritage site.
16. Ordinarily, a development that changes the character of a site exceeding 5000 m² (as the River Club development does) would require an approval issued by HWC in terms of section 38(4) of the NHRA. The River Club development was however subject to the alternative procedure prescribed in section 38(8) of the



NHRA that applies where an activity is also subject to the requirement of an environmental authorisation in terms of NEMA.

17. Section 38(8) provides for a cooperative process between the relevant heritage and environmental authorities, wherein the heritage authority ensures that heritage impacts are properly assessed through a heritage impact assessment meeting the requirements of section 38(3) (in the discretion of the HWC), while the environmental authority evaluates the justifiability of the heritage impacts within the broader context of the proposed development, taking account of the heritage authority's views.
18. In the case of the River Club development, there was a complete failure of this process. I say so because the provincial Department of Environmental Affairs and Development Planning ("DEADP") issued an environmental authorisation for the proposed development on the basis of a fatally defective heritage impact assessment, in the face of strong and consistent assertions by HWC that the assessment did not meet the requirements of section 38(3). By effectively ignoring the HWC, DEADP undermined the purpose of section 38 of the NHRA and the credibility of the environmental authorisation process.
19. The heritage impact assessment in question was an anomalously sympathetic one, which the LLPT managed to procure after abandoning an earlier and significantly more limiting heritage impact assessment for the proposed development. In the circumstances, the breach by the environmental authorities of section 38(8) has had particularly serious and material consequences.



20. In the result, we contend that the environmental authorisation issued for the project is fatally defective and susceptible to review. The development approval granted for the project in terms of the MPB is, we contend, likewise defective.

21. This is an application in two parts:

21.1. In Part A, the applicants urgently seek an interim interdict pending the outcome of review proceedings that are brought in Part B.

21.2. In Part B, the applicant seeks the review and setting aside of the following decisions in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

21.2.1. The decision taken by the Director on 20 August 2020 to grant environmental authorisation for the proposed development in terms of section 24 of NEMA.

21.2.2. The decision taken by the Minister on 22 February 2021 to dismiss the appeals lodged against the environmental authorisation in terms of section 43 of NEMA and to grant environmental authorisation for the proposed development.

21.2.3. The decision taken by the MPT on 4 September 2020 to approve the proposed development application in terms of section 98 of the MPB.

21.2.4. The decision taken by the Major on 18 April 2021 to dismiss various appeals against the MPT's decision in terms of section 108 of the MPB and to confirm the MPT's decision to approve

the proposed development.

21.3. The remainder of this affidavit is structured as follows:

21.3.1. First, I deal with the circumstances justifying the urgent basis on which this application is brought.

21.3.2. Second, I provide an overview of the River Club Development and its context.

21.3.3. Third, I provide an exposition of the relevant statutory framework.

21.3.4. Fourth, I provide a chronological outline of relevant events.

21.3.5. Fifth, I deal with the status of the provisional protection notice.

21.3.6. Sixth, I address the adequacy of the process carried out for the proposed development in terms of section 38(8) of the NHRA.

21.3.7. Seventh, I address issues arising from the processes in terms of the MPB.

21.3.8. Eighth, I set out the grounds on which the review in Part B of the notice of motion is brought.

21.3.9. Ninth, I address the applicants' entitlement to an interdict.

URGENCY

22. It is regrettable that the applicants have had to bring Part A of this application on such abbreviated time periods, especially given the complexity of the

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available record and the length of the papers that have been filed. Nonetheless, we contend that this matter is extremely urgent because the LLPT is in the process of defacing a valuable heritage resource, the value of which derives from its character as a relatively untransformed open space - and will no doubt claim in due course that the balance of convenience favours refusal of the relief in part A because construction has commenced (a claim that will only strengthen over time). It must be pointed out at the outset, however, that the LLPT has been put on notice of this intended review and that any work on site is at their risk.

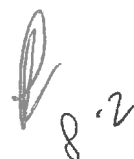
23. Nick Smith Attorneys, who act for the LLPT, have confirmed that construction activities on the site commenced on 26 July 2021. At the time of deposing to this affidavit, the only transformation of the site that I have observed is in the form of preparation of the ground and the erection of fencing. However, the LLPT will presumably now proceed apace with construction on the site (given its timeframe of 30 months for completion of the proposed development).

24. In anticipation of any complaints that the LLPT may now level against the applicants regarding delays and self-created urgency, I record the following:

24.1. The Mayor's decision to dismiss the appeals against the approval of the LLPT's development application (being the final of the decisions under review) was issued on 19 April 2021. Having received notice of the decision, the attorneys acting for the OCA set about finding and briefing suitable counsel to prepare papers for the review relief in Part B of this application. At this stage, the LLPT still required a water use licence in

terms of the National Water Act, 36 of 1998 (“NWA”) to proceed with construction.

- 24.2. On 11 May 2021, the OCA’s attorneys, the OCA’s attorneys addressed a letter to the LLPT, in which they requested a written undertaking that the LLPT would not proceed with the proposed development before the outcome of review proceedings that it intended launching. A copy of this letter is attached marked “LL2”. The LLPT did not respond to this request.
- 24.3. On 10 June 2021, the OCA received notification from the Department of Water and Sanitation (“DWS”) that it had issued a water use licence to the LLPT.
- 24.4. The OCA lodged an appeal against the Minister’s decision to issue the water use licence on 21 June 2021. It was forced to do so in ignorance of the reasons for the decision, which were not forthcoming from the DWS or from the LLPT. The effect of this appeal was to suspend the operation of the water use licence in terms of section 148(1) of the NWA with the result that the proposed development could not proceed.
- 24.5. On 7 July 2021, the OCA was notified by the DWS that the LLPT had submitted a request to the Minister in terms of section 148(2)(a) of the NWA for the Minister of Water and Sanitation for the operationalising of its NWA, notwithstanding the OCA’s appeal. This is plainly an inappropriate case for the exercise of this discretion by the Minister of Water and Sanitation as its practical effect would be to deprive the OCA



of its right to an effective appeal (rather than to simply rectify an inconvenience where no prejudice is occasioned).

24.6. In any event, given these circumstances, the OCA's attorneys addressed a letter to Nick Smith Attorneys reiterating the OCA's intention to launch review proceedings and requesting a written undertaking that the LLPT would not commence with any construction until such time as the review had been decided. A copy of this letter is attached marked "LL3".

24.7. On 26 July 2021, the OCA's attorneys received a letter from Nick Smith Attorneys advising that the water use licence had been brought into operation by the Minister of Water and Sanitation and that construction had commenced that morning. A copy of this letter is attached marked "LL4". At this stage, the preparation of this application was close to completion and the applicants' legal team acted with expedition to ensure that these proceedings were instituted as soon as reasonably possible.

THE RIVER CLUB DEVELOPMENT

The development

25. The River Club site is an area of 14.7 hectares located at the confluence of the Black and Liesbeek Rivers. It is bordered to the west and north-west by a residual watercourse following the original course of the Liesbeek River, and by the Liesbeek Canal and the Black River to the east. The site is described in the final basic assessment report as "a virtual island" surrounded by freshwater



systems and located in the flood plain of the Liesbeek and Black Rivers. An aerial photograph of the site is attached marked “LL5”.

26. The River Club development is very substantial development, composed of clusters of multi-storey buildings arranged into 2 precincts, and offering 150 000² metres of floor space. It is portrayed in conceptual drawings as a large-scale, urban campus. A selection of these drawings is attached marked “LL6”.
27. As part of the approved “Riverine Corridor Alternative”, the LLPT will rehabilitate the riverine corridor along the route of the existing Liesbeek Canal running adjacent to the eastern boundary of the site, while the “old” Liesbeek River channel on the western edge of the site, the residue of the original course of the Liesbeek River, will be largely infilled and landscaped with a vegetated stormwater swale. The whole of the building will be infilled in order to lift the development approximately three metres higher out of reach of floodwater (as the River Club site is coextensive with the Liesbeek flood plain).
28. The buildings comprising the proposed development will be allocated to a variety of uses including retail, hospitality, residential (including low-cost inclusionary housing) and office space. It is common knowledge that multi-national corporation Amazon is the intended anchor tenant and has been consulted and accommodated in the design and layout of parts of the proposed development.



The site

29. The greater part of the proposed development site is constituted by the River Club site, which is a 148 425 m² property owned by the LLPT, and presently operated as a rudimentary golf course with associated restaurant and conferencing facilities housed in the old “River Club” building.
30. The remainder of the proposed development site is comprised of 10 adjacent erven owned by the City. An image depicting the cadastral layout of the site is attached hereto marked “LL7”. The adjacent remainder of erf 15326, which for some reason is shown in this image as falling within the boundaries of the proposed development, is the Raapenberg Wetland, an area of high faunal sensitivity, managed by the City of Cape Town as a protected area.
31. The site forms part of a broader area known as the “Two Rivers Urban Park” (“TRUP”). An image showing the location of the site within the broader TRUP area is attached marked “LL8”.
32. The TRUP is a 300-hectare area incorporating large stretches of open space on either side of the M5 highway and surrounded by both residential neighbourhoods and industrial area. It incorporates diverse land uses and contains some remarkable remnants of our colonial history. Amongst these various uses are the Valkenberg Psychiatric Hospital, the South African Astronomical Observatory, the Oude Molen Eco-Village and the River Club. The area is an unlikely mix of endangered biodiversity (the Raapenberg Wetland), high-security healthcare facilities and recreational infrastructure, surrounded by industry and established suburbs (diverse in character and socio-economic standing). It is a very unusual place.



33. Much has been written about the history of the TRUP, which is remarkable for the multiple converging historical narratives and the many facets of South African history that it reflects. The various studies referred to in this affidavit detail the history associated with the site. I outline it briefly here as necessary context.
34. Very significantly, the TRUP was the site (or at least a part of the broader site) at which early and significant confrontations between colonial settlers and the Peninsula Khoekhoe occurred, culminating in their eventual exclusion from the area.
35. Many of the descendants of these groups attach profound symbolic significance to the confluence of the Black and Liesbeek Rivers (occurring on the River Club site) as a prominent marker in the lands of their ancestors, of which they were ultimately dispossessed. In this regard I refer to the supporting affidavit of Tauriq Jenkins, the High Commissioner of the Goringhaicona Khoi Khoin Traditional Indigenous Council, which is filed with this founding affidavit.
36. The notable “battle of Almeida” in which the Khoekhoe attacked and killed the Portuguese Viceroy of India, Francisco D’Almeida, occurred in 1510 in the vicinity of the site. The massacre was in retaliation for a cattle theft executed by men dispatched by D’Almeida.
37. The River Club site is one of the only undeveloped remnants of the grazing lands used in the summer by the Khoekhoe for their cattle. These groups lived as nomadic pastoralists. From 1657 onwards they were gradually eliminated from this area by Dutch settlers who erected barriers to keep them out, as well as watch posts and small forts to monitor their movements. A prominent watch

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fort was probably sited on the land presently occupied by the South African Astronomical Observatory. The TRUP, including the River Club site, was the site of Khoi armed resistance against the Dutch colonialist for many years as a result.

38. It was also in this general area, along the Liesbeek River, that farms were granted to Dutch settlers under private tenure for the first time. To this day, the site is defined by remnants of the early industry of those settlers in the form of structures such as the Nieuwe Molen (the oldest and largest windmill in South Africa – and a provincial heritage site).
39. The area was later defined by institutional uses. The South African Astronomical Observatory (“SAAO”) was built in 1825 on a raised portion of the TRUP which was at that stage far from the town. This resulted in the surrounding erven (which were at that stage undeveloped wetland) being put to other institutional uses, notably the Alexandra and Valkenburg mental hospitals (which were also considered to be activities that needed to be located far from the town).
40. Significant scientific advances were made at the SAAO in the early 19th century and the property on which it is located has now been declared a national heritage site in recognition of both its historic and aesthetic value. One of the reasons for establishing the SAAO at the Cape was the need to find “accurate star positions and provide a reliable time service to aid the navigation of ships”. For the latter function a clear view of Table Bay was essential to pass on visual time signals. Interestingly, the site is also referred to in Khoi oral history as “place of the stars”.

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41. During the early 19th Century, additional structures were built around Valkenberg to facilitate the segregation of black and white patients (hence Valkenberg West and Valkenberg East).
42. The following passage from a 2016 Baseline Heritage Study of the TRUP (which I deal with below) provides an interesting insight into the character of the area around this time:

“Deacon considers the area around Valkenburg being characterised as a place for institutions “of social or physical “impurity” thereby by exclusion, sanitising the town”. She cites the other uses of Ndabeni to accommodate black workers after plague scares in 1901, the presence of the abattoirs (1915), the treatment of leper cases, and the use of the Oude Molen site to accommodate black mental health patients after 1913. Other institutions included a TB hospital at the Alexandra Hospital in 1906, followed by its use as a hospital for the “medically defective” in 1918.”

43. These institutional uses in the TRUP area still endure today, with the surrounding land and historical structures being put to low-intensity recreational uses – such as the Oude Molen Eco Village.
44. The recent history of the River Club site in particular is that of community recreation. It was from about 1935 used by the South African Railways (predecessor to Transnet) as recreational grounds for its workers. The property was thereafter sold to Liesbeek Leisure Properties (Pty) Ltd in 1993, which now operate it as a relatively rudimentary golf course used by a diverse section of the community.

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STATUTORY FRAMEWORK

The National Heritage Resources Act

45. The National Heritage Resources Act, 25 of 1999 (“NHRA”) was enacted *inter alia* to: introduce an integrated and interactive system for the management of national heritage resources; promote good governance at all levels; empower civil society to nurture and conserve their heritage resources so that they may be bequeathed to future generations; lay down general principles for governing heritage resources management throughout South Africa; and to provide for the protection of conservation-worthy places and areas by local authority. The overarching purpose of the Act is to ensure the preservation of South Africa’s “national estate”.
46. The national estates encompass “*those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations*” (section 3(1)). Heritage resources protected by the NHRA may take many forms including “*places, buildings and structures of cultural significance*” (section 3(2)(a)) and “*landscapes and natural features of cultural significance*” (section 3(2)(d)). The criteria to be applied in determining whether a place or object has cultural significance or other special value such that it should form part of the national estate are listed in section 3(3). These criteria include: “*the importance of the place or object in the community*” (section 3(3)(a)) and its “*strong or special association with a particular community or cultural group for social, cultural or spiritual reasons*” (section 3(3)(g)).



47. Section 7(1) of the Act distinguishes between three categories of heritage resource. They are:
- 47.1. Grade I: Heritage Resources with qualities so exceptional that they are of special national significance.
 - 47.2. Grade II: Heritage Resources which, although forming part of the national estate, can be considered to have special qualities which make them significant within the context of a province or region.
 - 47.3. Grade III: Other heritage Resource's worthy of conservation.
48. Section 7(1) also directs SAHRA to prescribe a system for grading of heritage resources and assessment criteria. This system has been promulgated in regulation 43 of GNR. 548 of 2 June 2000. For the most part, it restates the criteria listed in section 3(3) of the NHRA.
49. Responsibility for the management and conservation of heritage resources is vested primarily in the South African Heritage Resources Agency (SAHRA) and provincial heritage resources authorities established in terms of the Act. The main function of provincial heritage resource authorities is to manage Grade II heritage resources and heritage resources which are deemed to be a provincial competence in terms of this Act.
50. In addition, a competent authority exercising a discretion in terms of any law dealing with heritage resources is required in terms of section 4(b) do so by reference to the heritage resource management principles listed in section 5(1). They are:

“(a) Heritage resources have lasting value in their own right and provide evidence of the origins of South African society and as they are valuable, finite, non-renewable and irreplaceable they must be carefully managed to ensure their survival;

(b) every generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans;

(c) heritage resources have the capacity to promote reconciliation, understanding and respect, and contribute to the development of a unifying South African identity; and

(d) heritage resources management must guard against the use of heritage for sectarian purposes or political gain.”

51. In terms of section 30, a provincial heritage resources authority must compile and maintain a heritage register listing the heritage resources in the province which it considers to be conservation-worthy in terms of the heritage assessment criteria set out in section 3(3) and prescribed under section 7. Once a property is listed in a provincial heritage register, the relevant local authority has 6 months to make provision for the protection of a listed heritage resource in terms of its planning scheme or by-laws. The relevant provisions of section 30 read as follows:

“(1) A provincial heritage resources authority must compile and maintain a heritage register listing the heritage resources in the province which it considers



to be conservation-worthy in terms of the heritage assessment criteria set out in section 3 (3) and prescribed under section 7.

(2) Subject to subsection (7), a provincial heritage resources authority may, by notice in the Provincial Gazette, list a heritage resource or amend or delete an entry in a heritage register.

...

(7) A provincial heritage resources authority shall not list a place in a heritage register without having consulted the owner of such place regarding inter alia the provisions to be established under subsection (11) for the protection of the place.

...

(9) On publication of a notice in the Provincial Gazette concerning the listing in the heritage register of a place within its area of jurisdiction, or the amendment or deletion of an entry for such place, a local authority must notify the owner of such place.

...

(11) Within six months of the publication of a notice in the Provincial Gazette concerning the inclusion in the heritage register of a place falling within its area of jurisdiction, every local authority must make provision for the protection of such place through the provisions of its planning scheme or by-laws under this Act: Provided that any such protective provisions shall be

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jointly approved by the provincial heritage resources authority, the relevant local authority and the provincial planning authority, and provided further that -

(a) the special consent of the local authority shall be required for any alteration to or development affecting a place listed in the heritage register;

.....”

52. Provincial heritage authorities are empowered in certain circumstances to “provisionally protect” heritage resources (listed or otherwise) by issuing a provisional protection notice in terms of section 29(1). This provision reads:

“SAHRA, or a provincial heritage resources authority, may, subject to subsection (4), by notice in the Gazette or the Provincial Gazette, as the case may be—

(a) provisionally protect for a maximum period of two years any—

(i) protected area;

(ii) heritage resource, the conservation of which it considers to be threatened and which threat it believes can be alleviated by negotiation and consultation; or

(iii) heritage resource, the protection of which SAHRA or the provincial heritage resources authority wishes to investigate in terms of this Act; and (b) withdraw any notice published under paragraph (a).”

53. The effect of a section 29(1) provisional protection notice is that anyone wanting to excavate, alter, subdivide or change the planning status of a provisionally

protected place must first obtain a permit from the provincial heritage resources authority.

54. The NHRA also establishes a system of assessments and approvals for activities that impact upon or have the potential to impact upon heritage resources. Of relevance in these proceedings is section 38, which provides that any person undertaking a development that involves an activity specified in section 38(1) must, at the very earliest stage of initiating the development, notify the relevant provincial heritage resources authority and furnish it with details of the development. The relevant authority must, if there is reason to believe that the development will impact upon heritage resources, instruct the person concerned to undertake a heritage impact assessment. The assessment must comply with any requirements specified by the relevant heritage resources authority and must at least include the information specified in section 38(3). Upon considering the reports, the relevant heritage resources authority is empowered to determine that the development may not proceed, or to impose limitations and/or formal protections. The relevant provisions of section 38 read as follows:

“(1) Subject to the provisions of subsections (7), (8) and (9), any person who intends to undertake a development categorised as -

(a) the construction of a road, wall, powerline, pipeline, canal or other similar form of linear development or barrier exceeding 300m in length;

(b) the construction of a bridge or similar structure exceeding 50 m in length;

- (c) *any development or other activity which will change the character of a site*
-
- (i) *exceeding 5 000m² in extent; or*
- (ii) *involving three or more existing erven or subdivisions thereof; or*
- (iii) *involving three or more erven or divisions thereof which have been consolidated within the past five years; or*
- (iv) *the costs of which will exceed a sum set in terms of regulations by SAHRA or a provincial heritage resources authority;*
- (d) *the re-zoning of a site exceeding 10 000m² in extent; or*
- (e) *any other category of development provided for in regulations by SAHRA or a provincial heritage resources authority, must at the very earliest stages of initiating such a development, notify the responsible heritage resources authority and furnish it with details regarding the location, nature and extent of the proposed development.*
- (2) *The responsible heritage resources authority must, within 14 days of receipt of a notification in terms of subsection (1) -*
- (a) *if there is reason to believe that heritage resources will be affected by such development, notify the person who intends to undertake the development to submit an impact assessment report. Such report must be compiled at the cost of the person proposing the development, by a person or persons approved by the responsible heritage resources authority with relevant*

qualifications and experience and professional standing in heritage resources management; or

(b) notify the person concerned that this section does not apply.

(3) The responsible heritage resources authority must specify the information to be provided in a report required in terms of subsection (2) (a): Provided that the following must be included:

(a) The identification and mapping of all heritage resources in the area affected;

(b) an assessment of the significance of such resources in terms of the heritage assessment criteria set out in section 6(2) or prescribed under section 7;

(c) an assessment of the impact of the development on such heritage resources;

(d) an evaluation of the impact of the development on heritage resources relative to the sustainable social and economic benefits to be derived from the development;

(e) the results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources;

(f) if heritage resources will be adversely affected by the proposed development, the consideration of alternatives; and



(g) *plans for mitigation of any adverse effects during and after the completion of the proposed development.*

(4) *The report must be considered timeously by the responsible heritage resources authority which must, after consultation with the person proposing the development, decide -*

(a) *whether or not the development may proceed;*

(b) *any limitations or conditions to be applied to the development;*

(c) *what general protections in terms of this Act apply, and what formal protections may be applied, to such heritage resources;*

(d) *whether compensatory action is required in respect of any heritage resources damaged or destroyed as a result of the development; and*

(e) *whether the appointment of specialists is required as a condition of approval of the proposal.”*

55. If, however, the development is subject to the requirement of an environmental impact assessment under NEMA, authority to approve the development shifts to the competent environmental authority, subject to the proviso that the competent environmental authority must consider a heritage impact assessment that meets the requirement of the provincial heritage resources authority in terms of section 38(3) and take account of the views of the provincial heritage resources authority in reaching its decision. This is the effect of section 38(8), which provides:

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“The provisions of this section do not apply to a development as described in subsection (1) if an evaluation of the impact of such development on heritage resources is required in terms of the Environment Conservation Act, 1989 (Act No. 73 of 1989), or the integrated environmental management guidelines issued by the Department of Environment Affairs and Tourism, or the Minerals Act, 1991 (Act No. 50 of 1991), or any other legislation: Provided that the consenting authority must ensure that the evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3), and any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the consent.”

The National Environmental Management Act

56. In terms of section 24(1) of NEMA, *“the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority.”*
57. “Listed activities” are those activities that have been identified by the Minister of Environmental Affairs in terms of section 24(2) as activities that may not commence without an environmental authorisation.
58. Any person wishing to obtain environmental authorisation for a listed activity must conduct an assessment in compliance with the Environmental Impact Assessment Regulations, 2014¹ (“the EIA Regulations”), pursuant to an

¹ GNR. 982 of 4 December 2014.

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application submitted to the competent environmental authority (which may be the national or provincial department of environmental affairs).

59. An application for environmental authorisation may require either a basic environmental assessment or full scoping and environmental impact assessment, depending on the particular activities that have triggered the need for an environmental authorisation. The procedure applicable to the proposed development was a basic assessment process.
60. The requirements for a basic assessment report are set out in Appendix 1 to the EIA Regulations. Amongst other things, the basic assessment report must:

“through the undertaking of an impact and risk assessment process, inclusive of cumulative impacts which focused on determining the geographical, physical, biological, social, economic, heritage, and cultural sensitivity of the sites and locations within sites and the risk of impact of the proposed activity and technology alternatives on these aspects to determine- (i) the nature, significance, consequence, extent, duration, and probability of the impacts occurring to; and (ii) the degree to which these impacts- (aa) can be reversed; (bb) may cause irreplaceable loss of resources; and (cc) can be avoided, managed or mitigated;” (item 2(d))

City of Cape Town Municipal Planning By-Law

61. The Municipal Planning By-Law (“**MPB**”) governs all planning and application processes related to the use of land in the City of Cape Town.



62. It incorporates as schedule 1 the “Development Management Scheme” (“DMS”) which promulgates the zoning and development rules for all land situated in Cape Town. Chapter 20 of the DMS provides for “Heritage Protection Overlay Zones”, which functions as the planning instrument contemplated in section 30(11) of the NHRA to conserve listed heritage resources. Development within a heritage protection zone is subject to strict limitations in terms of the DMS.
63. The land-use application submitted by the developer was decided in terms of section 98 and 99 of the MPB, which is a general provision governing all applications submitted in terms of the By-Law.
64. Section 99 deals with the criteria for decision-making on land use applications. In terms of section 99(1), the prerequisites for the approval of any application submitted under the MPB are that the application is consistent with the municipal spatial development framework, complies with generally with the By-Law (which incorporates the Development Management Scheme in schedule 1) and is desirable (as determined by criteria set out in section 99(3)). The considerations that are relevant to land-use decisions are set out in section 99(2) and include consistency with relevant policies approved by the City and the extent to which the proposal is desirable in terms of factors prescribed in section 99(3).
65. Sections 98 and 99 read as follows:

98 Determination of application



“ The City may in respect of an application –

(a) conduct any necessary investigation including the power to conduct an inspection as contemplated in section 96;

(b) approve the application –

(i) in whole or in part;

(ii) with an amendment provided that the amendment does not materially change the nature of the application;

(iii) subject to conditions set out in section 100; and

(iv) limit the approval to one or more of the uses included within the zoning or description of the consent use in case of an approval of a rezoning application or a consent use;

(c) refuse the application;

(d) make an appropriate determination regarding all matters necessary or incidental to the performance of its functions in terms of this By-Law and other applicable law.

99 Criteria for deciding application

(1) An application must be refused if the decision-maker is satisfied that it fails to comply with the following minimum threshold requirements –

- (a) the application must comply with the requirements of this By-Law;*
 - (b) the proposed land use must comply with or be consistent with the municipal spatial development framework, or if not, a deviation from the municipal spatial development framework must be permissible;*
 - (c) the proposed land use must be desirable as contemplated in subsection (3); and*
 - (d) ...*
- (2) If an application is not refused under subsection (1), when deciding whether or not to approve the application, the decision maker must consider all relevant considerations including, where relevant, the following –*
- (a) any applicable spatial development framework;*
 - (b) relevant criteria contemplated in the development management scheme;*
 - (c) any applicable policy or strategy approved by the City to guide decision making, which includes the Social Development Strategy and the Economic Growth Strategy;*
 - (d) the extent of desirability of the proposed land use as contemplated in subsection (3);*
 - (e) impact on existing rights (other than the right to be protected against trade competition);*



(f) in an application for the consolidation of land unit –

(i) the scale and design of the development;

(ii) the impact of the building massing;

(iii) the impact on surrounding properties; and City of Cape Town

Municipal Planning By-Law, 2015

(g) other considerations prescribed in relevant national or provincial legislation, which includes the development principles as contained in section 7 of the Spatial Planning and Land Use Management Act, 2013 (Act no. 16 of 2013).

(3) The following considerations are relevant to the assessment under subsection (1)(c) of whether, and under subsection (2)(d) of the extent to which, the proposed land use would be desirable –

(a) socio-economic impact;

(b) [deleted in the by-law]

(c) [deleted in the by-law]

(d) compatibility with surrounding uses;

(e) impact on the external engineering services;

(f) impact on safety, health and wellbeing of the surrounding community;

(g) impact on heritage;

(h) impact on the biophysical environment;

(i) traffic impacts, parking, access and other transport related considerations; and

(j) whether the imposition of conditions can mitigate an adverse impact of the proposed land use.

(4) ...

(5) ...”

CHRONOLOGICAL OVERVIEW OF RELEVANT EVENTS

Section 38(8) and NEMA processes

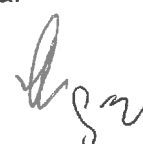
66. The River Club development was conceived in or around 2015 when the LLPT purchased the bare dominium of the River Club site from Liesbeek Leisure Properties (Pty) Ltd for R12 000 000. The latter company had acquired the site from Transnet several months earlier for the same amount. It is understood that a substantial additional amount will be payable by the LLPT to Liesbeek Leisure Properties (Pty) Ltd as further consideration for the property when the various development rights are in place.
67. The development encompasses activities listed in terms of section 24 of NEMA, namely the infilling of a watercourse and the development of land zoned as open space and accordingly required an environmental authorisation. The LLPT initiated a scoping and environmental impact assessment process in or around April 2016 with SRK Consulting (“SRK”) as the appointed environmental

assessment practitioner. The procedure was later downgraded to the less involved “basic assessment process” under the EIA regulations, due to a change in the regulations and associated listing notices.

68. A “notification of intent to develop” was also sent to HWC in compliance with section 38(1) of the NHRA because the proposed development will change the character of a site exceeding 5000 m². This was in late 2015. HWC responded in a letter dated 7 January 2016 in which it instructed the LLPT to undertake a heritage impact assessment, highlighting the “urban design framework” and including an archaeological study.

The First HIA

69. Shortly afterwards, SRK appointed Bridget O’Donoghue as independent heritage specialist to undertake a “phase one” heritage impact assessment (“the First HIA”).
70. I pause to note that a phase one heritage impact assessment has a more limited scope than a full heritage impact assessment. It encompasses only the first five of the requirements listed in section 38(3), namely, the identification of all heritage resources that will be impacted either directly or indirectly by the proposed development; the mapping and “spatialisation” of these identified resources; an assessment of the significance of the identified resources; the results of consultations with communities affected by the proposed development and relevant heritage design indicators. The evaluation of impacts, relative socio-economic benefit and alternatives is postponed to phase two of the assessment. Phased heritage impact assessments are ordinarily employed in circumstances where a “large scale and/or long-term subdivisional



development” or where “it is prudent to obtain HWC’s comment on the assessment of heritage resources heritage indicators in order to strengthen a heritage argument for revised design proposals”. This is explained in HWC’s “*Guideline for Heritage Impact Assessments required in terms of section 38 of the National Heritage Resources Act*”. A copy of this guideline will be available on the day of the hearing.

71. The First HIA went through various iterations and was eventually submitted to HWC on 22 February 2017. The relevant sections of this report are attached marked “**LL9**”. It concludes with the following recommendation (at page 103):

“The site has a unique position within TRUP and Cape Town and is assessed to possess high cultural significance. Its spatial character is a combination of an expanse of open, green landscapes, mature trees clusters, river frontages, and amenity facilities. The site has previously been assessed by the CCT and WCG with low development potential due to its value as an open area within TRUP and the ground levels below 1: 100 flood line...

The report’s heritage design indicators are developed to guide future development, without the potential negative impacts on the cultural resources, and to realise a potential for future mixed use, the site could have. Therefore, the site is positively assessed for sensitive development providing it addresses its position within the highly significant TRUP cultural landscape. Future development is required to incorporate the site’s landscape qualities that contribute to the immediate and broader context setting. Inappropriate development on



the site will diminish the cultural significances of the site and TRUP. The site's social, historic and aesthetic values need to be enhanced within a new vision of the site."

72. The "heritage design indicators" contemplated in the above extract refer to a comprehensive list of initial heritage-associated restrictions formulated by Ms. O'Donoghue (starting at page 83 of the report). Some examples of these restrictions are as follows: integrate the site visually and spatially with adjoining TRUP sites; retain significant vistas (notably view corridors to, from, and through the site from the SAAO, and linking Raapenberg Bird Sanctuary and Devil's peak); the proposed development should address its position within TRUP and primarily respond in a positive and marked way to the cultural significance of the site's historic, social, aesthetic, associational and contextual values; building style and language should be sensitive to the setting and not visually dominate the character of the TRUP and site's landscape settings; buildings and groups of buildings should reflect the values and significance of the heritage resources in context by being designed sensitively with regard to scale, proportion, positioning, heights, and significant site and context view cones; avoid high scaled buildings and buildings with large footprints. In sum, these proposed indicators would severely restrict the density and footprint of any development on the site.
73. HWC's Impact Assessment Committee ("IACom") considered the First HIA at a meeting on 8 March 2017. The members expressed reservations about the piecemeal assessment of heritage impacts in the TRUP Area. It was recorded that *"the Committee believes that the entire TRUP precinct should be looked at*

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holistically: it is problematic to consider the specifics of this application in isolation from the broader study". The minutes from this meeting also note that *"on several occasions HWC has been led to believe that the development issues for the entire TRUP area would be addressed prior to the development of individual pockets therein."* This (and the subsequent developments in IACom described below) I have gleaned from an "interim comment" addressed to the LLPT by HWC in terms of section 38(8) on 13 September 2019 ("the interim comment). A copy of this letter is attached hereto marked "**LL10**".

The TRUP Heritage Study

74. The IACom decided to postpone its deliberations on the First HIA, pending consideration of "a broader baseline study of the Two Rivers Urban Park, which had been commissioned by the Western Cape Department of Transport and Public Works ("DTPW") and which was to be considered at the next meeting of the IACom on 12 April 2017. I will hereinafter refer to this study as "the TRUP Heritage Study". Relevant sections of the report are attached marked "**LL11**".
75. The TRUP Heritage Study had been commissioned by the Western Cape Department of Transport and Public Works ("DTPW") pursuant to implementation of "the TRUP Programme". The TRUP Programme is described in the request for proposals relating to planning, landscape architecture and heritage services (among others) as:

"...a partnership initiative between the City of Cape Town, and the Western Cape Government. The intention is to enhance the areas natural and cultural resources and develop the TRUP for residential, commercial, institutional, manufacturing and recreational activities,

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aimed at generating a wide range of housing, recreation, business and employment opportunities.”

76. The TRUP Heritage Study describes its objective as being “...a *broad overarching baseline study ... to provide a framework for future heritage studies*”.
77. In line with its function as a framework instrument, the scope of the study was that of a phase one heritage assessment.
78. The report contains a high-level identification and mapping of heritage resources on the site (chapter 8). With respect to significance, the author states the following (at page 49):

“A case could be made for the TRUP having substantial cultural significance for associational, symbolic, spiritual, historical aesthetic (scenic) reasons. The entire TRUP site itself could be regarded as being of outstanding historical, symbolic scenic and amenity value, or a Grade 2 site. It is of sufficient cultural significance in terms of the definition and criteria contained within the Act.”

- 78.1. This report also proposed heritage-related design informants (at page 82), including the following: the unobstructed view to Signal Hill across the River Club Site should be retained and recognized through appropriate height restrictions associated with an astronomically related view cone across the site towards Signal Hill; buffer area on an extent yet to be decided should be negotiated adjacent to the Observatory Hill and related canal to ensure that the Observatory buildings retain the context of a hill site; development proposals to

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allow for the retention of open recreational spaces; view cones to and from the Observatory Hill and peripheral areas are to be considered as a dominant heritage informant; potential for development opportunities to the north of the site along proposed Berkley Road extension provided archaeological conditions are met (s 35 NHRA) and view cone to Alexandra Mill remains unobstructed.

79. Returning to the relevant sequence of events, on 12 April 2017, IACom, having considered the TRUP Heritage Study adopted the view that *“On balance, it is evident that, based on the heritage resources identified in the baseline study and its supporting documentation, the TRUP is of extremely high heritage significance. The Committee agrees that the overall site is of at least Grade II heritage significance, if not higher.”* In view of this, it was further recorded that *“Given the strategic importance and high significance of this site, it is a strong recommendation of the Committee that the Council of the HWC gives consideration to the provisional protection of the TRUP area under section 29 of the NHRA”*.
80. The matter was discussed at a meeting of the Inventories, Grading and Interpretation Committee (“IGIC”) in May 2017. It is unclear from the record what the outcome of this meeting was. However, it is recorded (in the interim comment referred to above) that *“After receiving feedback from the IGIC meeting, in the form of its minute of 9 June 2017, IACom recorded the following in its minutes: the Committee is unanimously of the view that based on the information provided for in the consultant’s Baseline Report tabled before this Committee, the TRUP is of potential Grade II or even Grade I significance. The*



Committee stands by its previous recommendation that the site should be provisionally protected so that the matter is fully investigated. The Committee recommends that a recommendation for the provisional protection of the TRUP is sent to the Council of HWC for its consideration."

The Second HIA

81. In the interim the LLPT, having abandoned the First HIA prepared by Bridget O'Donoghue, commissioned two new heritage specialists (Tim Hart and Stephen Townsend) to prepare a fresh heritage impact assessment (encompassing both phase one and phase two) ("the Second HIA"). The reasons for this decision were explained by Hart and Townsend in the Second HIA as follows (at page 22):

"We note that an earlier report (described as a "phase one HIA") was compiled on behalf of Liesbeek Leisure Properties Trust and submitted to HWC in early 2017. This report was, however, withdrawn before being considered by HWC as a consequence of two related factors: first, when considering the related Two Rivers Urban Park "base line studies" submitted at roughly the same time in early 2017 on behalf of the WC Provincial Government, HWC's Impact Assessment Review Committee (IAComm) was critical of what its members perceived as un-argued assumptions about the potential scale of development in the TRUP-area; second, similar assumptions to those just referred to had been included in O'Donoghue's "phase one HIA". Following the IAComm comments on these baseline studies, it was recognised by the owners that the development of Erf 151832, the study site of this report, provided an

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opportunity for a radically different alternative which could transform the Liesbeek River, a concrete-lined canal, into a restored ecological element and a historically numinous and iconic section of the Liesbeek River. As a consequence, a rather differently argued Draft HIA (which rebuts some assumptions of the “phase one HIA”) by us, Townsend and Hart, was circulated for public and interested party comment in January-March of 2018. That draft report, while recognising the research carried out for the “phase one HIA”, also took account of the previous consultative steps under both NEMA and the NHRA but dealt with a rather different preferred alternative to that presumed in the “phase one HIA”.

82. It is difficult to understand why IACom’s views regarding “unargued assumptions about the potential scale of the proposed development” (whatever these may have been) would have necessitated a fresh heritage assessment for the LLPT’s proposal. I say so because the description of the proposed development in the First HIA (at that stage unrefined) was perfectly consistent with the proposed development proposal that was ultimately advanced, and also contemplated rehabilitation of the river corridor. The author, Bridget O’Donoghue, described the proposed development in the First HIA as follows (at page 8):

“The proposed development on Erf 151832 Observatory Cape Town is for mixed use buildings and sites that incorporate future retail [shops and vehicular parking areas], commercial [offices], institutional [memorials,

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museum], infrastructure [roads, bridges], and the rehabilitation of river banks)."

83. In the circumstances, it seems very likely that the LLPT sought to procure a more favourable heritage assessment in order to avoid the limiting findings and conclusions set out in the First HIA and their consequences for the scale of the proposed development.
84. A draft version of Hart and Townsend's heritage impact assessment ("the Second HIA") was published for public comment in or around January 2018. A presentation based on its contents was made to the OCA during February 2018. I note that the SAAO also submitted an objection to this report (attached marked "**LL12**"), commenting *inter alia* that:

"The SAAO has very high historical significance as a scientific institute dating to the early 19th century and the first permanent observatory in the southern hemisphere. It is associated with a number of astronomical advances of international significance from the 1830s. It has considerable aesthetic significance with several architecturally significant buildings and a distinctive dome typology set within a wooded landscape at the confluence of the Liesbeek and the Black Rivers. The Main Building and McClean dome structure the central shaft of space.

The report argues (p.50) that the SAAO is of "low contextual significance" to the proposed project, since it is "rendered invisible" by the trees on-site (also pp.58,76). First of all, the statement is patently false, the SAAO is not invisible from the River Club. Secondly, and more importantly for the purposes of the proposal, the logic of the invisibility argument is strange: surely the point should

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be that the River Club site is very clearly visible from the Observatory. And indeed it will be even more so with 4 – 12 story buildings and more lights. The SAAO strongly objects to being brushed aside as an irrelevant factor in considering the impact of redevelopment of The River Club. In fact, Observatory staff regularly use the facilities offered by the River Club for official and recreational purposes and the two sites together form an integral part of the neighbourhood.”

85. On 14 March 2018, the Council of HWC resolved to publish a notice provisionally protecting the River Club site in terms of section 19(1) of the NHRA. On 28 March 2018, a letter was addressed to Mr. Jody Aufrichtig (a trustee of the LPT) giving notice of the provisional protection in terms of section 29(4).
86. It appears that the decision to protect the site in terms of section 29(1), though mooted during 2017, was prompted by notification that the LLPT intended to submit a new heritage impact assessment. This impression is created by the following statement in the interim comment:

“In or around February/March 2018, HWC management was made aware of the intent of the River Club to submit a new HIA. Following this, and noting concerns raised by the IACom, and recommendations made previously, a decision was taken at HWC Council in March 2018 to provisionally protect the site in terms of the provisions of section 29 of the NHRA...”

87. The provisional protection notice was published on 20 April 2018. A copy of the notice is attached marked “LL13”. I highlight that the effect of the

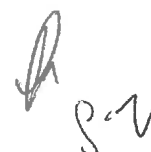
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provisional protection notice was not to freeze development on the site, but rather to impose the additional requirement of a permit in terms of section 29(1) of the NHRA.

88. The LLPT, the City, DEADP and DTPW all submitted appeals against the decision in terms of section 49 of the NHRA. Copies of these appeals will be available at the hearing.
89. An independent appeals tribunal ("IAT") was constituted in terms of section 49(2) of the NHRA, and a protracted appeals process followed ("the section 29 appeal"), which revolved exclusively around technical/procedural objections to the decision. The determination of the merits of the appeal was postponed on no less than two occasions in order to address and accommodate complaints by the LLTP that it had not been meaningfully consulted – in total these two postponements occasioned a delay of approximately a year. The appeal process eventually concluded on 14 April 2020 when the IAT handed down its decision dismissing the appeals (a copy of this decision will be available at the hearing of this application). By this stage the appeal record had ballooned to over 3000 pages. All parties thereafter proceeded on the understanding that the section 29 provisional protection of the site lapsed on 20 April 2020 (i.e. two years after publication of the provisional protection notice).
90. In the meantime, a final draft of the Second HIA dated July 2019 was submitted to HWC. A copy of relevant extracts of this report is attached hereto marked "**LL14**". It's content and recommendations are dealt with in due course, suffice to say that the authors were supportive of the proposed development.



91. On 13 September 2019, HWC furnished its interim comment on the Second HIA (annexure “LL11”). It adopted the view that the Second HIA substantially failed to comply with the requirements of section 38(3) and provided a detailed explanation of the perceived deficits. I deal with these comments in detail below. The HWC’s overriding concern was that the Second HIA had not accounted for the intangible significance of the site flowing from its historical associations, and that the assessment was consequently flawed. The interim comment concluded with the recommendation that a specialist consultant with expertise in intangible heritage should be engaged to provide a supplementary report.
92. Instead, the LLPT caused a supplementary report to be submitted in December 2019 (“the supplementary report”), which was prepared by the same authors as the Second HIA and essentially re-argued its conclusions. A copy of relevant sections of the Supplementary Report are attached marked “LL15” The supplementary report also incorporated a report entitled “The River Club First Nations Report” prepared by Rudewaan Arendse of AFMAS solutions (“the AFMAS Report”). This report purported to be an investigation of the “aspirations” for the site on the part of the First Nations people. A copy of relevant extracts of the AFMAS Report are attached marked “LL16”.
93. The HWC furnished its final comment on the Second HIA and the supplementary report on 20 February 2020 (“the final comment”). A copy is attached hereto marked “LL17”. The final comment reiterated the points made in the interim comment and advised the LLPT that the Second HIA, with its supplement, did not meet the requirements of section 38(3).



94. On 9 June, we were informed that a final basic assessment report (“BAR”) (incorporating the Second HIA and the supplementary report) had been submitted to DEADP. A copy of the cover page and executive summary is attached hereto marked “LL18”. By this time, the basic assessment process had progressed through multiple phases of public comment and had attracted 494 comments from the general public (of which the overwhelming majority were negative). The primary issues raised in the comments (by a large margin) were concerns about heritage. This appears from a summary of the process provided at page 133 of the BAR, a copy of which is attached marked “LL19”.
95. Just over two months later, on 20 August 2020, the Director issued an environmental authorisation for the proposed development.
96. Numerous appeals were lodged against this decision to the Minister in terms of section 43 of NEMA, including by the HWC, which submitted an appeal on 10 September 2020 (“HWC appeal”). A copy of this appeal is attached marked “LL20”. The HWC appeal relied on a single ground, which was that the decision was unlawful for want of compliance with section 38(8) in that the heritage impact assessment did not fulfil the requirements of HWC.
97. Prior to determining the appeals, the Minister sought to engage with HWC to resolve its objections to the heritage impact assessment process. On 25 November 2020, the Minister addressed a letter to the CEO of HWC, in which he advised that he was considering whether to direct the LLPT to submit further information and requested HWC to provide an indication of what additional information it would require in order to be satisfied with the process



before 11 December 2020. A copy of this correspondence is attached marked “LL21”.

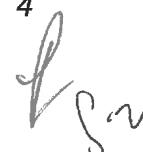
98. The HWC apparently responded to this letter on 11 December 2020, in which it recorded their view that the defects in the heritage impact assessment process were comprehensively explained in the interim comment and the final comment and appended those comments for ease of reference. I do not have a copy of this letter, but these responses are quoted in subsequent correspondence by the Minister.
99. The Minister responded in a letter dated 26 January 2021. A copy of this letter is attached marked “LL22”. The letter communicates his position as follows:

“I have reviewed your comments dated 13 February 2020 and 11 December 2020 as well as the information provided in the supplementary report to the HIA report dated 4 December 2019, as well as the Applicant’s Responding Statement dated 12 October 2020. I am of the view that the issues you raised in your response dated 11 December 2020, have been addressed in the Applicant’s Supplementary Report to the HIA Report, as well as the Responding Statement.”

100. A brief response to this letter was provided by HWC CEO on 3 February 2021. A copy of this letter is attached marked “LL23”. It states:

“Your letter dated 26 January 2021 in the above refers.

Heritage Western Cape (HWC) cannot agree with your contentions as stated in paragraph 3 thereof. It is reiterated that HWC is of the strong opinion that the Supplementary report to the HIA report dated 4



December 2019 and the Responding Statement dated 12 October 2020 merely re-state the initial opinions expressed in the original HIA and do not in fact address the issues that HWC raised in its Final Comment.

We can accordingly not also agree with the sentiments expressed in paragraph 5 thereof.”

101. All of the appeals were dismissed by the Minister, who recorded his reasons in a record of decision dated 22 February 2021.

Land-use planning decisions

102. In or around March 2018, the LLPT submitted an application for the permissions that it required in terms of the MPBL to implement the proposed development (“the proposed development application”). The application was duly advertised for public comment by the City’s development management department in a notification dated 27 August 2018.

102.1. rezoning of the site from Open Space 3: Private Open Space Zone to subdivisional area (comprising general business and open space zones);

102.2. permission to enable retaining structures to be constructed to a height of more than the permitted 2.0 meters above the existing level of the ground.

103. The application necessitated deviation from numerous policies of the City, including the Table Bay District Plan, which is the statutory spatial development framework applicable to the site. A lengthy motivation was submitted for the proposed development application. I will not burden the papers further by attaching this document. A copy will be available at the hearing.



104. An overwhelming number of objections against the proposed development were submitted by the general public. They are collected in a document running to 435 pages, which was attached to the decision of the Municipal Planning Tribunal (“the MPT”) as Annexure F to that document.
105. Commenting parties (including the applicant) were invited to make oral presentations to the Municipal Planning Tribunal on 18 September 2020. The applicant participated in this process. The development application was substantially approved by the MPT the same day (“the MPT’s decision”).
106. The only respects in which the MPT’s decision deviated from the proposed development application was that the LLPT’s request for subdivision to “general business zoning 7” and for permission to deviate from the City’s Floodplain and River corridor Management Policy and Management of Urban Stormwater Impacts Policy was refused. The practical result of this refusal was that plans to infill portions of the river, and certain business uses were excluded.
107. Numerous appeals were lodged against the MPT’s decision in terms of section 108 of the MPBL. A Mayoral Planning Appeals Advisory Panel met on 23 February 2020 to hear input from Appellants and the Applicants. On 18 April 2020, the Mayor published a decision dismissing all appeals and confirming the approval of the LLPT’s development application, this time without the reservations relating to general business zone 7 and the City’s Floodplain and River corridor Management Policy and Management of Urban Stormwater Impacts Policy.



THE STATUS OF THE PROVISIONAL PROTECTION NOTICE

108. At the outset, I am advised and verily believe that an application of the common law would hold that the provisional protection notice issued by the HWC as described above, was suspended for the entire duration of the appeals process and is still in operation.
109. I am advised that there exists a general principle of law that an administrative appeal suspends the operation of the relevant administrative decision absent any indications in the empowering statute that the legislature had a contrary intention. There is no contrary intention evident in the NHRA.
110. By virtue of this principle, the provisional protection notice is still in operation and will continue to be so until 8 April 2022, that is, until the passage of the balance of the two-year period following the termination of the appeals process.
111. I am advised and verily believe that on application of this principle of law in the present circumstances, would mean that the LLPT requires a permit in terms of section 29(10) of the NHRA to undertake construction of the River Club site (which it does not have) and that both the MPT and the Mayor were precluded by law from altering the planning status of the property.
112. I point out that the provisional protection or otherwise of the River Club site is not a mere technical legal question, the Council of HWC has recently (on 22 July 2021) resolved that the site should be declared a national heritage site and has referred the proposal to SAHRA for consideration. I was present at this meeting.



113. I submit that on this basis alone, any construction on the site ought to be interdicted as being prima facie unlawful, and on this basis alone the decisions of the MPT and the Mayor are reviewable.

THE TREATMENT OF HERITAGE CONSIDERATIONS IN THE SECTION 38(8) AND NEMA PROCESSES

114. It will be clear from the above chronology that there has at every juncture been disagreement between HWC and the competent environmental authorities under NEMA (both the Director and the Minister) regarding the impact of the proposed development on heritage resources, and the compliance of the heritage impact assessment with section 38(3) of the NHRA.
115. The available record reveals a complete failure by the environmental decision-makers (both the Director and the Minister) to understand the nature of the enquiry called for in terms of section 38(8) and generally to perform the duties imposed by that section – namely, to ensure that heritage resources are subject to an evaluation that complies with section 38(3) of the NHRA and that the views of the relevant heritage authority (in this case HWC) are properly considered.
116. The upshot of this failure is that a very substantial development proposal, with significant implications for a unique and highly significant site, has been approved in the face of clear and consistent opposition from HWC (not to mention the community) and a large body of specialist input suggesting that a development of this nature is unacceptable.
117. The question whether the heritage impact assessment met the requirements of section 38(3) of the NRHA was not considered by the Director and was woefully



misconceived by the Minister, whose evaluation was illogical, confused and entirely untethered from the provisions of the NHRA. It is clear that there was a wholesale failure by the environmental decision-makers to engage with the issues at stake and to apply their minds to the impact of the proposed development on what are widely accepted to be exceptional heritage resources. It is also clear that both decision-makers acted in excess of their powers by purporting to determine that the Second HIA was acceptable, when the empowering provision reserves this discretion exclusively for HWC.

118. The fact that the LLPT succeeded in procuring an anomalously sympathetic heritage impact assessment means that the failure by the environmental decision-makers to conduct the process in the manner required of them in terms of section 38(8) of the NHRA has had particularly serious and material consequences.
119. I explain below the content and findings of the Second HIA, HWC's views on their adequacy and the reasoning (or lack thereof) in the respective decisions of the Director and the Minister.

Deficiencies of the Second HIA

120. As noted above, the second HIA was submitted as a full HIA (encompassing both phase one and phase two of the process).
121. The content and findings of this report must, of course, be considered and understood in light of the function of a heritage impact assessment in terms of section 38(3) of the NHRA. What this section envisages is, firstly, a systematic identification and mapping of affected heritage resources together with an

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objective appraisal of their significance, and thereafter an evaluation of the potential heritage impacts (and mitigations) and the relative socio-economic utility of the proposal in light of those impacts. The point of departure in assessing the “significance” of a heritage resource are the factors listed in section 3(3) of the NHRA, which include its importance in the community or pattern of South Africa’s history and its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons.

122. The Second HIA does not lend itself to a systematic analysis against the requirements of section 38(3). The reason for this is that it is framed essentially as a motivation for the preferred Riverine Corridor alternative and structured around the subjective opinion of the authors.
123. The authors do not undertake any systematic mapping or identification of heritage resources on site. It is explained, however, that they perceive two potential dimensions of heritage significance: environmental and historical.
124. The environmental significance flows, they say, from the association of the natural features – the river and the floodplain - with the First Nations people and its centrality in their early engagements with, and ultimate displacement by Dutch colonialists. They conclude, however, that this significance is notional and that given the disparate and scruffy state of the property, the best hope for salvaging any heritage value on the property is through rehabilitation of the river corridor. Thus, it is stated at page 80:

“The most obvious significance is the environmental and topographical significance which, while often seen as natural or even scientific, in this case we see these as a set of cultural values derived from the site as a

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floodplain, as the lowest reach of the Liesbeek just before and as it meets the Black River...

Given this, the floodplain as a whole does not have a clear consistent experience or sense of place. The sense of place of the floodplain is of low-lying land but comprised of disparately-used, separated units of land without coherence. The sense that we have of this site in this landscape is of scruffiness and un-used-ness. Furthermore, as discussed earlier, the construction of the Berkley Road Extension will have a further transforming effect on the experience of the floodplain...

In other words, while we share a view of the environmental and ecological significance of these environs with many commentators in a general sense, we see this primarily as a potential rather than as a present and current significance. In other words, while the Liesbeek's floodplain is significant as a floodplain, this significance has been changed and derogated from. But this significance can be enhanced through recovery of a riverine corridor."

125. As regards historical significance, the authors are of the view that while there is historical significance attached to the land in theory, it is not feasible to accord it any practical significance because it does not take any tangible form on the site. This reasoning emerges from the following paragraphs (at page 82):

"The great historical significances of this site and its context are not visible at all and have left very little obvious impact on the landscape. Indeed, the greatest historical significance is that this floodplain as a

whole is one of the sites of the earliest conflict between the indigenous people and occupying intruders...

The historical significance of these political confrontations over the use and occupation of the land has as much symbolic and associative meaning today as it has ever had... this has, of course, been re-emphasized in the First Peoples groups' submissions; and, while, we recognise these claims and we emphasize our sympathies with respect to these submissions, we do not have the evidence that enables clear identification of characteristics or elements that are or should be feasibly protected."

126. I point out that the approach adopted here is definitively at odds with the scheme and principles of the NHRA. Section 3(2)(b) of the NHRA explicitly recognises "places to which oral traditions are attached or which are associated with living heritage" as heritage resources potentially worthy of formal recognition and expressly provides in section 3(3) for the definition of "significance" in line with criteria such as "importance in the community, or pattern of South Africa's history" and "a strong or special association with a particular community or cultural group for social, cultural or spiritual reasons". "Living heritage" is defined *inter alia* to mean "*the intangible aspects of inherited culture, and may include... popular memory*". In this regard I refer to expert opinions of Deidre Prins Solani and Bridget O'Donoghue filed with this founding affidavit, which attest to the importance of a proper identification and evaluation of living heritage and concur with HWC's view that the Second HIA (which



included a later supplementary report) does not comply with the mandatory requirements of section 38(3) of the NHRA.

127. This notwithstanding, the authors were intractable in their view that the only conservation-worthy heritage on the site is that flowing from the notional ecological potential of the river corridor. The strongly held views of Goringhaicona commentators were dismissed as follows (at page 64):

“The Goringhaicona have made a number of “recommendations” which we include here as an articulation of their view of the site as heritage:

“That the TRUP precinct be acknowledged as a place of national and international restitution and recognition of the Khoi Khoi

That the precinct encompasses the commemoration of the 1510 battle against the Portuguese Viceroy D’Almeida.

That the precinct recognises the intangible and tangible memory of “first and final frontier” contact.

Archaeological excavation be looked into.

More study and research be committed to the area.

That the area be recognised as a National and `International Heritage site.

That area be a place that illustrates the history of the colonial decimation of the indigene and the trajectory of European settler development in South Africa

That it be a site dedicated to the untold history of the genocide of Cape San

That it be a site dedicated to the acknowledgement and commemoration to the cultural ethnocide of Khoi Khoi and San indigenous groups. This would include processes of the language restoration.

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A site that would be a symbolic place of reference and utilisation for the purposes of a First Indigenous People's Conciliation Commission.

A site that celebrates place that connects the world to the DNA of the Khoi as of the oldest people on earth, through the re-engagement of a revived sense of place.

A site that recognises the Goringhaiqua, Cochoqua, Gorachoqua, and Goringhaicona as the precincts pre-colonial Khoi Khoi historical custodians.

A site that recognises the evolution of and the intermingling of diversities of nationalities and culture as experienced pre and post-Apartheid South Africa. These identities are part of a more recent memory and history of the site.

A site committed to a precinct wide recognition of scientific breakthrough and innovation of both the indigene and western technologies which has occurred within its borders.

A site that will recognise the exquisite plant, the sensitivity of the floodplain, the restoration of the Liesbeeck River and Black River, and animal life.

A site that acknowledges the linguistic ethnocide of the how plants in the region have been named and framed outside of their cultural and geo-specific areas.

A site demarcated to restoring the significance of the precolonial peopling of the area that nurtured a coexistence of animal, plant, land, water and the cosmos in ways respectful of each elements dignity and right to live and have a place under the sun.

A site that exemplifies the symbiotic and intrinsic qualities of the Khoi and San culture and people."

In this regard, we point out that the low spur of raised land on which the Royal Observatory was sited and on which the Valkenberg hospital and

Porter's institution followed later in the 19th century is the site of the fences and fortifications which were meant to repel or limit the access of the indigenous peoples to the then newly settled land; and the transformed floodplain and river must, as historical heritage site, be read with this even more developed part of the topography. This wider site is the historically significant place, a 'frontier zone' (if for a short period); but its meaning and persuasiveness as heritage site has been eroded by the 19th century institutional use and development of the spur, by the growing transformation of the floodplain for sporting uses and facilities and for railway-related functions during the second half of the 20th century, by the gradual creep of the suburb and business quarter below the railway line throughout the 20th century, and by the late 20th century growth of the transformation network of arterials and motorways.

Given this, we argue that the development of the River Club site and its development and transformation is, first, an opportunity for the articulation or making public, even celebration, of the significance of the place and of its historical associations and, second, an opportunity to restore ecological life to the Liesbeek River. These articulations, celebrations, restorations must, however, find form and life in the facts of the modern, constantly changing, constantly growing city-scape. We note that many commentators disagree with this view claiming that their views are "ignored": this is incorrect; we simply have different opinions and see rather the opportunity for radical improvements to the environs which are consistent with wider goals and needs. We note also, if with sadness, the antagonism of the First People groups' representatives

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towards us as authors of the HIA; and we hope that not all of the members of these groups see us in the same light. We do not ignore the antagonism (which we do not understand); but we hope to withstand it with forbearance and quiet dignity.

128. This approach adopted by the authors, in addition to being inconsistent with the NHRA, is also quite at odds with the normal, best practice approach for evaluating intangible significance. In this regard, I refer once more to the expert affidavits of Bridget O'Donoghue and Deirdre Prins-Solani filed herewith.
129. Having determined that the only heritage feature of any practical significance on the site is the river corridor, the authors find that the impacts associated with the proposed development are acceptable, and there is no need to impose any restrictions on the built form of the proposed development.
130. They state (at page 109):

"We do not regard the built-form of the proposed development in this case to adversely affect the heritage-significances present and we do not suggest heritage-related built-form restrictions (other than the distances and heights described), we do regard the urban design indicators devised by Urban Concepts and discussed above to be pertinent."

131. The urban design indicators referred to here are those put forward in a high-level urban design framework incorporated into the First HIA. They do not prescribe any detail with respect to the style and dimensions of the proposed development.



132. The upshot of this position is that the buildings comprising the proposed development are not subject to any concrete design restrictions at all, save that *“heights of the built-form on the southern portion of the site fronting or lining the restored riverine corridor should be limited, for the most part, to three-to-four storeys above the new ground level in order to acknowledge and ‘respect’ the significance and scale of the trees and the SAAO campus across the restored riverine corridor”*.

HWC’s “interim comment” on the Second HIA

133. The HWC, having considered the final draft of the Second HIA, decided that it was fatally defective and an inadequate basis for decision-making. These views were conveyed in the HWC’s interim comment on 13 September 2019 (already attached as “LL11”).
134. The comment concludes with the “strong” recommendation that a specialist consultant with the requisite expertise in dealing with the intangible aspects pertaining to the wider TRUP area is engaged and that a supplementary report from this consultant is incorporated into the Second HIA.
135. I summarise below HWC’s comments in relation to each of the requirements in section 38(3) of the NHRA.

Inadequate mapping and identification of heritage resources

- 135.1. The mapping of heritage resources was considered to be “illogical and flawed”. The two diagrams included for this purpose reflect, in their view, the conclusions of the authors rather than serving as the point of departure for the assessment.



The mapping of heritage resources – such as was undertaken – seems to have been formulated to justify a preconceived development concept:

“The second mapping diagram merely serves to post rationalize a preconceived development concept prepared by Urban Concepts in 2016, as per page 90 of the O’Donoghue Phase 1 HIA tabled at the IACom of March 2017.

An example of this post rationalization is the attempt to grade the current river corridor between the proposed two developments “envelopes” as IIIB, as indeed is the attempt to only identify some 40 – 50m of the river corridors, and confluence as heritage resources. This makes no sense and is rejected as flawed.

Notwithstanding that HWC has consistently advised against this, the HIA has not placed the River Club site within the context of the wider TRUP, and has downplayed the open low-lying green riverine character of the site which contributes to the intangible heritage experience.

Likewise, it is noted that the River Club building itself is down-played as a heritage resource, previous reports having noted the structure as being of IIIB, or at least contributory significance.”

The assessment of significance is inadequate

135.2. The assessment of significance in the HIA was inadequate. The authors have not taken account of the evaluation criteria set out in section 3(3) of the NHRA, in particular whether the River Club site “(i) is considered to have cultural significance to the community; (ii) could yield information about heritage; (iii) is

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important in exhibiting particular aesthetic characteristics valued by a cultural group.” Thus, it is stated:

“The HIA has not taken the above [the section 3(3) criteria] into account in the assessment of significance, and as noted, has merely reduced the identification of heritage resources, and subsequently significance to tangibly based ecological values rather than cultural heritage values.

It ignores the significance of the site to a Community that has a recognised and direct, deep and sacred linkage to the site through lineage and collective memory, and furthermore whilst acknowledging the historic importance of the site in South Africa’s pre-colonial and colonial history, it makes no attempt to assess the significance of this as a site of conflict, that has direct relation to the trajectory of South Africa’s Colonial history through the 20th century.”

Assessment of the impact of the proposed development on heritage resources

135.3. Because the mapping of heritage resources and identification of significance has not been properly undertaken, the assessment of impacts is flawed and unreliable:

“...given the heritage resources themselves have not been fully identified or mapped, and that the assessment, or grading, of the heritage resources is flawed (given they are tailor-made for mitigation rather than as informants), then it follows that any assessment of the development on identified heritage resources must be flawed.

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The report wholly downplays the irreversible impacts of transforming a green lung at the heart of the TRUP into a mega project. These irreversible impacts are hardly interrogated at all.

Whilst it is conceivable that the site may have some potential for some low-rise development and possible activation of edges, the HIA neither motivates for, or questions, the 150 000 m² of floor space proposed (in comparison, Canal Walk or Century City is 146 000 m²) and whether it is an appropriate site for a mega project)."

Evaluation of the impact of the proposed development on heritage resources relative to the sustainable social and economic benefits to be derived from the proposed development

135.4. The HWC comments in this regard are as follows.

"Whilst it is acknowledged that there may well be a potential economic benefit to developing the site, it is noted that there has been no attempt to develop an argument or acknowledge the impact of the development balanced against a site which has been recognised previously by HWC as being of provincial, if not national significance.

It is further noted that other than an acknowledgment of process followed thus far, the HIA and supplementary reports have not acknowledged or interrogated the significance that HWC and previous reports have attributed to the wider valley context.

As a result, and in attempting to define or limit significance to the riverine corridors only, meaningful discussion of the impact of the development on the

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significance of the wider TRUP cultural landscape is avoided altogether. This is in direct conflict with the advice HWC has previously given that the River Club cannot be looked at in isolation of the wider system.”

Results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the proposed development on heritage resources

135.5. While the formal requirements of the Promotion of Administrative Justice Act, 3 of 2000 were complied with, the consultation was not meaningful.

“It is clear to the HWC that there has been a lack or avoidance of meaningful consultation with the First Nations Groups. HWC is further disappointed that in the instances where comment has been received, this comment has seemingly been dismissed as a difference of opinion, rather than a meaningful interrogation of concerns raised.”

If heritage resources will be adversely affected by the proposed development, the consideration of alternatives

135.6. HWC's comments in this regard stated the following,

“The HIA fails in this respect as there is no meaningful consideration of alternatives whatsoever.

The HIA only assesses the preferred “Riverine Corridor Alternative” and the “Island Concept Alternative (both 150 000 m² of bulk) and simply dismisses the lower bulk alternatives, such as “the Mixed-Use Affordable Alternative”

(110 000 m²) and the “the Reduced Floor Space Alternative” (102 000 m²), as these have been considered economically unviable by the town planners.

A tread-lightly, green-dominated, recreational or educational alternative is not even considered, and nor indeed is the no-go option or the adaptive re-use of the site and buildings.”

Plans for mitigation of any adverse effects during and after the completion of the proposed development

135.7. HWC stated that:

“The reduction of the heritage significance to a few post-development, post-rationalised, and ecologically based values ... is not something that can be mitigated, as it wholly ignores the broader issues pertaining to a highly significant cultural landscape.”

The supplementary HIA

136. A supplement to the Second HIA (“the Supplementary Report”) was prepared by the authors of the Second HIA in response to HWC’s interim comment and submitted to HWC in December 2019.

137. The Supplementary Report does not do much more than defend and re-argue the original opinions and conclusions of the authors.

138. The report commences with the author’s interpretation of HWC’s position:

“While the Interim Comment contains a great number of statements and arguments (with one apparently central and reiterated argument)

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rationalising the comment as “interim”, it seems to us that the matter is rather simpler. Indeed, it seems to us that there are just two issues which could reasonably be cited as reasons for the HIA to be deemed to be “inadequate” or “incomplete”. These are: first, an incomplete engagement with and representation of First Nations’ interests and views; and, second, the contradictions and inconsistencies of the land-use planning development frameworks and policies for the wider environs.”

139. It thereafter goes on to address what the authors perceive as the issues arising from the interim comment, namely, engagements with first nations groupings, land-use planning in the Two Rivers area, identification and mapping of heritage resources, assessment of significance and alternatives and mitigation of impacts.

Engagements with First Nations groupings

140. The Supplementary Report makes reference to two reports based on a consultation process conducted by one Rudewaan Arendse of AFMAS solutions. The first is a report entitled “TRUP First Nations Report” dated 25 September 2019, commissioned, they say, by the City and the Western Cape Provincial Government pursuant to a joint project to prepare a “Local Spatial Development Framework” for the TRUP Area. The second is a similar report (seemingly derived, at least in part, from the same consultation process), also prepared by Arendse entitled “River Club First Nations Report” (“the AFMAS Report”).



141. The Supplementary Report incorporates and relies upon the AFMAS Report. Their purpose in doing so appears to be remedying identified deficits in the original assessment of significance in the Second HIA based on the failure to consider the significance of the site to the community and its “aesthetic characteristics valued by a cultural group”, as well as to address HWC’s comments related to consultation.
142. The AFMAS Report purports to be an inquiry directed at “[*understanding*] the significance of the River Club site to the First Nations by identifying Indigenous narrative of the broader TRUP cultural landscape... [*and identifying*] First Nations aspirations with regard to Indigenous cultural heritage and the River Club site.” This inquiry is undertaken pursuant to locating the “*indigenous narrative*” within “*the broader TRUP cultural landscape through multi-layered and multi-dimensional contextualizing - spatial, temporal, cognitive (memory and cognitive map of historical Indigenous landscape), epistemological (based on Indigenous knowledge structure), ontological (Indigenous ways of being) and cosmology (world view)*”.
143. The report gives the strong impression of being not much more than an exercise in obfuscating and diluting the strongly held views of sections of the Goringhaicona people (i.e. one of the several groups who were historically displaced from the land incorporating the River Club site) regarding the significance of the area.
144. Notably, the Goringhaicona Khoi Khoi Indigenous Council refused to participate in the process. This is noted in the report as follows:



“The First Nations Collective through Chief Zenzile Khoisan explained to Mr. Tauriq Jenkins, Supreme High Commissioner of the Goringhaicona Khoi Khoi Indigenous Traditional Council and spokesperson for Paramount Chief Delrique Dextery Aran (Impose Arendse), the position taken by the Collective, and invited the Goringhaicona to participate and join the Collective. Cautioning the Goringhaicona that refusing to formally engage, would constitute a voluntary extrication from the consultation process. Akin to a self-imposed exile.”

145. Obviously, the boycotting of the process by the Goringhaicona Khoi Khoi Indigenous Council compromises the recommendations in the report (given that *Goringhaicona* history is at issue) and poses something of a difficulty for the author - so much so that he found it necessary to enter into an unedifying analysis of comments posted on Facebook by people associated with this group (pages 5 to 7 of the report).

146. The AFMAS Report concludes with the following description of how the significance of the site to the First Nations people will be dealt with in the implementation of the proposed development (since incorporated into the site development plan):

“The First Nations Collective concluded a social compact with the developer in terms of applying the Indigenous Imperative at the River Club site.

This includes:

- *Establishing an Indigenous Garden for medicinal plants used by the First Nations.*

- *Establishing a Cultural, Heritage and Media centre at the location of the Heritage information hub.*
- *Establishing a Heritage-Eco trail that goes around the site and amphitheatre for use and cultural performances by both the First Nations and the general public.*
- *Commemorating the history of the First Nations in the area, by:*
 - *Establishing a Gateway Feature inspired by symbols central to the First Nations narrative at the road crossing the eco-corridor; and*
 - *Incorporating symbols central to the First Nations narrative in detailed design of buildings (e.g. pillars / supports, facades, building names, etc.); and*
 - *Naming internal roads inspired by people or symbols central to the First Nations narrative.*

147. The authors of the Supplementary Report conclude that:

“While it is apparent that there are some First Nations groupings who do not share this view, this First Nations Collective is authoritative; and Arendse’s report is persuasive in its method, its argument and in its conclusions; and we hope and trust that Arendse’s report and the incorporation of its conclusions/recommendations here in this Supplement to the HIA and in the revised development proposal will satisfy HWC at least insofar as there has been “meaningful engagement” with First Nations groupings. Indeed, we think that the interactions have been more than “meaningful”.”

Land-use planning in the Two Rivers area

148. In this section the authors provide an exposition of the City's various planning instruments dealing with the TRUP area, some of which are supportive of the proposed development and others of which are not.
149. Although not entirely clear from the report, it would seem that the purpose of this section is to meet HWC's complaint that the proposal should not be assessed in isolation from the broader TRUP area – referenced and paraphrased in the Supplementary Report as “the development of the River Club site should necessarily not be planned or assessed in isolation from the wider TR-area”.
150. The authors note the following:
- 150.1. the Two Rivers Urban Park Contextual Framework and Phase 1 Environmental Management Plan compiled by the City's Environmental Management Branch in 2003, which is not supportive of the proposed development, is not legally binding. It is stated that 2012 Municipal Spatial Development Framework makes no reference to the aforesaid contextual framework and instead designates most of the River Club Site as “urban development”. The revised and updated 2018 Municipal Spatial Development Framework designates the site as within the “urban core”.
- 150.2. The 2012 Table Bay District Plan, prepared as part of more detailed planning associated with the 2012 MSDF, designates the site as “open space”. This designation was based, the authors say, on



information known at the time before the more detailed hydrological studies associated with the River Club had been undertaken and it was assumed that the site had limited development potential due to flood risk.

- 150.3. Subsequent to the completion of the Second HIA, the draft Two Rivers Local Spatial Development Framework was released for public comment. This instrument, which will have statutory force once adopted in terms of section 12 of the MPB, changes the vision for the area. The authors site quotes from the draft version dismissing earlier visions for the TRUP as “utopian” and instead describing it as “a significant area of underutilized, state owned and private land, strategically placed within the Urban Inner Core of the City”.
151. It bears pointing out that the various planning frameworks adopted by the City are, at best, a factor that should be weighed (along with others) in the investigation required by section 38(3). The requirements of the NHRA and the controls imposed by that Act operate alongside the planning function of local authorities and require a distinct investigation based on the heritage impacts of a development proposal and their justifiability “relative to the sustainable social and economic benefits to be derived from the development” (section 38(3)(d)).
152. The authors conclude:

“Given this, it seems to us that the proposal analyzed in the HIA is generally in accordance with these recent land-use planning developments, that is, the preparation of and public circulation of these three land-use planning and heritage studies; and we trust that HWC will now accept that the River Club site

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and its development is not being planned or assessed “in isolation from” the wider TR area. Indeed, it appears to us that the River Club proposal and these various land-use planning and heritage planning endeavours are consistent with and ‘in synch’ with each other.”

Identification and mapping of heritage resources

153. The authors incorporate three diagrams prepared as part of other studies in order to make good the deficit raised by HWC related to the identification and mapping of heritage resources. Each one is accompanied by a comment explaining why the particular diagram falls short.
154. I note in passing that this exercise does nothing to meaningfully address HWC’s assertion that the mapping of heritage resources should serve as a foundation for the assessment and inform the evaluation of significances.

Assessment of significances

155. The sole contribution of this section is defending the assessment of “significance” advanced in the Second HIA.
156. It includes an analysis of the various ways in which the proposed development proposal has been revised over the course of the process in order to accommodate commentary by the First Nations and government authorities.

Alternatives and mitigation of impacts

157. In this section the authors set out their views on why HWC was incorrect in their assessment that there was no meaningful consideration of alternatives. The authors explain that the high capital costs associated with the proposed



development mean that lower density alternatives are not feasible and therefore not worth assessing. Acceptable mitigations can only be implemented if the Riverine Corridor is selected.

158. It concludes with the complaint that *“in the sixteen years that HWC has been operating, it has seldom required that alternatives be assessed and has not, in our experience, ever argued that an HIA was inadequate for the want of an “adequate” assessment of alternatives.”*

HWC’s final comment on the Second HIA and the Supplementary Report

159. The HWC furnished a “final comment” on the Second HIA on 20 February 2020 in which it reiterated its views set out in the interim comment and made the following additional points:

- 159.1. The AFMAS Report appeared to HWC be unreliable for the following reasons:

“the scope of the engagement resulted in a number of groups electing to not participate fully; the research process was contested by participants in the engagements; there were doubts about the impartiality of the research questions; the methodology for the engagement does not appear to follow accepted oral history interviewing protocols; the confusion between this report and the DT&PW-commissioned report presumably a reference to the contemporaneous report prepared by AFMAS solutions in connection with First Nations issues in the broader TRUP brought the ethics of the engagement into question”. (at page 9 of the comment)

- 159.2. The fact that the spatial planning tools cited in the Supplementary Report were in support of development in principle did not override heritage considerations.

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The fact of the proposed development's consistency with the 2018 Municipal Spatial Development Framework could not be equated with an assessment of its impact. In any event, the Table Bay Spatial District Plan was still considered the most relevant planning framework and, from a heritage perspective, the most relevant in its concerns, specifically the following: *"preserve the qualities of the various areas of the City, which exhibits a range of diverse character zones; protect the historical built fabric, scale and texture of the historical areas of the City; maintain the interface between the City and Table Mountain, retaining view corridors, ensure the retention and protection of historical areas, sites and features; ensure that construction within the strict and specifically within heritage and conservation areas do not negatively impact on the historical character of the area or fabric."* (at page 8 of the comment)

Decision of the Director

160. The environmental authorisation for the proposed development was issued by the Director on 20 August 2020. A copy of the record of decision and reasons is attached hereto marked "**LL24**"
161. I point out that the environmental authorisation imposes no restriction whatsoever on the design and layout of the proposed development, save for the following condition in paragraph 16.1:

"The recommendations provided in the Heritage Impact Assessment (compiled by Mr. T. Hart and Mr. S. Townsend and dated 02 July 2019) and the Supplementary Report (compiled by Mr. T. Hart and Mr. S. Townsend and dated 04 December 2019), as included in the EMP, must be implemented."



162. However, the recommendations provided in the Second HIA are so permissive and abstract as to be entirely devoid of content. No further content is added by the environmental management programme which simply incorporates the recommendations of the Second HIA. A copy of the relevant sections of the environmental management programme is attached hereto marked “LL25”.
163. As regards the reasons for the decision, the only meaningful substantiation in so far as heritage impacts are concerned is set out in the following two paragraphs:

“According to the heritage specialists, although HWC’s assessment of “National or Provincial” significance of the Two Rivers Urban Park is noted (albeit without any Section 29 investigation), it should be borne in mind that this is a planning boundary, and with the exception of the river courses (which themselves are much changed), much of the history that derives the cultural significance of the site extends over a far broader area. The heritage specialists have however indicated that they recognise that the River Club site has high historical significance, but also that this significance is not visible or apparent. The recovery of the Liesbeek riverine corridor could restore visible and apparent meaning and as a consequence of development, there is a reduction of a “sense of openness”.

A meeting was held on 4 March 2020 between officials of HWC, officials of this Department, the applicant, the Environmental Assessment Practitioner and the Heritage specialists to discuss HWC’s final comment dated 13 February 2020 and this Directorate’s comments on the draft BAR dated 17 February 2020 (requesting that the revision of the HIA and the external; review of the VIA, in



light of HWC's final comments dated 13 February 2020). It was agreed that further engagement with HWC, in the form of a meeting with the relevant HWC officials and the HWC IACOM committee and a written response to HWC's correspondence (dated 13 February 2020) was required. On 10 March 2020, the heritage practitioner and the EAP met with HWC officials and discussed the way forward. However, the scheduled HWC IACOM meeting never materialised. A written response to HWC's correspondence (dated 13 February 2020) was provided by the heritage specialists. The specialists' response (dated 31 March 2020) indicates that the proposed site creates a real and immediate opportunity, which could trigger meaningful planning of a much larger heritage site. Although the visual openness of the proposed site is highly valued, the existing development on the proposed site does not signal any heritage or cultural significance. An opportunity to commemorate and incorporate the views of the First Nations Collective exists in a space that currently displays no heritage significance. Given that significant input, research and engagement with the First Nations has been undertaken and that the views of the First Nations have been incorporated into the proposed development, the potential heritage impacts have been adequately assessed and concerns raised have been adequately responded to."

164. It is noted that the Director refers to a request from the Development Management Directorate for an external review of the Second HIA and the visual impact assessment. I do not believe that any such review was undertaken.

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165. The Director does not consider or address the substance of HWC's objections, nor does he engage in any independent inquiry as to whether the requirements of section 38(3) of the NHRA were met.

Appeal decision of the Minister

166. The appeal decision runs to some 128 pages; 49 of these pages deal with appeal grounds grouped under the heading "*Insufficient consideration was given to heritage informants and the relevant heritage resource authority's comments and there was non-compliance with section 38(8) and section 38(3) of the NHRA*". A copy of this section of the appeal is attached marked "LL26".
167. With due respect, these 49 pages convey almost nothing in the way of intelligible analysis. Much of this section is a random assemblage of quotes from the Second HIA and the Supplementary Report, which bear no relation to each other and no relation to the headings under which they are grouped, and which grow more incoherent as they go on. I do not think that it is overstating the matter to say that this section does not make any sense. Very little would be achieved by attempting to analyse it.
168. Nonetheless, by way of illustration, I will cite some examples of the poor or absent reasoning.
169. First, in attempting to address (or perhaps cure) HWC's objection that the Second HIA did not properly assess the significance of the affected heritage resources, the Minister sets out his own evaluation of "significance" (constructed from the observations in the Second HIA), except, he does not evaluate the significance of the heritage resources themselves, but rather



presents a convoluted assessment of the “significance” of each heritage related impact according to the methodology prescribed by the EIA Regulations.

170. In other words, the Minister conflates the requirement in section 38(3)(b) to assess the significance of the heritage resources affected by a development with the requirement in item 2(d)(i) of Appendix 1 to the EIA Regulations to assess “the nature, significance, consequence, extent, duration, and probability of the impacts occurring”. This is clear from the following passage:

“5.28 As detailed above, section 3(3) of the NHRA outlines the criteria for the determination of the significance of a heritage resource. However, the 2014 EIA Regulations state that the potential impacts must be assessed and rated based on the methodology and rating criteria including the nature, significance consequences, extent, duration and probability of potential environmental impacts and risks associated with the proposed development and alternatives. Regulation 19(8) of the 2014 EIA Regulations states that: “A specialist report must contain all information set out in Appendix 6 to these Regulations or comply with a protocol or minimum information requirement relevant to the application as identified and gazetted by the Minister in a government notice.”

171. The result is an entirely irrational and nonsensical analysis. I am advised that this error, in and of itself, is a fatal defect in the Minister's decision.
172. Second, the Minister uncritically adopts (or rather recites) the observation made by the authors in the Second HIA that the floodplain on the River Club site would in any event be compromised by the intended development of the Berkeley Road extension (at the north of the site), which was taken to be a foregone conclusion (at paragraph 5.53.6). This is entirely incorrect because this



construction would itself be subject to the requirement of heritage approval in terms of section 38 of the NHRA, being a road exceeding 300m in length. It cannot therefore be taken as a given. The Minister should have known this.

173. Third, the following quote from the Second HIA is inserted miscellaneously as one of the paragraphs under the heading “conclusions regarding significances”:

“Second, given this, they argue that what are often described as “heritage related design indicators” should be carefully devised to assist and even ensure that designers understand the significances (in kind and degree) and how those significances should be protected or enhanced. Such design advice must serve to outline criteria for decision-making by the responsible authorities. We also hope that this step-by-step methodology has assisted in the process of designing the “preferred alternative” and will serve the same purpose in the final steps of scrutiny and decision-making by the authorities.”

174. Quite apart from the fact that “heritage related design indicators” have nothing to do with the question of the significance of the heritage resources in issue, the Second HIA (as has been noted elsewhere) does not ultimately impose any heritage related design indicators, which makes any reliance on this passage very strange. One gets the impression that the author of this section of the appeal decision simply extracted paragraphs from the Second HIA which include the word “significance” and assembled them together.

175. Fourth, the section under the heading “Conclusions in respect of design indicators – criteria for decision-making” includes approximately two pages of completely unrelated and highly theoretical material extracted (i.e. copied and pasted) from the section of the Supplementary Report dealing with



“significances”, in which the authors defend their opinion on the significance of the heritage resources on the River Club site. Again, it would seem that these passages were identified as relevant based on the fact that the words “Heritage-Significance Related Design Indicators – Criteria for Decision-Making” were used in the first paragraph.

176. The irresistible conclusion is that the Minister did not apply his mind to the views of the HWC on the proposed development.

THE LAND USE PLANNING DECISIONS

177. The MPT’s decision is recorded in a report dated 4 September 2020 (“the MPT report”). A copy of the report (omitting the lengthy public participation section) is attached marked “**LL27**”.
178. The MPT decision is poorly reasoned and suffers from multiple defects which – like the decisions under NEMA – reveal a failure by the MPT to appreciate and discharge its duties in terms of the NHRA.
179. The findings of the MPT were, in essence, confirmed by the mayor in his decision on appeal (“the Mayor’s decision”). A copy of the Mayor’s decision is attached marked “**LL28**”.



Failure to appreciate the duties of the City in light of the HWC process to consider including the River Club site in the Western Cape Heritage Resources Register

180. In September 2020, when the MPT decided the LLPT's development application, HWC was actively investigating the possibility of listing the River Club site in the Western Cape Heritage Resources Register. This process is still underway. On 22 July 2021, the Council of HWC resolved that the site met the requirements for declaration as a national heritage site and referred the matter to SAHRA for decision. I was present at this meeting.
181. Inclusion of the River Club site in the Western Cape Heritage Resources register will trigger an obligation on the City in terms of section 30(11) to make provision for the protection of the site in its planning scheme. This will entail the imposition of a Heritage Protection Overlay Zone, which would almost certainly preclude the implementation of the proposed development.
182. While I appreciate that the MPT could not pre-emptively apply the restrictions imposed by the Heritage Protection Overlay Zone to the LLPT's development application (this would have been unlawful), the fact that the formal protection of the site was an imminent possibility should at least have been considered as a factor in the evaluation of the desirability of the proposal in terms of section 99(3) of the MPB, which expressly lists "impacts on heritage" as a relevant criterion. It should, furthermore, have been a particularly weighty factor, having regard to the duties imposed on the MPT by section 5(1)(a) of the NHRA to exercise its discretion with due regard to the lasting and irreplaceable value of heritage resources.

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183. I note in this regard that the applicant attempted to submit various relevant documents to the MPT in advance of its oral hearing on 18 September, including the interim and final comments of the HWC on the Second HIA and Supplementary Report, however it was not permitted to do so. The reason for this appears from an email exchanged attached marked “LL29” in which an unidentified administrator advised *“You are not permitted to raise new information at the Municipal Planning Tribunal (MPT), as the applicant would not have had the opportunity to respond to same, nor would the panel of the MPT been given an opportunity to examine said information ahead of the scheduled meeting”*. Consequently, the only reports that the MPT considered in connection with heritage impacts were those submitted to it by the LLPT.
184. Instead, the MPT determined the proposed development application in complete ignorance of the important parallel process being conducted by HWC. This is evident from the following comment at page 194 of the MPT Report that *“Additionally, the property was protected in terms of the National Heritage Resources Act and therefore would have been considered to be amongst the critical natural assets in terms of the MSDF. That protection status however lapsed in April 2020.”*
185. Thus, instead of applying their minds to the duties upon the City in terms of the NHRA to proceed conservatively in dealing with the planning status of the River Club site, the members of the MPT simply adopted the observations of the Second HIA without undertaking any evaluation of the anticipated heritage impacts of the proposed development. They are recited at pages 221 to 223 of the MPT Report.

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186. On appeal, the Mayor was made aware of HWC's investigation of the formal listing of the River Club site as a heritage resource.
187. This appears from paragraph 190 (at page 66 of the decision), which states "*the GTKC contends that there is a strong likelihood that the subject property will be declared a national or world heritage site and the OCA contends that a process is underway to have the TRUP declared a Provincial Heritage Resource and a National Heritage Site.*"
188. Notwithstanding this, the Mayor, like the MPT, failed to understand or engage with the City's duties in terms of the NHRA and proceeded to dismiss the issue in three short paragraphs:

"190.1 There is, however, no requirement to stall the City's municipal planning decision-making process until the finalisation of processes under other legislation administered by a different sphere of government.

190.2 Our courts have held that it is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose are of jurisdiction the decision is to be executed.

190.3 It seems to me that, unlike what is currently featured on the subject property, the proposed development will not only protect but celebrate the site's First Nations heritage."

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Irrational deviation from applicable policies

189. One would expect a development proposal such as the present one, which has been approved in the face of overwhelming public opposition, to be supported by particularly compelling policy objectives. In fact, the approval of the proposed development has necessitated deviation from multiple policies and planning instruments which deal pertinently with the site and/or issues directly connected to the proposed development.
190. What emerges clearly from the MPT's evaluation of the application (commencing on page 248) is that the assessment of the proposed development proposal in terms of sections 99(2) and 99(3) of the MPB was dominated by economic/developmental considerations at a very general and abstract level.
191. Much is made of the fact that the site is designated as "urban inner core" and the "metro-south east integration zone" in the City's 2018 Municipal Spatial Development Framework ("MSDF"), and that it will promote inclusive economic growth in line with the various overarching planning documents by virtue of its (negligible) low cost housing component and the temporary construction jobs that will be created.
192. However, the proposed development proposal conflicts with several important and directly relevant policy and planning instruments. Most notably, it is in direct conflict with the Table Bay District Plan ("the TBDP"). The TBDP is the most directly pertinent planning instrument in terms of the MPB, dealing as it does with fine-scale planning issues in the district. Notwithstanding this, the



decision to permit the deviation from the TBDP was only briefly touched upon in the MPT Report in the most superficial terms (at page 194):

“The property is located within the metropolitan node in Sub-district 3 of the Table Bay District Plan. The proposal seeks to deviate from the Table Bay District Plan (TBDP) which identifies the Two Rivers Urban Park as a multipurpose metropolitan urban park. It is designated as buffer 1 and core 2. It is regarded to be a precautionary area given the location of the site within a floodplain. A precautionary area are those areas that may pose a risk or have limited capacity for development. [Buffer 1 areas are generally farmlands and natural vegetated sites, amongst others. It could accommodate utility services. These properties usually do not form part of core areas. Core 2 areas are generally ecological areas and areas that offer ecological support. In this instance it accommodates water bodies and rivers.] The TBDP argues that such facilities as TRUP should be rehabilitated and upgraded. It should be used for passive and active recreation based on the Open Space 3 197 MPT Report Template – 8 June 2017 Page 195 of 277 zoning. According to the TBDP a limited range of development could be encouraged such as residential, some institutional uses and appurtenant limited commercial development. Public access should be permitted along the edges of the site where appropriate. As far as possible mountain to sea linkages must be retained as well as maintaining access to the waters edge. As is evidenced from the preceding comment, the district plan does not accord with the MSDF. The district plan was approved in 2012 while the MSDF was amended and approved in 2018. For this reason, district plans are presently being reviewed to ensure consistency with the MSDF. The review of district plans are still the initial stages of review.



The MSDF requires that lower order policies are consistent with the findings thereof. This principle is reiterated in the district plan. All lower level policies are informed by the higher order policies. The MSDF states that where lower order spatial plans conflict with the MSDF, the findings of the MSDF must take precedence.”

193. The extent and significance of the MPT's departure from relevant policy is illustrated by the fact that the City itself submitted an appeal against the environmental authorisation granted for the proposed development (presumably through its environmental management branch), based on *inter alia* the following grounds:

193.1. The decision does not align with relevant National and Provincial Legislation, Provincial and City Policy and Spatial Plans and the (Environmental Management Framework (EMF) approved by the Western Cape Government (WCG) MEC for Environmental Affairs & Development Planning (EA&DP).

193.2. Insufficient consideration was given to the City's comments regarding context, role of the site and desirability of the proposed development.

193.3. Insufficient consideration was given to heritage informants and the relevant heritage resources authority's comments and there was non-compliance with S38(8) and S38(3) of the National Heritage Resources Act, 25 of 1999 (NHRA).

193.4. The stormwater impacts, including flooding, are not sufficiently mitigated against, the decision-maker relied on outdated information

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and the City's Floodplain and River Corridor Management Policy appears to not have been considered.

193.5. The decision does not give due consideration to climate change impacts and resilience (and is contrary to the City's Climate Change Policy).

193.6. The decision does not appropriately describe, or mitigate, the loss of open space on site.

193.7. The decision does not appropriately describe or mitigate the high negative biodiversity impact or habitat loss of a high faunal sensitivity proclaimed Protected Area and assumes a willingness on the City's part to relinquish such Protected Area.

A copy of the is attached marked "LL30".

194. Moreover, and of particular relevance, are the EMD's submissions placing in doubt the MPT's assertion that the MSDF is in fact supportive of the proposed development. They were as follows:

"The IDP and MSDF recognise Cape Town's critical environmental assets and its globally important biodiversity. The MSDF's often misquoted "Consolidated Spatial Plan Concept" (also known as "The Blue Turtle" owing to the shape of the "Urban Inner Core") does not override the MSDF's Biodiversity Network as if development were more important than conserving biodiversity. The MSDF comprises 4 main maps, and notes that this is "A series of maps that collectively indicate a metropolitan-scale interpretation of the City's spatial vision, development directives, land use informants and investment priority

areas.” This clearly shows that the MSDF is to be read as a collection of maps of equal standing, rather than the ‘consolidated spatial plan concept’ overriding all other layers of spatial informants.”

195. The unjustified and unsubstantiated deviation from sound, relevant and duly adopted policies by the MPT is, I submit, indicative of an irrational decision-making process.
196. The Minister’s decision, confirming as it does the desirability of the proposed development, equally suffers from this defect.

GROUND OF REVIEW

197. In light of what is stated above, I respectfully submit that both decisions taken in terms of NEMA and both decisions taken in terms of the MPB in connection with the proposed development are reviewable and should be set aside.
198. The decision taken by the Director in terms of regulation 25 of the EIA Regulations read with section 24 of NEMA to issue the environmental authorisation for the proposed development is defective for the following reasons:
 - 198.1. A mandatory and material procedure was not complied with in that the competent environmental authority did not ensure that the heritage impact assessment fulfilled the requirements of HWC as required by section 38(8). The decision is therefore reviewable in terms of section 6(2)(b) of the Promotion of Administrative Justice Act, 3 of 2000.

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- 198.2. The Director acted in excess of his authority in terms of section 38(8) by usurping the HWC's exclusive power to determine that the Second HIA met the requirements of section 38(8). The decision is therefore reviewable in terms of section 6(2)(a)(i) of PAJA.
- 198.3. The conclusion by the Director that the heritage impact of the proposed development was justifiable is unreasonable in light of the consistent and well-substantiated assertions of Heritage Western Cape to the contrary (reinforced by the strong opposition from the general public) was unreasonable. The decision is therefore reviewable in terms of section 6(2)(h) of PAJA.
199. The decision taken by the Minister in terms of section 43 of NEMA to dismiss the appeals and confirm the environmental authorisation is defective for the following reasons:
- 199.1. A mandatory and material procedure was not complied with in that the competent environmental authority did not ensure that the heritage impact assessment fulfilled the requirements of HWC as required by section 38(8) and the Minister perpetuated this irregularity in his decision on appeal. The decision is therefore reviewable in terms of section 6(2)(b) of the PAJA.
- 199.2. The Minister acted in excess of his authority in terms of section 38(8) by usurping the HWC's exclusive power, on appeal, to determine that the Second HIA met the requirements of section 38(8). The decision is therefore reviewable in terms of section 6(2)(a)(i) of PAJA.



- 199.3. The decision was based on a material error of law in that the Minister did not appreciate that the evaluation contemplated in section 38(3) was required to be founded on an assessment of the significance of the heritage resource. The decision is therefore reviewable in terms of section 6(2)(d) of PAJA.
- 199.4. The Minister acted unreasonably in finding that the heritage impacts of the proposed development were justifiable in light of the consistent and well-substantiated assertions of Heritage Western Cape to the contrary (reinforced by the strong opposition from the general public). The decision is therefore reviewable in terms of section 6(2)(h) of PAJA.
- 199.5. The Minister's decision was not rationally connected to the purpose of the empowering provision in that his reasoning in connection with heritage related impacts is internally incoherent and, for the most part, unintelligible. The decision is therefore reviewable in terms of section 6(2)(f)(ii)(bb) of PAJA.
200. The decision taken by the MPT to approve the LLPT's development application in terms of section 98(2) of the MPBL is defective for the following reasons:
- 200.1. It failed to take account of a relevant consideration in that it took the decision in ignorance of the pending decision to grade the site as (at that stage) a grade II heritage resource. The decision is therefore reviewable in terms of section 6(2)(e)(iii) of PAJA.
- 200.2. It was unlawful to the extent that its effect was to subdivide and change the planning status of a property subject to provisional

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protection in terms of section 29 of the NHRA, contrary to the prohibition in section 29(10) of that Act. The decision is therefore reviewable in terms of section 6(2)(i) of PAJA.

- 200.3. The process by which it was arrived at was arbitrary and capricious in that it necessitated deviation from no less than five directly relevant policies, duly adopted by the City. The decision is therefore reviewable in terms of section 6(2)(e)(vi) of PAJA.
201. The Mayor's decision to dismiss the appeals against the MPT's decision and confirm the approval of the proposed development application in terms of section 108(7) of the MPBL is defective for the same reasons.

ENTITLEMENT TO AN INTERIM INTERDICT

202. It is my respectful submission that the requirements for an interim interdict have been established.
203. The facts set out above establish a strong prima facie right warranting protection by this court, namely a right to the review of the unlawful decisions at issue, which themselves have compromised the rights of the applicants to lawful action that conserves South Africa's heritage for the benefit of present and future generations, and to the lawful implementation of the spatial planning instruments affecting the area of Observatory.
204. It is furthermore beyond question that the anticipated harm – i.e. the destruction and transformation of the River Club site – will eventuate if the relief sought in Part A of the notice of motion is not granted. Indeed, it has already begun.

205. Finally, I submit that the balance of convenience favours the granting of the interdict, in light of the magnitude of the destruction that will result if it is not granted. The sheer quantity of objections from members of the public and concerned organisation to the development indicate that the interests of the general public are adversely affected by the interests of a single developer. In any event, any claim by the LLPT to the contrary is belied by the fact that more than one appeal has been submitted against the LLPT's water licence which will take approximately the same period to determine as Part B of this application.
206. If the destruction of the site is allowed to continue whilst the applicants' review is being determined, the relief granted therein will be undermined and will be all but meaningless. The applicants have no other recourse other than to prevent the irreversible destruction of the site, as heritage rights will not be able to be effectively restored once destroyed.
207. There is, with respect, no good reason why the financial interests of a single developer ought to be allowed to trump the rights of ordinary citizens of the country to have their heritage respected and protected by the very structures of State to which that obligation has been entrusted.

CONCLUSION

208. I respectfully state that it is appropriate, just, and equitable for this Honorable Court to grant the relief set out in Part A of the notice of motion to which this affidavit is annexed, and the relief set out in Part B in due course.

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LESLIE LONDON

I certify that:

- I. the Deponent acknowledged to me that :
 - A. He knows and understands the contents of this declaration;
 - B. He has no objection to taking the prescribed oath;
 - C. He considers the prescribed oath to be binding on his conscience.
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
- III. the Deponent signed this declaration in my presence at the address set out hereunder on 2021.


 P. Z 7088064-6 Npawly Sgt
COMMISSIONER OF OATHS

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SOUTH AFRICAN POLICE SERVICES