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

Case No: 12994/2021

In the matter between:

OBSERVATORY CIVIC ASSOCIATION	**First Applicant**
GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL	**Second Applicant**

and

THE 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**
WESTERN CAPE FIRST NATIONS COLLECTIVE	**Eighth Respondent**

FILING NOTICE

BE PLEASED TO TAKE NOTICE that the First Respondent files herewith:

Nicholas Smith Attorneys
Ref: Mr. N. Smith
Tel: 021 424 5826
Email: nicks@nsmithlaw.co.za

1. First Respondent's answering affidavit deposed to by Jody Aufrichtig with annexures "JA1" to "JA32".

2. Supporting affidavit of Graham Robert John Haldane with annexures "A" to "C".

SIGNED AND DATED at **CAPE TOWN** on this **25th DAY OF AUGUST 2021**

NICHOLAS SMITH ATTORNEYS
Attorneys for the First Respondent
2nd Floor
114 Bree Street
CAPE TOWN
Tel: 021 424 5826
Fax: 021 424 5825
(Ref.: Mr. N.D. Smith/L38-001)
Email: nicks@nsmithlaw.co.za

TO: **THE REGISTRAR** **BY HAND**
Western Cape High Court
CAPE TOWN

AND TO: **CULLINAN AND ASSOCIATES** **BY EMAIL**
Attorneys for the Applicants
18A Ascot Road
KENILWORTH
(Ref: Mr. Hercules Wessels)
Email: Hercules@greencounsel.co.za

AND TO: **HERITAGE WESTERN CAPE** **BY EMAIL**
Second Respondent
3rd Floor, Protea Assurance Building
Green Market Square
CAPE TOWN
(Ref: Ms. Penelope Meyer)
Email: Penelope.Meyer@westerncape.gov.za

AND TO: **WEBBER WENTZEL** **BY EMAIL**
Attorneys for the Third, Sixth and Seventh Respondents

15th Floor, Convention Tower
Heerengracht Street
Foreshore
CAPE TOWN
(Ref: Ms. Sabrina De Freitas)
Email: sabrina.defreitas@webberwentzel.co.za

AND TO: **OFFICE OF THE STATE ATTORNEY** **BY EMAIL**
Attorneys for the Fourth and Fifth Respondents
5th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
(Ref: Mr. Mark Owen/1873/21/P7)
Email: mowen@justice.gov.za

AND TO: **BASSON AND PETERSEN ATTORNEYS** **BY EMAIL**
Attorneys for the Eighth Respondent
Suite No. 6A, Bellpark Building
De Lange Street
BELLVILLE
(Ref: Mr. Petersen)
Email: bpinc.law@gmail.com

IN THE HIGH COURT OF SOUTH AFRICA
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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
WESTERN CAPE FIRST NATIONS COLLECTIVE	Eighth Respondent

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

JODY AUFRICHTIG,

do hereby make oath and declare as follows:

1. I am an adult male businessman and a trustee of the Liesbeek Leisure Properties Trust (no. IT 248/2015(N)) (the LLPT). I am duly authorised to depose to this affidavit on behalf of the first respondent, as confirmed in the attached resolution of the LLPT' trustees, signed and dated 3 August 2021 and attached to this affidavit, marked Annexure "**JA1**".

2. Unless the context indicates otherwise, the facts deposed to in this affidavit are within my personal knowledge and are, to the best of my belief, both true and accurate. Where I make legal submissions, I do so on the advice of the LLPT's legal representatives. Where I rely upon information conveyed to me by others, I state the source, which information I likewise believe to be true and correct.

3. I have read the founding affidavit filed by applicants and deposed to by Leslie ~~Mr~~ London dated 1 August 2021, as well as the accompanying affidavits of Tauriq Jenkins, Bridget O'Donoghue and Deidre Prins-Solani.

PART 1: OVERVIEW

4. The applicants seek to restrain the LLPT from carrying out any further works in relation to the development at the River Club site, pending review of the relevant environmental- and land use authorisations. The aforesaid authorisations were obtained following the conclusion of internal appeal processes on 22 February 2021 and 19 April 2021, respectively. Now, the applicants approach this Court on an extremely urgent basis, initially requiring the respondents to file answering papers to a 802-page founding affidavit within 6 days of service. The professed urgency, even to the extent it may exist, is entirely self-created and

disproportionate to the truncated timetable imposed upon the respondents. I am advised that the interim relief sought by the applicants is unjustified and that the application falls to be struck from the roll, alternatively dismissed. First, the application is not urgent; Second the applicants have not satisfied the requirements for an interim interdict.

5. In Part I of this affidavit, I deal with the *in limine* issues, followed by a brief overview of the River Club site and the authorised development, as well as the facts pertinent to the requirements for an interim interdict. Part II consists of my *seriatim* response to the founding affidavit of Mr London and the accompanying affidavits.

A. ***In Limine* Issues**

a. Lack of Urgency/ Self-Created Urgency

6. The applicants have brought this application in two parts, with the part A claim for interim interdictory relief being advanced on an urgent basis on a very abridged timetable. Although the time for the filing of this answering affidavit was extended by agreement between the parties, it has nonetheless had to be prepared under demanding and pressurised conditions, given the volume and detail of the founding papers.

7. To the extent any urgency may exist, it is entirely self-created and is disproportionate to the abbreviated time periods imposed upon the respondents for the various steps necessary to oppose part A of the relief sought in the notice of motion. As a result, the LLPT has been required to brief counsel and prepare

these papers under severe time constraints which have prejudiced it in putting up its case.

8. Despite the contended for urgency of the part A interdictory relief, the applicants make remarkably little attempt to demonstrate that they meet the requirements for interim relief. They confine themselves to the barest of allegations in five cryptic paragraphs which barely stretch to a single page at the tail of their founding affidavit.

9. This is not altogether surprising, because the applicants cannot demonstrate any reasonable apprehension of irreparable harm should the interim relief sought by them not to be granted. The applicants' case in this regard pivots in the main on an alleged failure to evaluate and appreciate the intangible heritage significance of erf 151832 (the River Club property or the property) and the adjacent 11 erven owned by the third respondent (the City). Where convenient, I refer to all of these properties as the River Club site or the site. This represents the historical, as opposed to the environmental, dimension of any heritage significance. Because the site is (as the applicants recognise) entirely transformed, there can be no question of destruction of or interference with any tangible heritage resource. This being the case, should the applicants in due course succeed in having the decisions which are challenged in part B set aside, there is no reason why any development which ultimately may be permitted will not have to be informed by the heritage resources which the applicants contend have not been adequately addressed to date.

10. Having been advised of the fifth respondent (the MEC)'s reasoned decision as far back as 22 February 2021, the applicants saw fit to wait some 160 days

before serving papers on the LLPT and demanding an answering affidavit within 6 days of informal service of papers on 2 August 2021. Similarly, the delay between notification of the Executive Mayor's reasoned refusal of their appeals on 19 April 2021 and the initiation of these proceedings as aforesaid is substantial, *viz.* some 105 days.

11. The challenge to the environmental decisions was also in no way contingent upon the outcome of the internal appeal process against the land use authorisations before the executive mayor. The 180-day period to challenge the former decisions under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) started to run from 22 February 2021. While there is some overlap in the nature of the impacts considered by the provincial and local government decision-makers, they exercised their respective discretionary powers entirely independently of one another, and under different statutory frameworks.

12. As such, there is no good reason why the applicants should have delayed until now to launch the review of the environmental authorisation decisions and then to do so on an urgent basis. The main thrust of this challenge rests on the proper interpretation of section 38(8) of the National Heritage Resources Act, no. 25 of 1999 (the NHRA) and whether the fourth respondent (the Director) and MEC usurped the discretion of the Heritage Western Cape (HWC) in determining that the LLPT's Heritage Impact Assessment (HIA) complied with the necessary content requirements. The factual matrix underpinning this question is not so complex as to justify a 5 ½ month delay in launching proceedings.

13. An analysis of the founding papers further reveals that the challenge against the land use planning decisions is little more than an afterthought. That challenge appears to be made solely as an attempt to justify the delay in the applicants' institution of these review proceedings.

14. The first applicant (the OCA) has been intimately involved in each step of the environmental and planning approval processes since 2016, when it commented on what Mr London calls the "First HIA" by Ms O'Donoghue.

15. The second applicant (the GKKITC), while declining invitations from the LLPT's heritage consultants to comment on the draft HIA in March 2018, lodged a notification of interest in mid-September 2018 in the appeals process against HWC's decision to provisionally protect the River Club site in terms of section 29(1) of the NHRA. A copy of GKKITC's 18 September 2018 notification is attached as Annexure "**JA2**".

16. Since at least the end of 2020, both applicants have also benefited from formal legal representation. The OCA retained the services of the applicants' attorneys of record to assist in the preparation and presentation of its appeal against the decision of the City's Municipal Planning Tribunal (MPT). Similarly, the GKKITC enjoyed legal representation by the Legal Resource Centre (LRC) since at least August 2020 and was represented by the LRC at the Municipal Planning Tribunal (MPT) hearing on 18 September 2020. As such, the applicants have simply not put up a plausible explanation for the delay in instituting this application.

17. The OCA was well aware of the urgency with which High Court review proceedings would need to be instituted so as to prevent the commencement

of the development in the event their internal appeals were rejected by the provincial and local government appeal authorities. In this regard, it is instructive that the OCA resolved as far back as 24 November 2020 to authorise its management committee *inter alia* to: (i) instruct attorneys to advise on the prospects of success in review proceedings challenging the MPT's decision, as well as the first environmental authorisation decision; and (ii) institute legal proceedings to stop the development. Notably, paragraph 5 of this resolution provided the following motivation statement:

> "The OCA is aware that if these appeals are unsuccessful, it will be necessary to institute a High Court review to prevent the River Club Development from going ahead as soon as reasonably possible, and that it may be necessary to instruct attorneys urgently to take the necessary action to safeguard the interests of the OCA" (emphasis added).
>
> A copy of the resolution dated 14 November 2020, as adopted at the OCA's AGM on 24 November 2020, is attached hereto marked Annexure "**JA3**".

18. It is common cause that the LLPT gave notice to the Department of Environmental Affairs and Development Planning of the Western Cape (DEADP) of its intention to commence with the authorised activities on 3 May 2021. This appears to have prompted the OCA to write to the LLPT on 11 May (R: 107, "LL2"), seeking an undertaking that it would not commence development-related activities pending the final determination of the OCA's proposed review proceedings.

19. Significantly, the OCA expressly tied its request to an undertaking that it would launch the application by 21 June 2021. Paragraph 6 of the OCA's 11 May letter concludes as follows: "This undertaking may be subject to the condition that the OCA must institute those review proceedings by 21 June 2021, failing which

the undertaking will lapse" (R: 107, Annexure "LL2"). This self-imposed deadline - some 120 days after the MEC's decision - came and went.

20. The applicants incorrectly assert that the LLPT failed to respond to the OCA's 11 May request. On the very next day, 12 May 2021, Ms Couzyn-Rademeyer (senior general counsel at Zenprop, writing on behalf of the LPPT) advised that the LLPT was not in a position to furnish the requisite undertaking. A copy of her e-mail is attached as Annexure "**JA4**". Indeed, the OCA's Mr Wessels responded later that day, thanking Ms Couzyn-Rademeyer's for her "prompt response" and stating that they would advise their clients accordingly. A copy of his email is attached as Annexure "**JA5**". In any event, Mr London's aforesaid claim in this regard is contradicted by Mr. Wessels' 21 July 2021 letter (R: 110, "LL3"), which expressly refers to Ms Couzyn-Rademeyer's aforesaid response of 12 May.

21. In any event, the LLPT could not commence with the development in mid-May of this year, as it was still awaiting the determination of its water use licence application (WULA). The WULA was granted on 6 June 2021 by the Acting Regional Director Head: Western Cape in the Department of Human Settlements, Water and Sanitation (DWS). The OCA lodged an appeal against this decision on 21 June, *viz.* the same date on which the OCA initially undertook to launch these review proceedings. The unavoidable inference is that the OCA was acutely aware of its dilatoriness in instituting review proceedings and, instead, lodged the WULA appeal in an attempt to delay the commencement of bulk earthworks at the River Club site. By operation of law, the WULA appeal suspended the licence. As detailed below, however, the

LLPT submitted a substantive responding statement to the OCA's appeal on 28 June 2021, together with a motivated request for the lifting of the suspension by the Minister in terms of section 148(2)(b) of the National Water Act, 36 of 1998 (the NWA). The Minister subsequently lifted the suspension on 22 July 2021.

22. In their attorney's letter of 21 July 2021 (R: 110, "LL3"), the applicants again advised that they would launch review proceedings; this time, stating that they would do so "within the course of the next month". Ultimately, the notice of motion was signed on 30 July, Mr London deposed to his affidavit on 1 August, and the papers were e-mailed in tranches to the LLPT's attorney of record during the course of the afternoon on 2 August.

b. <u>Authority</u>

23. Based on the documents provided in the affidavit of Mr Jenkins which accompanies the founding affidavit, it is unclear whether this application has been duly authorised by the GKKITC.

24. Annexure "TJ1" (R: 746) to Mr Jenkins' affidavit purports to be a resolution of the GKKITC dated 27 July 2021, authorising him to instruct the applicants' attorneys of record to institute legal proceedings to "stop the ... development" and grant any power of attorney and sign any affidavits on behalf of the GKKITC.

25. The resolution is signed by 5 individuals, *viz.* Chief Aran; Supreme Senior Chief Desmond Dreyer; Supreme High Commissioner Tauriq Jenkins; Supreme Elder Peter Ludolph; and Hamqua Patricia Aran.

26. However, according to a search of the CIPC records, only three of these individuals are listed as directors of the GKKITC, namely Chief Aran (recorded as "Delroque Dextry Arendse"), Supreme Elder Peter Ludolph (recorded as "Peter Fortuin Ludolph") and Hamqua Patricia Aran (recorded as "Patricia Arendse"). A copy of the search conducted on 3 August 2021 is attached hereto as Annexure "**JA6**".

27. In the circumstances, the applicants are called upon to produce the memorandum of incorporation of the GKKITC, in order that the LLPT may ascertain the validity of this resolution.

B. Merits

a. Overview of River Club Site and Development

28. Before dealing with the merits of the applicants' *prima facie* case, it is necessary to provide a brief overview of the River Club site and the authorised development.

29. The applicants seek to interdict any works to implement the authorised development of the River Club site, which consists of twelve properties located in Observatory, *viz.* the LLPT's River Club property situated at Erf 151832 (148 425m^2 in extent), which was rezoned from Open Space 3 to a subdivisional area and specific portions on eleven adjacent properties owned by the City, namely three erven zoned "Open Space 2" (erf nos. 26426, 108936 & 26427); one erf zoned "Community 1/ Open Space 2/ Transport 2" (erf no. 15326Rem); and seven erven zoned "Transport 2" (erf nos. nos. 26169 – 26175). The location of these erven is depicted on the locality and cadastral

maps (at pages 12 – 13) included in the Final Basic Assessment Report (BAR), a relevant extract of which is attached as Annexure "**JA7**", and described in the covering letter to the MEC's decision on appeal.

30. The River Club site is bordered to the west and north-west by an excavated and unlined channel of the old Liesbeek River course and to the east by the canalised Liesbeek River and the Black River, which are depicted in figure 46 in the BAR, an A3 colour copy of which is attached as Annexure "**JA8**".

31. The River Club site could be described as a "virtual" island, surrounded by these transformed freshwater systems and is located in the floodplain of the Liesbeek River. The River Club property itself is either mostly, or entirely, an infill site and is degraded.

32. The River Club property has its origins in the 1920s, when part of the old Salt River estuary was reclaimed for the construction of shunting yards and railway sheets, as well as the development of recreational facilities for employees of the then South African Railways and Harbours Company (SARHC). The original wetland that made up the River Club site was gradually reclaimed. The main buildings at the site were completed in 1939 and much extended over time. The River Club was established in 1993 and developed into a recreational venue and "mashie" golf course.

33. As for the transformed river courses bordering the site –

    33.1. Aerial photographs of the site in 1934 show the Liesbeek River as a simple narrow and straight ditch or artificially created canal. In about 1958, the Liesbeek River was diverted into a new concrete-sided canal

to the south-east of the site (Liesbeek Canal) and overburden added to the site to raise it above flood levels.

33.2. Between 1960 and 1980, the unlined course of the Liesbeek River to the west of the site was fully reclaimed and infilled. Shortly before 1990, it was dredged to allow water to backflow from the Black River into a deep ditch approximating the old river-course which now forms part of the City's stormwater system. (The most detailed account of this history appears in the 6 April 2020 memo of Fisher-Jeffes and Dr Day, which was included in the BAR).

34. The aforesaid development and transformation of the site is detailed in the July 2019 Heritage Impact Assessment (Jul 2019 HIA), at pages 24 and 48 – 50 and 81, as well as the December 2019 HIA Supplement (Dec 2019 HIA Supplement), a complete colour copy of which is attached as Annexure "**JA9.1**" at pages 16 – 17. I note that the River Club First Nations report dated November 2019 formed an annexure to the Dec 2019 HIA Supplement and is attached hereto, marked "**JA9.2**". A photograph of the Liesbeek Canal appears at page 79 of the Jul 2019 HIA. As to the nature of the in-fill material, I attach certain photographs I took at the River Club property on 11 August 2021, which show old building rubble unearthed during the groundworks, collectively marked Annexure "**JA10**".

35. I am advised by LLPT's legal representatives that the respondents' respective legal teams have sought to avoid the unnecessary duplication of lengthy annexures, by indicating which substantial annexures they intend to attach to

their papers. It is my understanding that a full copy of the Jul. 2019 HIA referred to above will be attached to the MEC's affidavit.

36. The authorised Riverine Corridor alternative contemplates a mixed-use development on the River Club property itself of approximately 150 000m^2, *viz.* residential, retail, commercial, institutional and associated uses. The development will consist of two precincts located on podium basement parking levels. An A3 copy of the development lay-out, which is depicted in figure 3 of the BAR (p. 16), is attached hereto as Annexure "**JA11**". Notable additional aspects of the development include:

36.1. Articulating and celebrating the significance of the place and its historical associations to First Nations groups by establishing an indigenous garden for medicinal plants used by First Nations; establishing a cultural, heritage and media centre, establishing a heritage-eco trail circling the site, establishing an amphitheatre for use and cultural performances by First Nations groups and the general public, and commemorating First Nations history in the area by: (i) establishing a gateway feature inspired by symbols central to the First Nations narrative at the road crossing of the ecological corridor; (ii) incorporating symbols central to the First Nations narrative in detailed design of the buildings; and (iii) naming internal roads inspired by people or symbols central to the First Nations narrative. The architect's impressions of the heritage centre, the eco corridor gateway feature and the bridge which were included in the BAR are attached as Annexure "**JA12**").

36.2. Retaining approximately 60% (~9.4 ha) of the River Club property as publicly accessible open space, with 25% of the River Club property being made available for recreational activities (including lawned areas, foot and cycling paths and an ecological corridor).

36.3. Rehabilitating the Liesbeek Canal to function as a natural watercourse, with a 40m setback buffer (which will include riverine vegetation to allow faunal movement, grassed banks and walking and cycling trails). Colour copies of artist's impressions of the rehabilitated Liesbeek Canal which formed part of the BAR are attached as Annexure "**JA13**".

36.4. Infilling the unlined course of the Liesbeek River, treeing the infilled area, providing for bioretention swales and incorporating standing water ponds or "pocket wetlands" along the "swale area" to retain stormwater in early summer and support Western Leopard Toad breeding cycles.

36.5. Infilling portions of the site above the 1:100 year floodplain.

37. Over and above the development on the River Club property itself, the development includes certain infrastructure on the adjoining City properties. These include –

37.1. Infrastructure to be constructed by LLPT: (1) a 2- lane extension of Berkley Road over the Black River; (2) a new bridge linking the site to the Liesbeek Parkway at Link Road over the original course of the Liesbeek River; and (3) the widening of the Liesbeek Parkway into the

original course of the Liesbeek River, between Station Road and Link Road.

37.2. Infrastructure to be constructed by the City: (1) the "dual" Liesbeek Parkway between Link Road and Malta Road; and (2) the upgrade of the Berkley Road Extension to the River Club property, including widening proposed Berkley Road Bridge over Black River & extending Berkley Road across site and over unlined course of the Liesbeek River to link Berkley Road (and M5) with Malta Road and Liesbeek Parkway at some point in future.

38. As detailed in the overview of the requirement of balance of convenience further below, I describe the five phases of the development over the course of the next 7 years. An aerial diagram of the development phases is included as figure 8 of the BAR at page 21, a copy of which is attached above as "**JA14**".

39. I turn now to an overview of the *prima facie* right requirement for the interim interdict, followed by a consideration of the remaining requirements for interim relief.

b. *Prima Facie* Right

40. The central premise of the applicants' case in respect of the environmental authorisation is that the Director and the MEC were bound by HWC's assessment that the HIA carried out as part of the section 24 environmental approval process under the National Environmental Management Act, no. 107 of 1998 ("*NEMA*") did not satisfy one of the mandatory provisos of section 38(8) of the NHRA, *viz.* a HIA which fulfils the information requirements specified by

the relevant heritage resource authority under subsection (3). On this basis, it is contended that the decisions fall to be set aside for failure to comply with a mandatory and material procedure and for exceeding the decision-maker's authority.

41. It is clear from the record that HWC also adopted this view. Despite numerous requests for clarification as to the exact nature of the information which remained outstanding by the LLPT's heritage consultants, department officials and the MEC himself, HWC remained intractable. In its final comment on the HIA, which was supplemented to address HWC's interim comment, HWC merely repeated, often word-for-word, the vague and open-ended criticisms contained in its interim comment. Moreover, the committee responsible for preparing the final comment (IA Committee) refused to meet with the LLPT's heritage consultants and department officials to explain their comments. In essence, HWC expected the NEMA consenting authorities to accept its mere say-so that the HIA (as supplemented) did not comply with the content requirements of section 38(3) of the NHRA.

42. I am advised that this construction of section 38(8) is untenable. The first proviso in this subsection, *viz.* the obligation of the consenting authority to "ensure that the [heritage impact] evaluation fulfils the requirements of the relevant heritage resources authority", involves an objective test. Put differently, this proviso does not require the "endorsement of the HIA [by the relevant heritage resources authority] and no other party", as insisted upon by HWC in its appeal (R: 296, para 1.17). Rather, this proviso requires the consenting authority to determine whether the HIA includes the information specified by the

relevant heritage resources authority under subsection (3), after giving due consideration to the latter's comments in this regard, any responses from the applicant, as well as any other relevant information. While the views of the relevant heritage resources authority as to compliance with subsection (3) is an important consideration, the consenting authority is not bound thereby.

43. It is clearly apparent from the founding papers that the applicants have approached this urgent application on the basis that they need not make out a case that, objectively, the HIA failed to fulfil HWC's requirements under s. 38(3). The founding papers fail to identify the alleged information defects in the HIA (as supplemented) with any adequate particularity. Instead, they provide perfunctory summaries of HWC's interim and final comments, which in themselves were devoid of any cogent reasoning as to why the HIA (as supplemented) failed to meet the relevant information requirements.

44. In other parts of the affidavit, Mr London suggests (albeit not clearly) that while the consenting authorities had the power to determine compliance with the information requirements of section 38(3), the decisions were unreasonable for failure to give proper consideration to HWC's concerns in this regard. This alternative argument is reflected in the third ground of review under section 6(2)(h) of PAJA.

45. However, I am advised that the applicants have not succeeded making out *prima facie* prospects of success on review on this alternative basis. Given their extensive reliance on the criticisms as articulated by HWC, without offering any meaningful elaboration or clarification, they have failed to establish a *prima*

facie case that the respective decisions of the MEC and the Director were not supportable on the facts before them.

46. The essence of the applicants' alternative case – as far as it can be discerned – is that the HIA (as supplemented) failed to identify, map and attach adequate significance to the intangible heritage resources at the River Club site. However, neither HWC nor the applicants have been able to articulate what the intangible heritage resources referred to are.

47. In my summary of the LLPT's defence below, I rely upon the HIA (as supplemented), as well as the heritage practitioners' written responses to HWC's final comment on the HIA dated 31 March 2020 and 22 September 2020 (attached as "**JA15**" and "**JA16**", respectively.) It is my understanding that "**JA15**" served before the Director and the MEC (it is expressly referred to in the Director's decision) when they made their decisions, while "**JA16**" served before the MEC.

48. It must be emphasised that the HIA (as supplemented) acknowledged the considerable politically-charged historical significance of the Liesbeek Riverine corridor for First Nations, of which the River Club site forms an important part. However, most of the corridor has been transformed and the cultural landscape has been broken into different areas, each with their site-specific historical, scientific, architectural or aesthetic significances. In the case of the River Club site itself, its history and usage most closely parallels with parts of the corridor adapted and used by different sporting codes.

49. The HIA (as supplemented) further detailed that, contrary to claims by the applicants, the River Club site (a reclaimed seasonal wetland) was not the site

of any historic events (such as the D'Almeida battle) or a burial ground. No tangible heritage relics or resources occur on the site.

50. Accordingly, the site has no obvious heritage significance. The question the heritage practitioners had to grapple with was how its historical, political and cultural significance could be meaningfully restored.

51. This enquiry was informed by the heritage practitioners' assessment that the presence of the Liesbeek River (and its associated histories) was the most important characteristic establishing the River Club site's sense of place. For this reason, the heritage practitioners contended that the historical significance of the site could be reclaimed through the proposed recovery of the riverine corridor (together with ecological functionality).

52. In this regard, the heritage practitioners cited the following improvements to the site and its sense of place as a heritage resource proposed in the riverine corridor development: (i) a re-established and clear identity of the Liesbeek River and its riverine corridor at this site; (ii) a re-integration of the identity of the Liesbeek River as a river from the mountain to its confluence with the Black River and to the sea; (iii) a significant improvement to the ecological functioning of the Liesbeek River as a riverine corridor and of the stormwater channel/ditch; (iv) guaranteed access to and "ownership" (through formal agreements) of the place by descendants of pre-colonial people; and (v) radically improved access to and use of the river banks and site by the wider public for various recreational activities, including closer access to the riverine corridor ecology and the nearby bird sanctuary. (These improvements are listed at page 5 of "**JA16**").

53. While the heritage practitioners recognised that the site's sense of place also relied on its "topographic flatness and openness" (which would be radically changed by the development), they emphasised that the presence of the Liesbeek River was by far the most important characteristic.

54. For reasons which neither HWC nor the applicants have been able to explain, they ignored the findings of extensive engagement with First Nations groups who concur with the aforesaid views of the heritage practitioners.

55. The applicants' claims about intangible heritage are stated in terms which do not distinguish between historical narratives, underpinning values and intangible heritage. As noted by the heritage practitioners, the general difficulty when faced with intangible heritage is first, to describe the intangible heritage; and second, to make a rational argument connecting the intangible heritage to a place. As demonstrated in this affidavit, the founding papers do neither.

56. Finally, a feature of HWC's comments (and by extension the applicants' case), is that they elide and confuse the significances of the Two Rivers Area (TRUP) and the River Club site, as pointed out by the heritage practitioners in their response. HWC's explanation for their (now lapsed) provisional protection of the River Club site is stated in such general terms that it could apply equally to many pieces of land in the Western Cape.

57. For these reasons, it will be argued at the hearing that the applicants have failed to establish a *prima facie* review case that the Director and the MEC's decisions are not supportable on the facts which served before them.

58. Finally, the applicants assert that the MEC's decision is reviewable under section 6(2)(h) of PAJA, because he conflated the information requirement in section 38(3)(b) of the NHRA with the assessment of the significance of the development's impact on the heritage resource in terms of item 2(d)(i) of Appendix 1 to the EIA Regulations. I am advised that this argument too lacks merit. It is apparent from the MEC's reasons that his reference to the regulations was in the context of the determination of, *inter alia*, the desirability of the development given the nature of the possible impacts and the proposed mitigation measures, under NEMA. This reference does not establish a *prima facie* case that the MEC applied the wrong test or failed to exercise his discretion under section 38(8) as to whether the HIA met the information requirements under subsection (3)(b).

59. The main attack on the decisions of the MPT and the Executive Mayor is the alleged continued survival of HWC's provisional protection directive issued under section 29(1) of the NHRA in April 2018. I am advised, however, that in the present case the appeals against HWC's determination did not suspend its operation. That is so, because the presumption that the common law principle providing for the suspension of a court order by an appeal applies to administrative decisions may be negatived by the implications of the statute in question. The very purpose of section 29(1), read in the context of the purpose of the NHRA as a whole, is to protect a heritage resource either from a threat or in order to allow an investigation as to the protection requirements. If an internal appeal could suspend such a directive and render the prohibitions under subsection (10) inoperative, it would negate the very purpose of section 29(1). Finally, I am advised that even if the LLPT is wrong in this respect, any

suspension as a result of an appeal does not mean that the operation of the maximum 2-year period itself is suspended or altered in some way, as the applicants would have it. The 2-year period is calculated from the date of the directive. The running of the provisional protection period is not suspended by the lodging of an appeal, resuming after the appeal has been disposed of.

60. As to the attack on the basis of a so-called "pending" decision to grade the site as a grade II heritage resource, it will be shown that the relevant resolution relied upon has been misstated in the founding papers. In any event, I am advised that any alleged failure to consider a possible future decision to grade a site cannot be considered material for purposes of section 6(2)(i) of PAJA.

61. Finally, I am advised that in order to succeed in the review and setting aside of an administrative decision for failure to follow applicable policy guidelines, an applicant must demonstrate that the departure was not supportable on the facts or not rationally connected to the policy objectives. In the present case, the founding papers fail to allege the relevant factual basis upon which the decision-makers exercised their discretion with sufficient particularity so as to found their case. Given that the applicants have had over 100 days to articulate the relevant factual bases relevant to these policy considerations, it cannot reasonably be expected of the respondents to meet a case which consists of little more than a passing reference to the policy documents.

c. <u>Irreparable harm</u>

62. As indicated above, the applicants are unable to demonstrate any reasonable apprehension of irreparable harm should the interim relief sought by them not be granted. The River Club site is totally and completely transformed, and

hence the applicants are unable to point to any heritage resource which will be irretrievably damaged or destroyed.

63. Should the applicants ultimately succeed with their part B challenge, there is no reason at all why any development which might ultimately be approved should not be fully informed by the heritage considerations which, so the applicants contend, require to be taken into account to protect the intangible heritage resources upon which the applicants seek to rely.

64. In short, any development currently being undertaken pursuant to approvals that may subsequently be set aside should the applicants succeed in part B, on the basis of not sufficiently responding to the intangible heritage resources relied upon by the applicants, will of necessity have to be altered or removed in due course.

65. Accordingly, the applicants cannot point to any right which will be irreparably harmed should interim relief not be granted. The LLPT has been advised in this regard that the applicants' right to approach this court for review relief in due course is not a right which requires protection in the form of an interim interdict. Quite apart from the right to review and set aside impugned decisions, the applicants are required to demonstrate a *prima facie* right that is threatened by an impending or imminent irreparable harm. They have failed to demonstrate any right which is threatened in this manner and to this extent.

d. <u>Balance of Convenience</u>

66. The absence of any irreparable harm on the part of the applicants also affects the balance of convenience. The harm to be endured by the applicants if interim

relief is not granted is limited to the further alteration, pending the hearing and final determination of part B, of an already entirely transformed site. On the other hand, as will be shown, the harm that the LLPT will bear if an interdict is granted is severe, irreversible and out of all proportion to that which might be sustained by the applicants.

67. In dealing with the LLPT's irreparable harm, I do so with reference to first, the LLPT's obligations to Amazon Development Centre (South Africa) (Pty) Ltd (ADC); second, the implications for the development finance secured by the LLPT; third, construction penalties and cost escalation; and fourth, the LLPT's obligations in terms of services agreements concluded with the City for the external infrastructure work detailed in the services agreements. This includes road widening, new roads, a bridge over the Black River, internal roads, water and sewerage pipe reticulation, electrical supply to the site and landscaping.

The LLPT's agreements with ADC

68. The development is to occur in two precincts and a third portion, as described below:

- Precinct 1 which is located on the southern portion of the property provides approximately 60 000m² of mixed use floor space zoned as General Business (GB) in buildings with a maximum height of 25m in the GB3 subzone and 38 m in a GB6 subzone.

- Precinct 2 which is located on the northern part of the property provides some 90 000m² of mixed use floor space zoned as General Business (GB)

in buildings with a maximum height of 38m in the GB6 subzone and 44.7 m in a GB7 subzone. Precinct 2 has been divided into precinct 2A and 2B.

- A third portion zoned special open space of not less than 49 835 m^2 (about the size of 13 soccer fields), with reasonable access in favour of the public as registered against the title deed of the property.

69. I annex a copy of a drawing showing these precincts, marked "**JA7**". Construction is to be on a phased basis, commencing with precinct 2A. I annex marked "**JA8**" a copy of a bar chart reflecting the overall planning programme.

70. The development of precinct 2A is to comprise buildings, structures, infrastructure and other improvements which the LLPT is to construct in terms of a development agreement it has concluded with ADC (the development agreement).

71. These improvements will provide for the accommodation of web services for Amazon Web Services (AWS) in two buildings and for the accommodation of a call centre (CS) in a third building. These three buildings comprise the first stage of the development of precinct 2A (the ADC premises). ADC has an option for the construction of an additional two buildings in this precinct in due course.

72. As required by the development agreement, the LLPT and ADC have concluded separate lease agreements for the web services and the call centre components (the lease agreements).

73. The current approved development is entirely dependent upon the involvement of ADC in terms of the development agreement and the lease agreements (as

financing for the development of precinct 2A and the infrastructure has been procured by the LLPT, against the security of these signed leases). It is the norm that a development project cannot be funded without signed and binding lease agreements that evidence rental income sufficient to service the funding debt. Should ADC withdraw, as it is entitled to do in certain circumstances, that will almost certainly be the end of the development as planned and approved.

74. The development agreement provides for an anticipated practical completion of work by the LLPT on 30 November 2022 and a handover of the premises to ADC for it to attend to the tenant work, and a lease commencement date of 1 December 2023, being approximately 13 months after the practical completion date. Practical completion will be achieved as evidenced by the practical completion certificate issued by the principal agent. Such certificate will certify that the buildings have been completed for practical completion purposes in accordance with the relevant design documents and that the leased premises are ready for access by ADC for the purpose of carrying out further work by it.

75. ADC requires that a portion (approximately 12 000m^2) of the retail component of precinct 1 be completed and operational (presumably for the convenience of its employees) within 6 months of its anticipated lease commencement date, and its contractual arrangements with the LLPT provide for this requirement. This is a further material element in the construction programme pressure bearing on the LLPT.

76. The 13-month period between the practical completion date and the lease commencement date is of particular importance to ADC. It is the time needed

to carry out what is defined in the development agreement as tenant works, being improvements and fitting out work according to ADC's design plans and specifications.

77. A portion of ADC's operations which are to be accommodated in terms of the development agreement are currently carried out in various leased premises in and about Cape Town. These leases are due to expire in the latter part of 2023. ADC is scheduled to start moving into its premises in the River Club development over the period December 2022 to November 2023.

78. There has unfortunately already been construction programme slippage, caused by the Covid-19 pandemic and consequent delays to the environmental and planning processes. A further delay was caused by the OCA lodging a purported appeal against the granting to the LLPT of a water use licence required in terms of the NWA. This has to date caused a construction programme delay of approximately six months.

79. The result of these delays has been to pressurise the construction programme, leaving little latitude for further delay (and any delays will trigger penalties). ADC recently agreed to reset the practical completion date and consequently the lease commencement date to those stated above, reducing its own tight tenant works programme. In the negotiations to adjust these dates, ADC has made it clear that it cannot and will not tolerate any further significant delay.

80. The development agreement contains various provisions entitling ADC to terminate that development agreement and the lease agreements in the event

of it becoming likely that the anticipated practical completion and anticipated lease commencement dates will not be achieved.

81. Should interim relief be granted pending the final determination of the applicants' part B relief, the LLPT has been advised that further work on the development would be halted for anything between 12 to 24 months, if not longer. Obviously in this event it would be clear that the anticipated practical completion date and the anticipated lease commencement dates would not be achieved. Any such delay would almost certainly see ADC terminating the development agreement and the lease agreements, as it would be entitled to do. Indeed, even a reduced delay of 6 months will result in termination by ADC.

82. ADC received a number of bids for the provision of premises for its operations, culminating in it concluding the development agreement with the LLPT. There can be little doubt that alternative opportunities will be offered, be it by those who previously put up proposals to ADC or by other parties, to accommodate ADC (in South Africa or outside of South Africa all together). A further possibility in the event of ADC no longer tolerating further delays would be for it to negotiate fresh leases in its existing premises.

83. Accordingly, ADC's exit from the River Club development would almost certainly result in this development not going ahead. Over and above the financial consequences to the LLPT, all the current construction workers would immediately be out of work. The heritage and social compact commitments to the First Nations would also not materialise (over and above the socio-economic impacts stated below).

84. In the accompanying affidavit of environmental consultant S Reuther of SRK Consulting South Africa (Pty) Ltd (SRK), she details the socio-economic impacts of the development. Costs and data are presented by Ms Reuther as at the date of her study, as indicated by her.

85. Estimated capital investment costs amount to R3.9billion, which is highly significant for a single development, as the total investment (over approximately 7 years) represents:

- approximately 1.4% of the City's GDP of R283.28 billion in 2015 (WCG, 2016); and
- approximately 35.5% of the City's construction sector's contribution of R11.11 billion in 2015 (WCG, 2016).

86. As pointed out by Ms Reuther, the River Club development may increase total economic output by approximately R7.4billion over the approximate 3 to 5 year construction period.

87. Ms Reuther estimates that the development will directly employ an average of 5239 workers during the 30 month construction period, at times peaking at 8382 workers. Total direct construction employment amounts to approximately 157 170 person-months.

88. Ms Reuther estimates that the development may increase total employment by some 19 000 jobs, of which 13 700 would be indirect and induced for this project. The creation of some 5 239 direct and possibly some 13 700 indirect and induced jobs will contribute meaningfully towards employment at a regional level, and the construction sector in particular.

89. The cost of direct employment during the construction period is estimated at some R1.63 billion for the 5 years of construction, with the average wage being above the South African minimum wage of R3 500.00 in 2017, generating income for a large number of households.

90. Assuming that 5 239 direct employees support between 1.0 (skilled labour) and 2.65 (semi- and low-skilled labourers) dependants, an additional 12 500 people benefit from income earned by direct employment at the River Club development. Assuming further indirect and induced employment of approximately 13 700, this could increase the number of benefitting dependents by another approximately 30 000.

91. Further economic benefits and impacts as described by Ms Reuther go to increased State and local government revenue, and an increase in centrally located housing, including inclusionary housing. In this regard, of some 600 residential units, at least 120 units will be for inclusionary housing.

92. While the River Club development will see a loss of the private open space previously enjoyed by golfers, this will be replaced by significantly improved open space that is more accessible to the public. Open space facilities will include high quality landscape areas, pathways, lawns, river walks and rehabilitated watercourses. This high quality open space provided by the River Club development will be accessible to a wider public, compared to the current situation.

93. In the highly unlikely event of ADC not cancelling the development agreement should the development be suspended by an interim interdict, the development

agreement provides for liability to ADC should the LLPT not deliver the premises to ADC by the anticipated practical completion date.

94. In this event, the LLPT will be liable to ADC for liquidated damages equal to two days of principal rent as defined in the lease agreements for every day of delay until the premises is delivered to ADC. These liquidated damages which may be invoked for at least 6 months prior to the right of ADC to cancel, amount to approximately R454 000.00 for every day of delay. Needless to say payment of damages of this magnitude will render the River Club development entirely unviable and the LLPT would have to terminate it and leave the site in its current transformed state, without implementation of environmental rehabilitation and the heritage memorialisation. Added to this will be the immediate loss of jobs for the currently employed construction workers.

Development finance

95. FirstRand Bank Limited, acting through its Rand Merchant Bank Division (RMB), has agreed to provide infrastructure and development finance to the LLPT for the development, in terms of a development facility agreement for the precinct 2A buildings and an infrastructure development facility agreement which relates to land and Infrastructural costs of the development as a whole, both internal and external (the loan agreements).

96. In terms of the development facility agreement RMB is to make available R1 106 684 000.00 as a development loan facility, repayable 30 months after the first advance date. The purpose of the development facility is to fund the development costs for precinct 2A, as defined. A non-refundable financing fee

of R8 300 126.00 (plus VAT) is payable by the LLPT to RMB for the granting of this facility.

97. The land and infrastructure development facility agreement contains a similar provision for a non-refundable financing fee of R1 827 169.00 (plus VAT).

98. If the development is halted pursuant to an interdict granted in part A, both non-refundable financing fees are still due and payable by the LLPT to RMB (and would amount to a penalty for not implementing the facilities).

99. Both of the loan agreements provide for the consequences of events of default entitling RMB to cancel the loan agreements and the facilities, in which case in addition to the non-refundable financing fees becoming due and payable within 10 days of demand, RMB is entitled to immediate repayment of all advances made to the LLPT prior to cancellation (plus interest until paid), as well as recovery of all damages it may suffer as a result of cancellation. An event of default includes the occurrence of a material adverse change which is not capable of being remedied or mitigated against.

100. A material adverse change means the consequence/s of any event, circumstance or matter or a combination of events, circumstances or matters, which has or is reasonably likely to have a material adverse effect on the LLPT's ability to perform its obligations, or on the property, business, assets or financial condition of the LLPT resulting in its ability to perform any of its material obligations in terms of the development facility being materially or adversely affected.

101. A suspension of the development pursuant to an interdict granted in part A in these proceedings would constitute an act of default under both of the loan agreements. Needless to say, should ADC terminate the development agreement and the lease agreements, this too would be a material adverse change and an act of default, entitling RMB to cancel the loan agreements.

102. In the event of RMB's cancellation of the loan agreements, the LLPT will be liable to RMB for substantial costs and damages, over and above the debt restructuring fees of R8 300 126.00 and R1 827 169.00. RMB's legal and bond registration fees amount to R1 350 000.00, to be paid by the LLPT. A further fee to Investec to settle the land purchase price finance agreement will be payable, in an amount of R1 250 000.00.

103. In addition, penalties payable to RMB on cancellation of the loan agreements, as and for damages, are estimated to amount to R22 120 000.00 in respect of the development loan facility and R1 620 000.00 in respect of the infrastructure development facility.

104. Were it to be possible for the development in some form or another to proceed after a suspension, fresh applications for development finance would have to be submitted – a complex, time consuming, expensive and uncertain process.

Construction costs and penalties

105. The main contractor for the development is WBHO Construction (Pty) Ltd (WBHO), appointed in terms of the principal building agreement of the JBCC Series 2000 (edition 4.1, code 2021, March 2005) (the JBCC contract).

106. The LLPT's construction cost consultants MLC Quantity Surveyors SA (Pty) Ltd, in the person of Mr G Haldane, has calculated and quantified certain construction and related costs which are relevant for present purposes.

107. Assuming a suspension of building work on 25 September 2021, the value of completed construction work on the ADC premises, including apportioned land cost and professional fees, will total R349 860 780.00. Were the development not to proceed as a result of the granting of an interim interdict, this amount would in substantial measure represent a sunk and wasted cost. Further details of Mr Haldane's calculation (and all of his calculations to which I refer) are set out the accompanying affidavit of Mr Haldane.

108. The value of work completed as at 25 September 2021 in respect of infrastructure for the development as a whole will amount to R48 989 259.00, as calculated by Mr Haldane.

109. A delay in the building work of 12 to 24 months would result in the termination of the JBCC contract. Were WBHO to remain on standby to resume the works the LLPT would be liable to it for standing time (calculated over 18 months) of R115 067 517.00. The magnitude of this sum makes it inevitable that termination of the JBCC contract would be the only option.

110. Clause 39 of the JBCC contract deals with cancellation on cessation of works for a continuous period of 90 calendar days due to circumstances beyond the control of either party. The granting the interim relief sought by the applicants would bring clause 39 of the JBCC contract into operation.

111. Clause 39 of the JBCC contract provides that either party may cancel the agreement on cessation of the works for a continuous period of 90 calendar days or an intermittent period totalling 120 calendar days due to circumstances beyond the control of either party. Where one party considers cancelling in these circumstances 10 days notification of such intention is to be given.

112. Mr Haldane has calculated the standing time costs which would be payable by the LLPT in this event, based upon the 10 day notification period and the 90 day delay period contemplated by clause 39. An amount of R13 028 531.00 would be payable by the LLPT to WBHO.

113. Mr Haldane has also calculated the delay penalties due by LLPT to ADC as a result of construction delays of 6 months, with ADC then terminating the development agreement and the lease agreements. In terms of clause 10.10 of the development agreement, if the developer does not deliver the premises to the tenant by the anticipated practical completion date, the developer will owe the tenant liquidated damages equal to two days of principal rent for every day of delay until the premises is delivered to the tenant. If practical completion is not achieved within 6 months of the anticipated practical completion date, the tenant has the right to terminate the agreement (and each of the lease agreements) within 30 days of such date, on written notice.

114. The liquidated damages for which the LLPT would be liable to ADC in the event of clause 10.10 cancellation would amount to R83 011 296.00, while the cost of the construction delay would amount to R35 232 029.00. Details of how the sum of R83 011 296.00 is arrived at appear in Mr Haldane's report summary.

Details of the calculation of the cost of the construction delay are set out in annexure D to Mr Haldane's report summary.

115. In addition, in the event of termination by ADC in terms of clause 10.10 of the development agreement, the LLPT would be liable for interest on development costs amounting to R14 415 750.00, as set out under item 5 of Mr Haldane's report summary.

116. Mr Haldane has made certain further cost calculations, for illustrative purposes. In respect of precinct 1, he has calculated that an 18 month delay would result in an increase in the estimated construction cost of R141 634 652.00. An 18 month delay would result in an escalation of infrastructure costs of R21 306 314.00.

Liability in terms of the services agreements

117. Planning approval for the River Club development included a condition that the LLPT was to pay development contributions in respect of the construction of external infrastructure. In terms of services agreements concluded between the LLPT and the City, the LLPT undertook to construct certain of the external infrastructure, the cost of which was to be set off against development contributions payable by it. The services agreements provided that should the LLPT fail for any reason to construct the infrastructure in question, the City would do so and recover the costs from the LLPT. RMB has provided a payment guarantee to the City in respect of the LLPT's obligations in this connection, in the sum of R85 823 597.00. The LLPT will be liable to RMB for the full amount of R85 823 597.00 as and when the City calls for payment to cover the cost of the infrastructure construction which the City would have to undertake.

118. The applicants assert that the balance of convenience favours the granting of an interdict, because of the *'magnitude of the destruction that will result if it is not granted'*. As pointed out, this contention is misconceived and entirely misses the point. Nor does the quantity of objections (seemingly also relied upon by the applicants) assist in assessing the balance of convenience. Finally, the applicants appear to suggest that unless interim relief is granted their review remedy will be undermined. This is certainly not the case. The applicants' review rights are protected and there is no reason why they should not obtain appropriate review relief, if they can demonstrate the unlawfulness of the impugned decisions.

e. <u>Alternative Remedy</u>

119. I have pointed above to the fact that the applicants have not demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm. Assuming that the applicants were in a position to establish some or other harm requiring protection, the LLPT has been advised that the applicants could have instituted expedited review proceedings rather than belatedly claiming interim interdictory relief in circumstances of self-created urgency.

<u>Part 2: *AD SERIATIM*</u>

120. I will now deal with the specific allegations made in Mr London's founding affidavit. As I have already addressed many of the allegations contained in the founding affidavit, I will not respond to each and every allegation made. To the extent that I may fail to deal with any specific allegation, this is not to be taken as an admission. Any allegation made in Mr London's affidavit which is not in

accordance with the LLPT's version as set out above, must be taken to be denied.

_AD_ THE FOUNDING AFFIDAVIT

Ad paragraphs 1 – 11: Parties

Ad paragraph 1

121. The contents of the paragraph under reply are noted. As stated in paragraph 17 above, the OCA resolved as far back as 24 November 2020 to institute "any legal proceedings" to stop the development and to authorise its management committee to grant any power of attorney and sign any documents on its behalf.

Ad paragraphs 2 - 3

122. The contents of the paragraph under reply are noted, saved to state that my affidavit details certain instances where the founding affidavit contains incorrect statements of fact or has omitted material documents.

Ad paragraph 4

123. The contents of the paragraph under reply are noted, save to reiterate that it is unclear whether the GKKITC is properly before the Court. In amplification hereof, I reiterate what I have stated above.

Ad paragraph 5

124. The description of the trustees of the LLPT is correct.

Ad paragraph 6

125. Save to reiterate that proper service of these papers does not appear to have been effected on HWC, the contents of the paragraph under reply are noted.

Ad paragraphs 7 - 11

126. The contents of the paragraphs under reply are admitted.

***Ad* paragraphs 12 – 21: Nature of this application**

Ad paragraph 12

127. As demonstrated in this affidavit, it is not accurate to describe the approved riverine corridor alternative as a so-called "megadevelopment". It is an emotive and subjective description.

128. As already detailed above, bulk earthworks commenced at the River Club site on Monday, 26 July 2021 and continue.

Ad paragraph 13

129. For reasons already foreshadowed at paragraphs 47 - 56 and elaborated upon further below, it is denied that the development will result in the permanent and irreversible loss of a valuable heritage resource.

130. It is not correct that the HWC shares the OCA's views, as alleged. While HWC expressed reservations as to whether HIA complied with the content requirements of section 38(3) in the context of the first proviso under section 38(8) of the NHRA, HWC has, to the best of my knowledge, never expressed a

view that the development will result in a "permanent and irreversible loss of a valuable heritage resource."

131. Were this indeed the view of HWC, it could have sought the review and setting aside of the environmental authorisations. I am not aware of any steps by HWC to institute judicial review proceedings.

132. For reasons detailed elsewhere in this affidavit, it is denied that the actions of the Director and the MEC nullified HWC's regulatory function under section 38(8) of the NHRA.

Ad paragraph 14

133. I reiterate that Mr London uses the term "River Club site" indiscriminately across the founding papers when referring to the development site as a whole, or to the LLPT's property which is included in the development site. The LLPT's application documents in the environmental and planning authorisation processes defined the "River Club property" as the LLPT's erf 151832 (of almost 15 hectares in extent) while the "River Club site" was defined as comprising of portions of 12 properties, *viz.* the LLPT's erf 151832, as well as the 11 adjacent erven owned by the City.

134. Given that the paragraph under reply refers to the "River Club *itself*" and "the property", I understand this paragraph to refer to the River Club property.

135. As to the allegation that the River Club property embodies "exceptional heritage significance by virtue of its symbolic and actual association with early confrontations between the Peninsula Khoekoe and the first Dutch settlers, I say as follows:

136. First, this opaque description of the alleged heritage significance of the River Club property draws no distinction between tangible heritage and intangible cultural heritage. To the extent this paragraph refers to the intangible heritage of the River Club property (or even the River Club site), I am advised by Dr. Townsend that no attempt has been made here, or elsewhere in the affidavit, to identify any intangible heritage associated with the River Club property or the River Club site, or to explain how any putative intangible heritage could be adversely affected by the development.

137. Second, the history of the broader area within which the River Club property and the River Club site are situated, *viz.* the Two River Local Area (Two Rivers Area) has been exhaustively detailed in section 4 of the HIA and is uncontested (I note that the Two Rivers Area was previously referred to as the Two Rivers Urban Park (TRUP)). However, in respect of the River Club property and the River Club site (which make up 5% of the Two Rivers Area), comprehensive research carried out on the First Nations history by the Western Cape Provincial Government's Department of Transport and Public Works (the DTPW) in 2019 confirms the following findings of the HIA:

137.1. No cross-cutting, narrative-defining event or function can be attributed specifically to the River Club site;

137.2. No tangible or intangible reference has been made to the First Nations people having settled specifically at the River Club site;

137.3. The River Club site was most likely part of an early precolonial landscape from which the members of the First Nations present there upon the arrival of European settlers were displaced and/or precluded from having

further access after colonial conquest of that land as part of a much larger portion of the Cape Peninsula that was occupied by the Dutch colonisers; and

137.4. The Liesbeek River is an important tangible heritage resource that remains in the broader transformed landscape.

138. The HIA finds that –

138.1. Apart from the Liesbeek River corridor, the River Club site itself has little obvious heritage significance;

138.2. Apart from the Liesbeek River corridor, no tangible heritage relics or resources occur on the River Club site;

138.3. No historic events have been found to have occurred precisely or exclusively on the River Club site;

138.4. The Liesbeek River corridor is a tangible heritage resource that remains in this transformed landscape, is a potentially strong symbol of past events and reflects the history and significance of the area; and

138.5. The restoration and memorialisation of the river course (where it currently flows through a sterile concrete canal), its corridor and the confluence with the Black River would be a heritage benefit.

139. As to the allegation that the River Club property (or even the River Club site), embodies exceptional heritage significance by virtue of its location within a broader "urban park", I say as follows:

140. First, the heritage specialists maintain that the Two River local area (or TRUP) is comprised of a variety of precincts of very different topographies, histories of use, of development-type, each with its own qualities and a variety of potential heritage significances. However, as already mentioned above, they are of the view that the River Club site (apart from the Liesbeek River corridor) has little obvious heritage significance. In this regard, I refer to page 108 of the BAR, a relevant extract of which is attached above as Annexure "**JA7**", as well as page 73 of the July 2019 HIA (R: 189) and page 18 of the Dec 2019 HIA supplement (R: 242 and "**JA9.1**").

141. More specifically, the heritage specialists cite *inter alia* the following considerations in support of their aforesaid conclusion that the River Club site (apart from the Liesbeek River) has "little obvious heritage significance":

141.1. The site is entirely an infill site; and certainly reclaimed from wetlands before 1934 and iteratively reshaped since then.

141.2. The valley (or floodplain) in which the site is located, although an important component of the Liesbeek River as a landscape, has been transformed by urban development of various sorts;

141.3. The site is relatively small, comprising only 5% of the Two River local area;

141.4. No tangible heritage relics or resources occur on the site; and

141.5. No historic events are attributed to have occurred at the site.

In this regard, I refer to page 108 of "**JA7**" (the BAR extract) attached above, the following pages of the incomplete copy of the July 2019 HIA: p. 72 (R: 188); p. 82 (R: 198), as well as pages 23 and 113 of the July 2019 HIA which forms part of the extract of the HIA omitted from "LL14", marked Annexure "**JA9.1**".

142. Second, the Two Rivers Area is a very large and arbitrarily defined area. According to the heritage and indigenous heritage specialists, the history that is cited and argued to give significance to the River Club site in fact extends over a far broader area. In this regard, the heritage consultants have repeatedly argued that much of the Liesbeek Riverine corridor has considerable politically-charged historical significance. They accept and acknowledge that the River Club site is a significant part of this corridor and that, in turn, the River Club site is an important, but small part, of the Two Rivers area.

143. However, the Two Rivers area has been significantly transformed, and it is a "cultural landscape" which has been broken into areas of different character and other layered and different significances. For example, the neighbouring SAAO and Valkenberg Hospital sites are very large parts of the Two Rivers area with their own considerable separate site-based historical, scientific, and architectural and/or aesthetic significances.

144. In contrast, the River Club site's history and usages most closely parallel the parts of the corridor adapted and used by different sporting codes. However, unlike most of those pieces of land, it was not a part of an early agricultural land-holding (probably because it was too low-lying and therefore subject to flooding).

145. Finally, as to the allegation that the River Club site is an important "green lung" in the City, I say as follows:

145.1. The heritage specialists are of the view that, while the development may lead to significant visual impacts, transformation of the site's character is of relatively low heritage significance.

145.2. The development and the riverine corridor in particular will be publicly accessible. The open space component is deemed sufficient for a development of this nature. Sixty-five percent of the site will is to be retained as open space, and twenty-five percent of the site will be made available for recreational activities in open space areas.

145.3. The development will allow a more meaningful enjoyment of the open space vistas associated with the Raapenberg Bird Sanctuary by the public.

145.4. The wider open space system of which the site forms part contains campus style development (e.g. SAAO and Valkenberg). These institutions illustrate that development can be accommodated within the Two Rivers local area, provided that pockets of green space and ecological connectivity are retained (as per the development proposal).

145.5. There are very extensive open space areas in the immediate vicinity, comprising active open spaces such as sports fields and passive open spaces including parks and environmental areas.

145.6. Within the greater the Two Rivers local area there remain very large areas in public ownership which cannot be developed and (along with

open spaces that have been included in the development proposal) could also form part of the public open space system.

145.7. Considerable social (as well as heritage and ecological) benefits are anticipated from extending the public movement corridor along the rehabilitated, re-shaped and natural Liesbeek River corridor as contemplated in the approved riverine corridor alternative.

146. Regarding the carbon sequestration potential of the site:

146.1. Indigenous vegetation proposed in landscaped and ecological areas (~6 ha of the site) will have a significantly higher carbon sequestration potential than the current mowed lawn that comprised the golf course that formerly occupied most of the site and that will offset the impact of the loss of ~12 ha of lawn at the site.

146.2. As to the site's role in reducing the urban heat island effect:

146.2.1. Lawns have a limited role in reducing the urban heat island, and the "unlined course" of the Liesbeek River (backwater) is unlikely to have a significant impact (cooling effect) on ambient temperatures even locally.

146.2.2. Indigenous vegetation proposed in landscaped and ecological areas (6 ha of the site) will promote urban cooling to a greater extent than existing lawned areas, and thus promote urban cooling (albeit insignificantly in a metropolitan context).

Ad paragraph 15

147. I am advised that the designation of a site for provisional protection under section 29(1)(a) of the NHRA does not, in and of itself, evidence the type of significance claimed by the applicants. The purpose of this sub-section is to conserve a heritage resource through "negotiation and consultation" so as to alleviate a threat (section 29(1)(a)(ii)), or to permit an investigation by the provincial resources authority in terms of this Act (section 29(1)(a)(iii)). However, given the extent of the additional legal controls provided for under section 29(10), this designation may not exceed two years.

148. In the present case, the provisional designation was motivated on the basis "[of the need for] more effective legal controls than those provided for in section 38(8) [of the NNHRA] and specifically to investigate the desirability and extent of the area to potentially be declared as a Provincial Heritage Site". In this regard, I refer to paragraphs 13 – 15 of the Independent Tribunal Appeal Ruling dated 14 April 2020, which dismissed appeals lodged against the provisional protection decision of the HWC by the LLPT, the DEADP and the DTPW. I am advised that the ruling will be attached to the City's answering papers.

149. It is common cause that, for reasons which remain unclear, HWC failed to conduct any investigation into the desirability of declaring the River Club site as a provincial heritage site during the two-year period of statutory provisional protection. Nor did HWC make any meaningful effort to consult or negotiate with the LLPT in order to mitigate or alleviate any perceived or purported threat.

150. I point out that after being asked to engage with the LLPT during the IAT appeal process, HWC's CEO did propose a heritage centre and a buffer. LLPT advised

HWC's CEO that it would gladly incorporate these elements into the design proposal. Indeed, HWC's CEO stated that, as far as he was aware, this was the first time a private developer offered to incorporate such elements. Despite LLPT's willingness to accommodate these requests, HWC thereafter failed to consult or negotiate with the LLPT as they were required to do under section 29(1) of the NHRA. Notably, pursuant to extensive engagement with First Nations groups, the final design proposal for the riverine corridor alternative set out in the BAR went far beyond what HWC's CEO had requested.

151. Mr London concedes that this protection "has now lapsed". This statement directly contradicts his averments at paragraphs 108 – 113. There, he belatedly claims that, by operation of the common law, the internal appeal process suspended the provisional protection notice and that it remains in operation until April 2022.

152. For reasons which I detail in my *seriatim* response to paragraphs 180 – 182 further below, I deny the accuracy of Mr London's account of the recommendation by the Council of HWC regarding a possible declaration of the River Club site as a national heritage site. Moreover, this recommendation does not, in and of itself, provide a compelling factual basis for the heritage significance of the River Club site as alleged by the applicants.

Ad paragraphs 16 - 17

153. I am advised that the paragraphs under reply accurately describe the operation of section 38(8) of the NHRA. However, to the extent Mr London seeks to imply that the process under section 38(8) is less onerous than that prescribed under section 38(4) of the NHRA, it is denied.

Ad paragraph 18

154. For reasons elaborated upon below, the criticisms of the section 38(8) process in the present case in the paragraph under reply are denied.

155. The HIA (as supplemented) which served before the Director and the MEC was comprehensive and based on extensive independent research. Moreover, neither the Director nor the MEC "ignored" HWC. The records of decision demonstrate that they took proper account of all the heritage-related information and complied with the procedural and substantive requirements of section 38(8) of the NHRA.

156. As detailed elsewhere in this affidavit, the heritage specialists conducting the HIA repeatedly requested further clarification from HWC regarding certain opaque and open-ended language in its various comments on the HIA. However, HWC merely repeated earlier statements, without providing any meaningful clarification of its position.

157. In point of fact, the MEC was at pains to establish HWC's position in order to ensure a proper exercise of his discretionary powers under section 38(8). Notably, correspondence pertaining to these attempts by the MEC and the failure of HWC to provide him with any further meaningful comment has been omitted from the founding papers. This correspondence is detailed at paragraphs 285~~284~~ - 290~~289~~ below.

Ad paragraph 19

158. The contents of the paragraph under reply are denied.

158.1. It is not correct that the LLPT abandoned the HIA undertaken by Ms. O'Donoghue in 2017 (Phase One HIA).

158.2. The HIA undertaken by Dr. Townsend and Mr Hart, as supplemented, as well as the self-standing assessment of the intangible heritage relevant in the River Club First Nations report, were comprehensive and based on independent research. The characterisation of these assessments as "anomalously sympathetic" is disingenuous.

158.3. The environmental authorities complied with their duties under section 38(8) and exercised their respective discretionary powers in a reasonable and rational manner.

159. I note that my affidavit is accompanied by the expert affidavits of Dr. Townsend and Mr. Hart. They confirm their independence as experts and reject Mr London's characterisation of their HIA as "anomalously sympathetic".

160. Significantly, the OCA did not produce any research or specialist study to discredit the findings of the heritage experts who carried out the section 38(8) HIA. No interested and affected party (IA&P), including the OCA, objected to the independence of any of the HIA specialists in the section 38(8) process. Indeed, the MEC concluded that "the appellants have not demonstrated any conflict of interest of any members of the basic assessment process project team and specialists" (R: 398, para 5.78.7).

161. Mr London's characterisation of the HIA is also at odds with the fact that the July 2019 HIA concluded that the canal through which the Liesbeek River flows currently, more so than the old stormwater channel, required "celebration". This

finding necessitated an entire redesign by LLPT of the development plan at significant cost. The rehabilitation of the concrete canal that comprises the current Liesbeek River's course will also involve significantly higher costs. The amended plan provides further for a wider buffer area on the side of the stormwater channel, transforming it into a meaningfully viable Riverine corridor.

162. Finally, I must point out that Mr Jenkins of the GKKITC was invited to participate in the assessment process conducted by Mr. Arendse to establish the intangible heritage of the River Club Site for First Nations. Mr Jenkins initially participated in the public engagement process, but elected to withdraw after a brief period.

Ad paragraph 20

163. For reasons detailed further below, the contents of the paragraph under reply are denied. I must add that Mr London's perfunctory reference to the alleged invalidity of the decisions under the Planning By-Law are not supported by any adequately particularised allegations in the founding papers.

Ad paragraph 21

164. The contents of the paragraphs under reply on noted.

***Ad* paragraphs 22 – 24: Urgency**

Ad paragraph 22

165. For reasons already detailed at paragraphs 6 - 22 above, I reiterate that to the extent any urgency exists, it is entirely self-created.

166. I am advised by the LLPT's attorney of record, Mr. Smith, that a copy of the founding affidavit *sans* the notice of motion was delivered to him *via* e-mail at 14h44 on 2 August. After he requested a copy of the notice of motion at 16h01, the notice was emailed to him immediately. A copy of the aforesaid email exchange is attached as Annexure "**JA19**".

167. I note that the notice of motion was signed by the applicants' attorney of record on 30 July 2021. No timetable is provided for the hearing of part A if the matter is opposed.

168. I am advised by Mr Smith that the bulk of the respective records of decision (including the reasons) which pertain to the impugned decisions were publicly available by the time the respective 180-day time periods under section 7(1) of PAJA started to run. While these records are voluminous, the applicants' representatives (Mr London and Mr Jenkins) would necessarily have been familiar with the contents thereof by virtue of their active involvement in the public participation processes since 2017 on behalf of the OCA. As already detailed at paragraph 16 above, the applicants have also enjoyed legal representation since at least the last few months of 2020. As such, any complexity of the publicly available records of decision does not constitute an adequate reason for a delay of over 5 ½ months. In any event, the main thrust of this challenge focuses on the correct interpretation of section 38(8) of the NHRA, which involves a narrow factual enquiry.

169. It is also not correct that the groundworks for precinct 2A are "defacing" the heritage value of the site or the receiving environment. In this regard, I say as follows:

170. First, it is not correct that the River Club site is a "relatively untransformed open space". The site is entirely an infill site, reclaimed from wetlands before 1934 and iteratively reshaped since then.

171. Second, apart from the Liesbeek River, the River Club site itself has little obvious heritage significance. No tangible heritage relics or resources occur on the site and no historic events are attributed to have occurred at the site.

172. Third, the Liesbeek River is the only tangible heritage resource that remains in this transformed landscape and is potentially a strong symbol of past events, reflecting the history and significance of the area. However, the restoration and memorialization of the river course and confluence would be a heritage benefit.

173. Fourth, a quality like openness or "greenness" is not a heritage resource, but it may give significance to a place. The HIA (as supplemented) acknowledged the qualities of "openness" and "greenness" as significant qualities of this part of the Liesbeek River and what would have been low-lying wetlands. However, although these qualities will be interrupted by the development, they will not disappear. Rather, they will be transformed to provide better greenness and greater ecological functionality, as well as a clearer, more distinctly recognisable and natural riverine corridor. The "openness" quality of the site will be interrupted, but the topography will still exist. Like the surrounding components of the environment, it will be transformed into a more useful and integral part of the urban environment.

174. In this regard, it should be borne in mind that the development will be publicly accessible and 35% of the site will be retained as public open space, which will be made available for recreational activities by the general public. Moreover,

the development will allow the public to enjoy open space vistas associated with the Raapenberg bird sanctuary more meaningfully than is currently the case. The same will apply to access to an enjoyment of the Liesbeek River along the rehabilitated and restored natural water course and its immediate environs. For the reasons set out at pages 26 – 28 of the Dec. 2019 HIA Supplement ("**JA9.1**"), the transformation of the site's character is considered to be of relatively low heritage significance.

Ad paragraph 23

175. The erection of fencing was done to facilitate the search and rescue operation. As to the current state of earthworks, including bulk earthworks and piling activities, I have already explained how those activities have proceeded since the end of July this year.

Ad paragraph 24

176. For reasons detailed below, I deny that the steps outlined in the paragraph under reply provide an adequate reason for the 5 ½-month delay in initiating these proceedings and then on such truncated time periods.

Ad paragraph 24.1

177. For reasons already detailed at paragraphs 11 - 16 above, I reiterate my denial that the substantial delay in initiating these review proceedings can be justified in light of the fact that the Executive Mayor's decision in respect of the land use authorisations was only issued on 19 April 2021. A responsible litigant would not have waited almost two months after receipt of the MEC's 22 February

appeal decision to commence preparation of the review. I deal with the limited relevance of the then pending WULA decision further below.

Ad paragraph 24.2

178. It is not correct that the LLPT failed to respond to the OCA's request for an undertaking to delay commencement of the development. In this regard, I refer to what I have already stated at paragraph 20 above.

Ad paragraph 24.3

179. While it is so that the LLPT could not commence with the development without a WUL, a reasonable litigant in the applicants' position would not have delayed the lodging of review proceedings of the impugned decisions on the basis that the WULA had yet to be determined.

180. Apart from the obvious fact that the WULA process has no bearing on the judicial review of these decisions, it would have been reasonably clear to the applicants that the WULA decision was imminent. In this regard, I note that the WULA process took some 3 years to complete. The WULA was initiated on 28 June 2018 and finally granted on 6 June 2021.

181. Moreover, given that the applicants had secured legal representation by at least the end of 2020, they would have been alive to the reasonable likelihood that the effect of any appeal against the granting of the WUL could be suspended pursuant to section 148(2)(b) of the NWA.

Ad paragraph 24.4

182. It is not correct that the OCA lodged an appeal against the Minister's decision to issue the WUL. Rather, the appeal was lodged with the Water Tribunal against the decision by the DWS' Acting Regional Head: Western Cape.

183. While the LLPT cannot speak to the circumstances in which the OCA requested the Acting Regional Head: Western Cape to provide them the reasons for his decision, it is opportunistic to imply that the LPPT sought to frustrate the appeal by failing to be "forthcoming" as to the "reasons".

184. Given the fact that the OCA lodged the appeal without the benefit of any reasons within a matter of 7 business days from the date of notification, the unavoidable inference is that the appeal was lodged for the main purpose of suspending the WUL and preventing commencement of the development. Having failed to adhere to their self-imposed deadline for lodging the review application by 21 June 2021, I say that this is not the conduct of a reasonable litigant.

Ad paragraph 24.5

185. On 28 June 2021, the LLPT delivered a substantive responding statement to the OCA's appeal, together with a motivated request to the Minister of Human Settlements, Water and Sanitation for the lifting of the then applicable suspension in terms of section 148(2)(b). Copies of these documents were simultaneously delivered to the OCS attorneys under cover of an email.

186. Accordingly, to the extent the paragraph under reply seeks to suggest that the OCA only learned of the LLPT's responding statement to the OCA's appeal on 7 July, it is denied.

187. On 22 July 2021, the Minister advised the LLPT and the OCA's attorneys of her decision to lift the suspension. Copies of these letters are attached as "**JA20**" and "**JA21**", respectively.

188. It is denied that the Minister exercised her discretion under section 148(2)(a) of the NWA inappropriately, or otherwise unlawfully. The absence of appropriately particularised allegations in this regard precludes any meaningful response. In any event, the Minister's decision is not the subject of these proceedings.

Ad paragraph 24.6

189. For reasons already detailed at paragraphs 6 - 22 above, I say that the OCA's letter of demand dated 21 June 2021 is of little, if any, relevance given the 5 ½ month- long delay in initiating these proceedings.

Ad paragraph 24.7

190. I note that the applicants have attached the first draft of the letter transmitted by the LLPT's attorney of record at noon on 26 July 2021. Later that afternoon, Mr. Smith transmitted a slightly updated version of his letter. A copy of the covering e-mail and accompanying letter is attached as annexure "**JA22**". This updated letter substituted the words: "[the relevant records of decision] all also clearly suggest that your client's assertions are without merit" for the words: "all clearly suggest otherwise".

Ad paragraphs 25 – 28: The River Club Development – The development

Ad paragraph 25

191. I reiterate that the River Club site is not limited to the River Club property (erf 151832), but includes certain portions of eleven adjacent properties owned by the City. The River Club property measures some 14,8425 hectares in extent.

192. It is not necessarily incorrect to say that the River Club site is located at the confluence of the Black and Liesbeek Rivers. However, it is more accurate to say that while the site's north-eastern corner (some 60m of which forms part of the proposed restored riverine corridor) reaches the confluence of the Liesbeek and Black Rivers, the site is located on the western bank of the currently canalised Liesbeek River.

193. The reference to the "residual water course", bordering the River Club site to the west and north-west must be understood to mean the excavated and unlined channel of the old Liesbeek River course. In this regard, the Dec. 2019 HIA Supplement notes that –

193.1. The pre-1958 river-course carries no river water, and is therefore not authentic and has little integrity as such; and

193.2. The lower reaches of the rivers, especially where flowing slowly through very flat floodplains, tend to change their course periodically through sudden flooding, thus establishing a series of "authentic" but separate river-beds over time (at pages 15 – 18 of "**JA9.1**", read together with page 87 of the Jul 2019 HIA).

194. In the circumstances, the Dec. 2019 HIA Supplement concluded that the current canalised bed of the Liesbeek River to the east of the River Club site constitutes a legitimate and feasible course for the recovered riverine corridor, the amenity value of which can be enhanced without damaging the historical or locational significance and authenticity of the Liesbeek River.

195. Furthermore, the independent freshwater ecologist, Dr L Day, concluded that–

195.1. The proposed vegetated shallow wetland swales and deepwater pools, set within a broad open space area and planted with indigenous vegetation, would more closely replicate the floodplain wetlands once believed to have been associated with the Liesbeek River, as well as with the seasonal Black River.

195.2. The implementation of the preferred development alternative (as authorised by the relevant decision-makers), "would, from a biodiversity and general aquatic ecosystems perspective, be a positive impact, and its implementation is recommended" (in this regard, I refer to section 9.1 of the Biodiversity Impact Assessment, an extract of which is attached as Annexure "**JA23**"); and

195.3. The western course is a transformed habitat, with limited ecological function, fed primarily by stormwater and back-flow of polluted water from the Black River. In this regard, I refer to section 3.1.6 of "**JA23**".

196. As detailed in the HIA, in the 1950s the City diverted the Liesbeek River at the site away from the western reach (which approximates the original

watercourse), into a concrete-sided and floored canal to the east of the site. The flow of the Liesbeek River no longer enters the western course.

197. Finally, a key component of the development is to establish a terrestrial and aquatic transition area (swale) in this hydraulically disconnected, western course. The swale will comprise a mosaic of wetland pools, wetland swales and, importantly, high quality terrestrial habitat for the Western Leopard Toad. Dr. Day considers this to be an ecological benefit in and of itself, and an important mitigant for the loss of currently degraded terrestrial habitat at the site (a landfill site now comprising tarmac parking areas and mowed lawns forming part of the mashie golf course and its surrounds).

Ad paragraph 26

198. The description of the development as "very substantial" is more appropriate than the term "megadevelopment".

Ad paragraph 27

199. I reiterate what I have stated at paragraphs 193~~192~~ - 197~~196~~ above, regarding the rehabilitation of the riverine corridor along the route of the existing Liesbeek River Canal to the east of the River Club site and the transformation of the excavated and unlined channel of the Liesbeek River to the west and north-west of the River Club site into a terrestrial and aquatic transition area in the form of the swale.

200. The concluding sentence of the paragraph under reply is incorrect. Mr London presumably refers to the infilling of the flood plain, as opposed to the infilling of "the whole of the building". The effective (visually) raising of the ground level is

not to be achieved by "in-fill", but will be voids accommodating parking basements.

201. In this regard, the BAR records that -

201.1. Portions of the River Club site fall below the 1 in 100 year floodline elevation, which has been assessed to be 5.81 metres above mean sea level (mamsl) at the site.

201.2. The ground levels of buildings proposed at the site will therefore be raised above this level, plus an additional 600 mm safety factor, i.e. to 6.4 mamsl (but basements will be below this level).

201.3. Basement parking at precinct 1 and precinct 2 will be built on the current ground level of the site to create a podium at each precinct at ~6.4 mamsl – between ~3.5 and ~1.5 m above current ground level. The total extent of the podiums (or basements) will be 79 500 m^2 (~ 8 ha).

201.4. Within the two podium areas, the buildings will occupy a footprint of ~ 3.4 ha (23% of the River Club property) and internal roads will occupy ~1.5 ha. (In this regard, I refer to page 14 of the BAR, attached above as "**JA7**").

Ad paragraph 28

202. The contents of the paragraph under reply are noted.

_Ad_ paragraphs 29 – 44: The River Club Development - The Site

_Ad_ paragraph 29

203. I note that the River Club property is no longer operated as a golf course. Prior to the commencement of groundworks, the property included a fully operational 9-hole mashie golf course, conference facilities, restaurants, and indoor and outdoor pub facilities.

_Ad_ paragraph 30

204. The adjacent remainder of erf 15326 includes portions of the canal to be rehabilitated, as well as the Berkley Road extension. For this reason, it forms part of the River Club site. However, no development is proposed in the Raapenberg Wetland, and the impacts on this feature have been carefully considered and found to be of "very low significance" to "insignificant". In this regard, refer to pages 95 - 96 of the biodiversity impact assessment conducted by Dr. Day (an extract of which is attached above as Annexure "**JA23**").

_Ad_ paragraph 31

205. I reiterate that the City now refers to this area has the Two Rivers area; and not the Two Rivers Urban Park (or TRUP).

_Ad_ paragraph 32

206. As already detailed above, the key findings of the HIA (as supplemented) insofar as the wider Two Rivers area is concerned include that –

206.1. The area was the dominion of the Gorinhaiqua and formed part of the historic indigenous landscape; each individual precinct having different qualities and measures of indigenous cultural heritage; and

206.2. Much of the history that derives the cultural significance of the Two Rivers area extends over a far broader spatial scale.

Ad paragraph 33

207. The contents of the paragraph under reply are noted.

Ad paragraph 34

208. The contents of the paragraph under reply are noted. However, I am advised by Dr Townsend, Mr Hart and Mr Arendse that this description pertains to a much wider area than the Two Rivers area (to say nothing of the River Club site), including for example the entire City Bowl and the entire length of the Liesbeek River.

209. The history of the place, encompassing the River Club Site, the Two Rivers area and the Cape Peninsula more broadly, is exhaustively detailed in section 4 of the July 2019 HIA (at pages 34 – 51), as supplemented in the Dec. 2019 HIA Supplement (at pages 15 - 20) ("**JA9.1**" attached above) and the River Club First Nations report (at pages 10 - 58) ("**JA9.2**" attached above).

Ad paragraph 35

210. The Dec. 2019 HIA Supplement is clear that there are no historical accounts or other evidence in recent times that any "profound symbolic significance" was

publicly celebrated in respect of the confluence of the Black and Liesbeek Rivers before this development was initially proposed in 2016.

211. I reiterate that the confluence of the Black and Liesbeek Rivers do not occur "on the River Club site". Rather, the confluence is proximate to the River Club site. In this regard, I reiterate that the LLPT's property does not include the banks or bed of either the Black or the Liesbeek River.

212. I am advised by Dr Townsend, Mr Hart and Mr Arendse that the supporting affidavit of Jenkins contains numerous inaccuracies and hyperbole. I deal with these aspects elsewhere below.

213. For present purposes, I note that Jenkins' affidavit does not set out any facts which establishes the requisite expertise to second-guess the findings of Mr Arendse, as well as those of Dr Townsend and Mr Hart. Moreover, Mr Jenkins' affidavit provides no factual basis for the claim that he speaks for any of the Peninsula Khoekhoe, except for the Goringhaicona.

Ad paragraph 36

214. As detailed in the HIA as supplemented, it is not entirely clear from historical accounts where the D'Almeida event took place. A possible candidate for the site is the Salt River mouth. In this regard, the authors of the HIA cited the research on this event by by Attwell and Jacobs in their *Phase 1 HIA* for the Two Rivers area and their supplementary study of the history of the D'Almeida event. These aspects are set out in section 4.3 at pages 39 – 40 of the July 2019 HIA.

215. I am advised by Dr Townsend and Mr Hart that they do not contest the account of the First Nations as detailed in the First Nations Report prepared by Mr Arendse. Rather, they suggest that this history is a true *heteroglossia*. Their views in this regard are detailed at pages 6-7 of the Dec. 2019 HIA Supplement (attached above as "**JA9.1**").

216. I am further advised further by Dr Townsend and Mr Hart that no part of the battle took place on the River Club site, then a wetland on the eastern side of the Liesbeek River. This is detailed in the Attwell/Jacobs' Supplementary Report of October 2017 which, responding to a question from HWC, gives an account reliant on the written record (accounts by three Portuguese 'chroniclers' reliant, so it is assumed on survivors' accounts) of the 1510 d'Almeida battle which is different from that given by Mr Jenkins. In this regard, I refer to pages 51 – 63 of the Atwell/Jacobs report, an extract of which is attached as Annexure "**JA24**". These pages have been omitted from the copy annexed to the founding papers as "LL11" (R: 153).

217. Mr London states that the battle took place in the "vicinity" of the River Club site, which is true if he means that it is likely that the first part of the battle (as the Portuguese fled in retreat towards the beach) could well have taken place somewhere west of the pre-colonial Liesbeek River course, but not on the River Club site itself.

Ad paragraph 37

218. I note that the description "one of the only undeveloped remnants" does not make sense. It is one of several, or it is the only. Rather, I am advised by Dr Townsend, Mr Hart and Mr Arendse that the River Club site could be described

as one of several undeveloped remnants of the grazing lands used in the summer by the Khoekhoe for their cattle, including probably most significantly what is now the Ysterplaat airfield. As already detailed elsewhere, the River Club site was a wetland on the eastern side of the Liesbeek River during this period which, in summer, may well have been grazed by the cattle belonging to members of the Peninsula Khoekoe that were herded there seasonally.

219. As to the specific use of the term "undeveloped", I reiterate that the BAR demonstrates that the River Club site has been significantly transformed over recent years, going back as far as the 1920s. The transformed nature of the River Club site can hardly be disputed by the applicants.

220. The HIA (as supplemented) makes the following findings in respect of the River Club site which are relevant here-

220.1. The area in which the River Club is situated is historically important for the role it played in the distant past;

220.2. The River Club site is located within the core of this "early contested landscape" (section 4.5 of the HIA) and within an "associative cultural landscape" with definable/known historical associations of great socio-political import.

220.3. Apart from the Liesbeek River, the site itself has little obvious heritage significance;

220.4. The Liesbeek River is a tangible heritage resource that remains in this transformed landscape, is a potentially strong symbol of past events, and reflects the history and significance of the area; and

220.5. The restoration and memorialisation of the river course and confluence would be a heritage benefit.

221. I am advised further by Dr Townsend and Mr Hart that when Mr London says that "[T]hese groups … [f]rom 1657 onwards … were gradually eliminated from this area", he must mean from the entire length of the Liesbeek River and from the Peninsula as a whole.

Ad paragraphs 38 - 39

222. I am advised by Dr Townsend that the use of the word "site" in paragraph 38 under reply is a further example of the applicants' conflation of heritage considerations pertaining to the Two Rivers area and the River Club site. It is clear from the context of paragraph 38 that Mr London means the "Two Rivers area" when he uses the term "site" in this context.

223. The contents of the paragraphs under reply are noted.

Ad paragraph 40

224. I am advised by Mr. Arendse that there is no historical or factual basis, whatsoever, for the averment that either the River Club site or the broader Two Rivers area was referred to in Khoi oral history as "place of the stars" (*Igamirodi !khaes*). Notably, the paragraph under reply is silent as to the source for this claim.

225. I am further advised by Mr Arendse that it appears this notion is a recent fabrication by Mr Jenkins, for the following reasons:

225.1. None of the First Nations representatives he consulted with in the course of preparing his First Nations report on behalf of the LLPT or the DTPW during the respective periods in 2019, made any mention of "place of the stars" in relation to the River Club site, the broader Two Rivers area or even the Cape Peninsula.

225.2. Most notably, even Mr Jenkins made no such reference during the environmental and planning approval processes and in his personal interviews with Mr Arendse in 2019, or in his many appearances together with Mr London in the protracted appeal proceedings pertaining to the decision by HWC to provisionally protect the River Club site.

225.3. There is no such concept as "the place where the stars gather." Mr Arendse confirmed this with the Science Engagement Astronomer, of the South African Astronomical Observatory (SAAO), Dr D Cunnama. They commissioned extensive research on Khoi and San star lore, and are currently developing and writing a scientific publication on indigenous constellations as articulated by their First Nations engagements, and the study of historical material. For example, First Nations have identified the dassie and other animals in the stars.

226. This term appears for the first time in the founding papers. I can only assume that the applicants, Mr London or Mr Jenkins provided this information to journalists and opinion writers in the weeks leading up to the initiation of these proceedings, as this term now features prominently in articles and opinion pieces on the development and this application. By way of example, I attach a copy of an op-ed by Pregs Govender headed "Amazon's Liesbeek

development: Preserving "the place of the stars", published by the *Maverick Citizen* on 5 August 2021, a copy of which is attached as Annexure "**JA25**".

Ad paragraphs 41 - 42

227. The contents of the paragraphs under reply are noted.

Ad paragraph 43

228. The contents of the paragraph under reply are noted, save that the in-fill required to enable such use is shown on aerial photographs dating back to 1934. In this regard, refer to page 17 of the Dec. 2019 HIA Supplement, attached above as Annexure "**JA9.1**".

Ad paragraph 44

229. Save to deny the description of the former golf course on the River Club property as "rudimentary", the contents of the paragraph under reply are noted.

***Ad* paragraphs 45 – 65: Statutory Framework**

230. The contents of the paragraph under reply constitute legal submissions, which fall to be dealt with in the heads of argument. I am advised that HWC has not included this site in such a register (as referred to in section 30 of the NHRA).

Ad paragraphs 66 – 73 – Chronological Overview: Section 38(8) and NEMA processes

Ad paragraph 66

231. The averments regarding the commercial arrangements upon the vesting of developmental rights are irrelevant to the merits of this application.

232. I note that the purchase price stated in the paragraph under reply included the acquisition of the business owned by LLPT (Pty) Ltd.

Ad paragraph 67

233. The apparent reference to listed activity no. 15 (per listing notice 3, GN No. R985) ("[T]ransformation of land bigger than 1000 m^2 ... to ... commercial, industrial or institutional use, where such land was zoned open space, conservation or had an equivalent zoning, or on or after 2 August 2010 in areas zoned for conservation use in urban areas in the Western Cape"), is misleading.

234. At page 10 of the BAR, it is clearly stated that this listed activity has been conservatively included in the application and pertains only to the transformation of a portion of the City-owned Remainder of Erf 15326 for the extension of Berkley Road. The document goes on to state that although this property is zoned as Community 1, Transport 2 and Open Space 2, a portion of the project footprint (i.e. the Berkley Road extension), is located in an area categorised as "Buffer 1" and "Core 2" in the Table Bay District Plan and as "Biodiversity Protection Spatial Planning Category" in the City's Spatial Development Framework, although no natural vegetation exists in this area.

235. As to Mr London's apparent attempt to imply that the basic assessment process was insufficiently comprehensive in the circumstances, I point out it is common cause that the LLPT followed the statutorily prescribed application process. There can be no suggestion that LLPT was somehow favoured by the so-called "downgrade" to the basic assessment process under NEMA.

Ad paragraph 68

236. The contents of the paragraph under reply are noted.

***Ad* paragraphs 69 – 73: The First HIA**

Ad paragraph 69

237. The contents of the paragraph under reply are admitted.

Ad paragraphs 70 - 73

238. The contents of the paragraphs under reply are noted.

239. The Phase 1 HIA, which was preceded by a draft which had been circulated publicly for comment, includes little direct reference to the development proposed, other than that it "is a series of multi-level buildings for mixed use" (at page 2), but which includes a number of "heritage design indicators for new buildings".

240. In this report, Ms O'Donoghue argued that the aforesaid "indicators" should guide future development including, for example to – (i) restrict and stagger the height of buildings north of the existing River Club building; (ii) require modelling of scales of the proposed buildings within the site and site context in order to assess the potential impacts on the site and TRUP; (iii) limit the height so as not to exceed the adjacent buildings on Fir Road (which is eight storeys); (iv) stagger building heights from south to north and across the site; (v) locate the tallest buildings adjacent to the proposed Berkley Road extension; and (vi) vary building heights so as not to create a monolithic built complex (at page 88) (It is noted, however, that although these "indicators" propose a limitation of eight

storeys at page 88, elsewhere at page 2 she states "not above 5 storeys." I note also that the account of Ms O'Donoghue's "heritage design indicators" selectively cited by Mr London in paragraph 72 of his affidavit gives a different impression of Ms O'Donoghue's true position.

241. In addition to these "heritage design indicators for new buildings", the Phase 1 HIA also includes references to a 2016 scoping report by SKR; a 2016 urban design study (which both include several alternative diagrammatic development proposals), and to a "peer review" which includes the recognition that the development was then presumed to amount to 137 000m^2 of floor space and that "(t)he issue then becomes how this bulk could be distributed across the site" (Dr Nicolas Baumann). (In this regard, I refer to the 3 July 2016 *River Club: Heritage Impact Phase One: Heritage Independent Review* prepared by Dr Baumann at page 118. A relevant extract from Dr Baumann's report is attached as Annexure "**JA26**").

242. Accordingly, while Ms O'Donoghue had differences of opinion with these colleagues (SRK, Marissa Potgieter of Urban Concepts and Baumann), it is clear that she knew and accepted that she was engaged in the process of finding the appropriate form for a development of very considerable scale on the property in question.

243. Furthermore, her "heritage design indicators for new buildings" listed above taken with her summarising diagram (Figure 92: Heritage Design Indicator principles overlaid on Urban Concepts 2016(1) Initial Ideas Presentation at page 90 of her report), suggest a not significantly distant, if loose, approximation of the development ultimately approved in the impugned

decisions. The sole obvious difference being that she (wrongly presuming that there is enough water in the Liesbeek River to fill two river courses) promotes "reactivating" the long disused pre-1958 river course lining the western edge of the River Club site and retaining the current concrete canal course of the Liesbeek River lining its eastern edge.

244. I am advised by Dr Townsend and Mr Hart that, apart from Ms O'Donoghue's unsubstantiated views on intangible heritage in her July 2021 affidavit, the descriptions and significances of the tangible heritage resources identified by her in the Phase 1 HIA (on or off the River Club property in question) are not significantly different from those identified and described in the Jul 2019 HIA (which was, of course, overtaken by the Dec 2019 HIA Supplement and Mr Arendse's report). I elaborate elsewhere on the criticisms by Dr Townsend and Mr Hart in respect of Ms O'Donoghue's statements on the intangible heritage of the River Club site.

245. Given Ms O'Donoghue's views expressed in the Phase 1 HIA and, in Dr Baumann's words, given that "(t)he issue then becomes how this bulk could be distributed across the site", and given the very negative comments on the study (and of her views) from the OCA, it seems curious that Mr London should, on behalf of the OCA, now seek Ms O'Donoghue's expert opinion. The last time the OCA engaged with Ms O'Donoghue's views on the same subject (i.e. commenting on her draft Phase 1 HIA in 2017), they thought she was wrong, that the report seemed "flawed" in many ways, and that the LLPT, informed/guided by its consultants (Ms O'Donoghue and SRK and the many other independent consultants), had "misguided intentions that are

unfortunately totally misplaced". In this regard, I refer to OCA's letter of comment/ objection dated 10 February 2017, at page 11 and 20, a copy of which is attached as Annexure "**JA27**".

246. As to Ms O'Donoghue's statement that she withdrew from the project, *inter alia* because she was asked to work with Dr Townsend on the HIA, I am advised by Dr Townsend that -

246.1. While Ms O'Donoghue may have had differences of opinion with several colleagues in 2016-2017, it is clear that she knew and accepted that she was engaged in the process of finding the appropriate form for a development of very considerable scale on the property in question;

246.2. The aspect of the "concept design" which seems to have led to her alleged non-support was the idea of restoring full ecological functioning to the water-carrying canalised section of the Liesbeek River, separating the River Club site from the Observatory property, instead of her preferred concept, namely requiring the ecological "activation" of the edges of the pre-1950s river course now serving as a stormwater drain and simply leaving the canalised section as is (at page 90 of her Phase 1 HIA).

_Ad_ paragraphs 74 – 80: The TRUP Heritage Study

_Ad_ paragraphs 74 - 77

247. The contents of the paragraphs under reply are noted.

Ad paragraph 78

248. The contents of the paragraph under reply are noted. I point out, however, that the HIA recommends that part of the site be so graded and, indeed, designated as a provincial heritage site (page 109 of Jul. 2019 HIA).

Ad paragraph 78.1

249. The contents of the paragraph under reply are noted. It is also noted that these "informants" are contested by other of Ms O'Donoghue's referents, Urban Concepts and Dr Baumann and, as already pointed elsewhere, they are at odds with her own "building indicators".

Ad paragraphs 79 - 80

250. The contents of the paragraphs under reply are noted.

***Ad* paragraphs 81 – 101: The Second HIA**

Ad paragraph 81

251. I deny that the LLPT abandoned the Phase 1 HIA prepared by Ms O'Donoghue, as alleged.

252. The report was withdrawn for the reasons explained in the excerpt quoted at page 22 of the July 2019 HIA. This HIA refers in terms to its recognition of the research carried out by Ms. O'Donoghue in the Phase 1 HIA.

253. The sequence of events as they pertain to the Phase 1 HIA and the subsequent appointment of Dr Townsend and Mr Hart to carry out the HIA is detailed at page 22 of the Jul. 2019 HIA.

Ad paragraph 82

254. It is not correct that the proposed development considered by Ms O'Donoghue is "perfectly consistent" with the proposed development proposal ultimately advanced. In this regard, I point out that the Phase 1 HIA did not include the rehabilitation of the riverine corridor which was, according to Ms O'Donoghue, to remain a concrete canal. As detailed elsewhere, the final concept was informed by the heritage significance of the Liesbeek River and its role in celebrating and restoring to its proper place the recognition of the role of the First Nations in the Two Rivers area.

Ad paragraph 83

255. For reasons already elaborated upon at paragraphs 158~~157~~ - 160~~159~~ above, I deny the serious allegation that the LLPT sought to procure a more "favourable" assessment in order to "avoid" the findings of the Phase 1 HIA.

256. This is also an opportune point to deal with the allegation by Ms Donoghue at paragraph 7 of her affidavit (at R: 758) that she resigned from the project due to her "non-support" of the proposed concept (rehabilitating the canalised river course) and because she was asked to work on the HIA with Dr Townsend.

257. In this regard, I would point out that SRK which was the environmental assessment practitioner appointed by LLPT to compile the BAR, appointed both Ms Donoghue and, subsequently, Dr Townsend and Mr Hart, and later Mr Arendse.

258. It is also not correct that Ms Donoghue resigned from the project. I am advised by SRK's Mr M Law that he terminated her mandate after Ms Donoghue repeatedly missed deadlines and failed to attend scheduled project meetings.

Ad paragraph 84

259. As to the SAAO's objection to the July 2019 HIA, I must point out that –

259.1. The riverine corridor alternative was designed, in part, to mitigate impacts on the SAAO;

259.2. Since February 2018, SRK has engaged the SAAO to identify ways in which any impacts on the SAAO could further be mitigated;

259.3. Subsequent to the granting of the impugned authorisations, the SAAO has accepted the proposed development and is working together with the LLPT on a number of design- and related aspects, focusing on shared heritage values and the benefits of the recognition of a "liberation route"; and

259.4. Representatives from the SAAO attend weekly site meetings to keep apprised of the implementation of the development.

Ad paragraph 85

260. The contents of the paragraph under reply are admitted. I reiterate what I have stated at paragraph 59 above regarding the irrelevance of the provisional protection notice.

Ad paragraphs 86 - 87

261. For reasons which will be dealt with in heads of argument, I am advised that the provisional protection notice is no longer valid, having effluxed through the passage of time on 20 April 2020.

262. I say that HWC's attempt to place the River Club site under provisional protection was a reactive strategy. HWC sought to create an additional permitting obligation under the NHRA, given its limited statutory powers under section 38(8) of the NHRA.

Ad paragraph 88

263. The contents of the paragraph under reply are admitted.

Ad paragraph 89

264. It is correct that the appeals process that followed the constitution of the IAT was protracted. The determination of the merits of the appeal was postponed on no less than two occasions to address the justified complaints by the LLPT that it had not been consulted before the decision to provisionally protect the River Club site was made, and thus denied an opportunity to make the necessary representations to the HWC Council prior to issuing the section 29(1) declaration.

265. It is further correct that all parties (including the Chairperson of the IAT and its members) 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).

Ad paragraph 90

266. For reasons already dealt with elsewhere, I deny the suggestion in the paragraph under reply that the authors of the July 2019 HIA lacked the necessary independence.

267. It is also not correct that the authors of the July 2019 HIA were "supportive of the proposed development", without significant mitigation of the impacts in as much as the identified heritage resources on and surrounding the site warranted. This pertained both to the rehabilitation and remaking of the Liesbeek riverine corridor, in particular, and to the articulation of the proposed built form. These mitigations were, as argued in the HIA and its supplement, adequate and appropriate for both the protection of the heritage resources in question and for the appropriate growth, change and inevitable densification of the city.

Ad paragraph 91

268. While it is correct that HWC furnished its interim comment on the July 2019 HIA on 13 September 2019, the relevant annexure is "LL10"; not "LL11".

269. HWC's overriding concern was that the July 2019 HIA allegedly failed to "[account] for the intangible significance of the site flowing from its historical associations" and was thus "flawed". For reasons which are elaborated upon further below, this characterisation of the July 2019 HIA is denied.

Ad paragraph 92

270. Given that First Nations parties approached by the heritage consultants during the public consultation process elected not to submit comments on the Draft HIA when it was circulated, it was accepted that the HIA could be improved in that respect. As a consequence and in an abundance of caution, the LLPT implemented the recommendation of HWC in its interim comments and duly appointed a specialist consultant with expertise in intangible heritage, *viz.* Mr Arendse.

271. Mr Arendse subsequently prepared what is referred to in the founding papers as the "AFMAS Report". A complete copy of the River Club First Nations report, together with Mr Arendse's *curriculum vitae*, is attached above as Annexure "**JA9.2**". As already explained elsewhere, this report was annexed to the Dec. 2019 HIA Supplement, which integrated the findings and recommendations of Mr Arendse's report into the rest of the analysis, assessment and conclusions of the HIA.

272. For reasons elaborated upon below, it is denied that the Dec. 2019 HIA Supplement or the River Club First Nations report was defective or otherwise inadequate.

Ad paragraph 93

273. The views and statements set out in HWC's final comment are dealt with further below. For present purposes, however, it is denied that the Dec. 2019 HIA Supplement failed to meet the requirements of section 38(3) of the NHRA. Indeed, as will be apparent, it is clear that HWC had not properly considered

the supplemented HIA and the River Club First Nations report or their findings and conclusions.

Ad paragraph 94

274. The contents of the paragraph under reply are noted.

275. However, I pause to note that the applicants' chronology omits the following events.

276. On 4 March 2020, a workshop was held at the offices of HWC. The workshop was to be attended by senior HWC officials, the HWC committee responsible for preparing the final comment, officials of the DTPW and the DEADP, SRK's Mr Law, as well as Mr. Hart.

277. The events surrounding the 4 March workshop is detailed in the Hart/ Townsend specialist response to HWC's final comment dated 31 March ("**JA15**") as follows:

277.1. Prior to the workshop, HWC was provided with two documents: (1) a detailed 43-page matrix, listing HWC's interim and/or final comments, together with the heritage practitioners' response on each point; and (2) a briefer 6-page summary, focusing on the arguments raised in HWC's interim and final comments.

277.2. These documents refuted the views expressed by HWC that the HIA (as supplemented) failed to comply with section 38(3)(a) – (g) of the NHRA.

277.3. The purpose of the workshop was to seek clarity regarding HWC's arguments that the HIA (as supplemented) did not comply with the aforesaid provisions.

277.4. However, the authors of HWC's final comment, i.e. the Impact Assessment Committee (IA committee), belatedly declined to attend the workshop. Although officials from HWC, DTPW and DEADP were in attendance, the meeting was inconclusive. As a result, the HWC CEO invited Dr Townsend and Mr Law to meet with HWC officials and, thereafter, with the IA committee at its regular monthly meeting.

277.5. Dr Townsend and Mr Law later on 10 March 2020, as per this invitation, arrived at the IA committee meeting. However, at about 45 minutes after the scheduled time for the meeting, the IA committee again refused to meet with them.

277.6. Given the repeated refusal of the IA committee to discuss and clarify its views regarding the alleged non-compliance of the HIA (as supplemented), the LLPT was confronted with a difficult choice. It could proceed "blindly", without further input from HWC, and attempt to submit yet further documentation in an attempt to satisfy the irrational and rigid position adopted by the IA Committee in their final comments. Alternatively, it could proceed directly to the decision-maker without further submissions as to the alleged compliance issues raised in the comments.

277.7. In the circumstances, the LLPT resolved to proceed directly to the decision-maker.

277.8. The letter proceeds to rebut the various objections raised by the IA committee in its final comments. I deal with the substance of this rebuttal further below.

278. I note that HWC failed to respond to this rebuttal. The contents of the 31 March 2020 specialist response are also referred to and relied upon in the Director's decision of 20 August 2020, which is quoted at paragraph 163 of Mr London's affidavit (R: 85).

279. Finally, another crucial document which has been omitted from the founding papers is an appendix to the BAR, which summarised the various interim and final comments by HWC and the heritage practitioners' relevant responses. A copy of appendix G5C, titled "*Updated HWC issues and responses*", is attached as Annexure "**JA28**".

Ad paragraph 95

280. The contents of the paragraph are admitted.

281. I point out, that under the heading "*Impact Assessment and Mitigation measures*" and the sub-heading "*Heritage impacts*" (page 18, para 3 and pages 19 – 21, para 3.2, respectively), the Director sets out various aspects pertaining to the heritage impacts likely to be occasioned by the development. He gives attention to a range of other impacts at paragraphs 3.3 to 3.14 of the reasons. These are the visual impacts (para. 3.3); botanical impacts (para. 3.4); faunal impacts (para 3.5); groundwater impacts (para. 3.6); avifaunal impacts (para 3.7); ecological and freshwater impacts (para. 3.8); geotechnical considerations (para 3.9); surface water hydrology impacts (para. 3.10); impacts on services

and bulk infrastructure (para. 3.11); socio-economic impacts (para. 3.12); traffic impacts (para. 3.13); and dust and noise impacts (para. 3.14).

282. HWC's appeal referred to in the paragraph under reply was ultimately dismissed by the MEC. The HWC has taken no further steps to institute judicial review proceedings in respect of the MEC's appeal decision.

Ad paragraph 96

283. I am advised that HWC's appeal reveals a fundamental misconception of its role in the context of section 38(8) of the NHRA. The first proviso in this subsection, *viz.* the obligation of the consenting authority to "ensure that the [heritage impact] evaluation fulfils the requirements of the relevant heritage resources authority", involves an objective test. Put differently, this proviso does not require the "endorsement of the HIA [by the relevant heritage resources authority] and no other party", as insisted upon by HWC at paragraph 1.7. of its appeal (R: 296). Rather, this proviso requires the consenting authority to determine whether the HIA includes the information specified by the relevant heritage resources authority under subsection (3), after giving due consideration to the latter's comments in this regard, any responses from the applicant, as well as any other relevant information. While the views of the relevant heritage resources authority as to compliance with subsection (3) is an important consideration, the consenting authority is not bound thereby. Put differently, the consenting authority may arrive at a different conclusion, provided he/she has a rational and reasonable basis to do so on the facts of the case.

284. I further dispute HWC's characterisation of the Director's decision-making process as a mere "blanket acceptance of the [LLPTs'] responses" (R: 296, para 1.7). I deal with the substance of the HWC's claims in this regard further below.

Ad paragraphs 97 - 99

285. The record of decision demonstrates that the MEC took every reasonable step to engage HWC in the performance of his obligations under section 38(8) of the NHRA.

286. The MEC's letter of 25 November 2020 (R: 298, "LL21"), lists HWC's repeated objections in its interim and final comments, as well as its internal appeal to the MEC, to the effect that the HIA was not compliant with section 38(3). Against this backdrop, the MEC expressly requested HWC to "provide [him] with the information/ HIA requirements to supplement the current HIA that will enable HWC to consider that the HIA fulfils the requirements of HWC and the NHRA."

287. I pause to note that the MEC addressed correspondence to all the appellants and the LLPT on 10 December 2020, inviting comment by 8 January 2021 on the review application brought by the DTPW to challenge the decision of the Ministerial Appeal Tribunal upholding the HWC's provisional protection order. Notably, Mr London does not divulge that he wrote to the MEC on 8 January 2021, complained about the deadline, demanded that the MEC refrain from determining the internal appeal pending the outcome of the (irrelevant) review application, and undertook to submit further comments by 31 January 2021. However, Mr London failed to submit further comments before his self-imposed

deadline. A copy of Mr London's 8 January 2021 letter is attached hereto, marked Annexure "**JA29**".

288. As to HWC's response to the MEC on 11 December 2020, the founding affidavit does not fully convey HWC's sentiments apparent from the excerpt quoted in the MEC's response of 26 January 2021 (R: 301, "LL22"). HWC bluntly refused to identify any requirements or additional information as requested by the MEC, save to refer him to the final comments of the IA Committee. HWC drew the MEC's attention to "paragraph 43 and onward", which it claimed "detailed .... the information required." In an apparent attempt to justify this response, HWC stated it was loath to "highlight" certain of these requirements for fear that "it would result in the impression ... that these are the only issues which must be addressed." In conclusion, HWC reiterated that "all the issues stand to be addressed."

289. However, the relevant paragraphs of HWC's final comments were opaque and unspecific. The record of decision demonstrates a repeated refusal on the part of HWC to clarify what information it considered to be outstanding, in response to reasonable requests from the LLPT's heritage consultants, the Director and, finally, the MEC. The unavoidable inference is that HWC's misconception of its role under section 38(8) resulted in an attitude that the consenting authority should simply accept its say-so as far as the subsection (3) information requirements were concerned.

290. I note that the specialist response attached above as Annexure "**JA16**" is the "Responding Statement" referred to at the end of the quoted paragraph in Mr London's paragraph 99 (R: 57). As already detailed above, this comprehensive

12-page document demonstrates the flaws in HWC's reasoning and the vague and open-ended nature of its comments.

Ad paragraph 100

291. To the extent the contents of the paragraph under reply accurately record HWC's response, it is admitted. I reiterate that HWC has taken no steps to review the MEC's decision.

Ad paragraph 101

292. The contents of the paragraph under reply are noted.

***Ad* paragraphs 102 – 107: Land-use planning decisions**

Ad paragraphs 102 - 104

293. The contents of the paragraph under reply or noted. However, I point out that the lack of adequately particularised allegations of alleged deficiencies in the land use planning process, compounded by the unduly truncated time periods for the filing of papers, preclude any meaningful response to inferences or bald statements that the land-use planning decisions were unlawful.

Ad paragraph 105

294. The MPT hearing commenced at 10h08 and concluded around 15h12. I attended the meeting virtually. Notably, from 14h15 onwards, each of the five members of MPT gave carefully considered reasons for their conclusions to those in attendance. It was apparent to me that the MPT members had a

thorough understanding of the MPT report and supporting documentation which served before them.

Ad paragraphs 106 - 107

295. The contents of the paragraphs under reply are not correct. The MPT approved all applications before it (with reference to the MPT's record of decision dated 30 September 2020), including condition 6.1.2, granting a zone of GB7 (but with a height limitation of 44,7m, as opposed to the standard 60m height limit for GB7).

_Ad_ paragraphs 108 – 113: Status of the provisional protection notice

Ad paragraphs 108 – 111

296. As to the legal status of the provisional protection, I reiterate what is stated at paragraph 59 above.

297. It is therefore not correct that HWC's provisional protection notice remains in operation and will only terminate on 8 April 2022. Similarly, the conclusions which Mr London draws regarding the operation of the prohibitions under section 29(10) lack merit. I reiterate that Mr London's allegations in this regard are contradicted by what he stated at paragraph 15 (R: 16) of his affidavit, as well as express findings by the IAT in its decision of 14 April 2020.

Ad paragraph 112

298. For reasons detailed in my *seriatim* response to paragraphs 180 - 182 of the founding affidavit further below, the contents of the paragraph under reply are denied.

Ad paragraph 113

299. I reiterate that the applicants' reliance on the continued existence of the provisional protection notice lacks merit.

_Ad_ paragraphs 114 – 119: The treatment of heritage considerations in the section 38(8) and NEMA processes

Ad paragraph 114

300. I reiterate that HWC's comments and appeal focused on an insistence that the HIA did not contain the information required under section 38(3) of the NHRA.

301. As already detailed above, the mere fact that the consenting authorities disagreed with HWC as to whether the HIA fulfilled the relevant information requirements under section 38(3) of the NHRA is not determinative of the question of legality. Rather, the question of compliance involves an objective test.

Ad paragraph 115

302. The publicly available records of decision demonstrate that Director and the MEC made every reasonable attempt to engage HWC in respect of its objections against the HIA and gave due consideration to their comments and submissions.

303. Mr London's averment that the views of HWC were not "properly considered" by the consenting authorities is not borne out by the records of decision. Moreover, it is also at odds with the applicants' more ambitious argument that

HWC's views on compliance with section 38(3) information requirements are definitive and bind the consenting authorities.

Ad paragraph 116

304. As detailed elsewhere in my affidavit, the applicants have failed to provide sufficient factual basis to support the claims made in the paragraph under reply.

305. It is not clear to which "specialist input" Mr London is referring to. I can only assume that he refers to the affidavits of Ms O'Donoghue, Ms Prins-Solani or Mr Jenkins, which accompany his founding affidavit. However, I am advised that to the extent these submissions did not serve before the relevant decision-makers, their contents are of no legal relevance in judicial review proceedings. In as much as he may be referring to "specialist input" from HWC's IA committee or from the City's environmental and heritage department or even from the wider public, the very extensive specialist input submitted by LLPT rebutted the demonstrably misinformed and/or unbending positions argued by the "specialist input" that he refers to.

Ad paragraph 117

306. The contents of the paragraph under reply are denied. The lack of any adequately particularised factual allegations to support Mr London's averments preclude any meaningful response.

307. I must point out, however, that this paragraph is yet another example of the inconsistency with which the applicants characterise the legal basis for their interdictory relief in relation to section 38(3) and 38(8) of the NHRA. Here, Mr London avers that "the discretion [to determine whether or not a HIA meets the

requirements of section 38(3)] is reserved exclusively for HWC." Elsewhere, he suggests a different legal test, *viz.* that the consenting authorities failed to give "proper consideration" to HWC's comments in relation to compliance with section 38(3).

Ad paragraph 118

308. For reasons already dealt with in my *seriatim* response to paragraph 19 of the founding affidavit, the contents of the paragraph under reply are denied.

Ad paragraph 119

309. I note that the applicants' criticisms of the HIA (as supplemented) are frequently stated in general and open-ended terms. Given the severe time constraints imposed upon the respondents, it has not been reasonably possible to provide this Court with a detailed overview and analysis of the HIA (as supplemented), and to contextualise many of the claims contained in the founding papers.

***Ad* paragraphs 120 – 132: Deficiencies of the second HIA**

Ad paragraph 120 - 121

The contents of the paragraphs under reply are noted

Ad paragraph 122

310. The lack of specificity with which the criticisms of the July 2019 HIA are framed renders these averments meaningless and precludes any meaningful and detailed response.

311. Elsewhere in my affidavit, I set out the heritage consultants' detailed responses to HWC's comments, dated 30 March 2020 and 22 September 2020 ("**JA15**" and "**JA16**"), which Mr London has omitted to attach or refer to in his affidavit. These responses demonstrate that Mr London's averments in the paragraph under reply are without merit.

Ad paragraph 123

312. It is not correct that Dr Townsend and Mr Hart did not undertake any "systematic mapping" or "identification of heritage resources on site". Given the lack of particularity with which this averment is made, I can do no more than to refer to my summary of their responses to HWC's comments on the July 2019 HIA (as subsequently supplemented) at paragraphs 355 -357 below.

313. I am advised, however, that any criticisms of the Jul. 2019 HIA are of limited legal relevance, given that this HIA was supplemented by a further HIA report in December 2019 and by Mr Arendse's stand-alone River Club First Nations report dated November 2019.

Ad paragraph 124 - 125

314. To the extent the contents of the paragraphs under reply accurately reflect the authors' description of the environmental and historical dimensions which inform the River Club site's heritage, it is noted. I note, however, that Mr London's quotation from the HIA in his paragraph 124 omits an entire page in between the first and second paragraphs and hence misleads. He refers to "page 80" whereas the quote stretches from page 80 to 82; and I point out that this quotation is from a section of the HIA headed "Environmental

Significances". The quotation in his paragraph 125 from a section headed "Historical Significance" is likewise incomplete.

Ad paragraph 126

315. Mr London fails to provide any adequately particularised factual basis for his claim that the authors' approach was at odds with the scheme and principles of the NHRA. This defect is not cured by his purported reliance on the accompanying affidavits of Ms Prins-Solani and Ms O'Donoghue. That is so for two reasons: First, Mr London fails to provide specific paragraph references to these affidavits, so as to allow a meaningful interrogation of his claims; and Second, I am advised by Dr Townsend, Mr Hart and Mr Arendse that these affidavits contain several statements which are either incorrect, irrelevant or so vague as to be meaningless. More importantly, it appears that these deponents expressed their opinions without considering all the documents submitted by the heritage consultants, which cast significant doubt on the relevance of their opinions.

316. Given Mr London's reference to the concept of "living heritage" in the context of section 3(2)(b) of the NHRA, it is convenient to detail the response by Dr Townsend, Mr Hart and Mr Arendse to certain statements made by Ms Prins-Solani and Ms O'Donoghue in this regard.

317. Before turning to Ms Prins-Solani's views on intangible heritage, which she implies are at least in part reliant on the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (R: 781, para.5), it is necessary to set out the Convention's definition of this term -

"1. 'Intangible Cultural Heritage' means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage…"

"2. The 'Intangible Cultural Heritage', as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship."

(UNESCO, 2018, *Basic Texts of the 2003 Convention for the Safeguarding of the Intangible Heritage*, p5, Definitions.)

318. In this regard, I am advised by Dr Townsend, Mr Hart and Mr Arendse as follows:

318.1. It is important to note, that while this Convention has it that Intangible Cultural Heritage is "manifested" in the domains of tradition, performance, practice and skills, Ms Prins-Solani differs, claiming that these "domains" "are only a "guideline" (R: 784, para.11) and that Intangible Cultural Heritage is "manifest" in "material form" (R: 783, para.9).

318.2. Whereas "manifested" or "manifest" means "to make evident to the eye or understanding; to show plainly, disclose, reveal", it appears that Ms Prins-Solani, while noting (not helpfully) that "Intangible Cultural Heritage elements can be identified in all aspects of human life" (R: 784, para.12), attempts to shift the emphasis or essence of Intangible Cultural Heritage from behaviours, practices, performances and skills or activities to the material forms associated with such behaviours and practices.

318.3. This shift in emphasis apart, it is accepted that "living heritage" is referred to in the NHRA and that a place or landscape can be deemed or recognised as a heritage resource by virtue of associated "living" or "intangible" cultural heritage (R: 785, para.14.1).

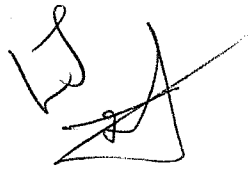
318.4. However, Ms Prins-Solani's listing of draft or irrelevant policies (R: 786, paras.14.2-14.4) and her implied claim that all levels of government have responsibilities in respect of intangible heritage as an "irrevocable and critical element of the National Estate" (R: 786, para.15), is of doubtful relevance in the present case.

318.5. There is also no dispute regarding her view that the "inherently dynamic nature of living heritage" or (despite some confusion about authenticity more generally), her conclusion that living heritage and its significance should be determined by "communities of practice" (R: 787, para.17). This is an important point in discussing her opinions, which I return to further below.

318.6. Ms Prins-Solani has critiqued the Jul 2019 HIA (R: 791 – 793, para. 30-38) without considering any of the documents submitted by the heritage consultants subsequent to HWC's interim comment. These documents include: the Dec. 2019 HIA Supplement, the River Club First Nations report dated Nov. 2019, the Hart/ Townsend specialist response to HWC's final comment dated 31 March 2020 ("**JA15**") or the Hart/ Townsend specialist response on the appeals before the MEC (including that of HWC) dated 22 September 2020 ("**JA16**"), which have outlined precisely the process she outlines.

318.7. In her affidavit (R: 782, para 6.4), she defines the "HIA" as "unless otherwise specified, referring to the 2019 Heritage Impact Assessment prepared in terms of section 38 of the [NHRA] by Stephen Townsend and Tim Hart, submitted as part of the final EIR for approval of the proposed development." Subsequent criticisms of the "2019 Townsend and Hart HIA", specifically in the context of the authors' alleged failure to employ Community-Based Inventorying (CBI), make no reference to the Dec. 2019 HIA Supplement or Mr Arendse's River Club First Nations report. Given the extensive engagement with First Nations groups by Mr Arendse, Ms Prins-Solani's failure to explain why the methodology adopted by Mr Arendse did not properly apply the CBI methodology (as incorporated in the Dec. 2019 HIA Supplement), gives rise to the unavoidable inference that the term "HIA" as used in her affidavit means the "Jul. 2019 HIA". In this regard, I specifically refer to paragraphs 32, 33, 35 and 38 of her affidavit (at R: 791 – 793). Her subsequent confirmation of the views expressed in "HWC's response", if that in fact includes HWC's final comment, is therefore curious. That is so, because the final comment clearly states that the comment was framed, having considered "the supplementary reports as well as the original reports" (R: 270, para 4).

318.8. Given the limited information upon which Ms Prins-Solani has based her opinion, it is irrational and irrelevant.



318.9. The Hart/Townsend account of the River Club First Nations report in the Dec 2019 HIA Supplement includes the following, which given its significance requires quotation in full:

> " [The River Club First Nations] report ... is an independent 'stand-alone' report ... and we argue that the authorities, both the DEADP and HWC, should read and take account of its contents and argument and, in particular, the aspirations of the First Nations in respect of its proposals for the implementation of the strategies for actualising or realising the First Nations' narrative(s) in the planning and development of the River Club property... we stand by our articulation of the history of the site and environs described in section 4. The History of the Place, pp34-49, and that articulated by Attwell and Jacobs in their *Phase 1 HIA* for the TR-area and their supplementary study on the history of the D'Almeida event; but we do not contest the account of the First Nations and we suggest rather that this history is a true *heteroglossia*".
>
> "However, we accept and support Arendse's views on implementing the indigenous imperative at the River Club site and we propose that they present a real opportunity for the realisation of First Nation aspirations".
>
> "These views, which have been articulated and developed in engagements between the First Nations collective and the developer, have been agreed to and have been explored in some detail in revisions to the proposal. In essence, this comprises "indigenizing the site through the following place-making mechanisms" (page 7).
>
> "[T]he implementation of these mechanisms is to be assured through the following institutional arrangement which has been agreed to in principle by the developer:
>
> > 'The First Nations Collective led by the Gorinhaiqua Cultural Council, in discharging its traditional duty of custody over not only the River Club site, but all of the precincts of the Two Rivers area; and in exercising its internationally recognized right of Indigenous cultural agency, is in the process of establishing a legal entity that will be responsible for the post-establishment governance, planning, management, operations, maintenance and sustainability of the aforementioned indigenous place making mechanisms.'
> >
> > 'This entity will be a fully autonomous indigenous entity, whose Indigenous access and negotiated rights as, articulated above as the elements of the First Nations

> Imperative, will be enshrined in a formal agreement between the envisaged First Nations legal entity led by the Gorinhaiqua Cultural Council, and the Community Property Association of the development'.
>
> "We note ... that several First Nations groupings and the First Nations Collective led by the Gorinhaiqua Cultural Council explicitly and clearly support the development proposal: for example, a five-page letter from the Gorinhaiqua Cultural Council signed by Chief !Garu Zenzile Khoisan articulates its support clearly and cites the concurrence of several other leaders of different groupings; another letter from the Goragouqua signed by Kai bi'a Hennie van Wyk articulates their position; and Chief !Garu Zenzile Khoisan has responded publicly in the media to articles attacking the application and proposal explaining the reasons for the support of 'the majority of senior indigenous leaders and their councils in the Peninsula' unambiguously".
>
> "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'" (at pages 8 - 9).

318.10. Ms Prins-Solani makes no effort in her affidavit to identify any intangible heritage associated with this site (or the wider Two Rivers area) or to argue for such an association, although she suggests vaguely that there may be "visual and sound routes across the proposed site" and that the "focus on the river course way as the only site of significance erases the relationship between land and people and living heritage" (R: 793, para 39.3 – 39.3). She also does not explain how any imagined intangible heritage (named, described, qualified and/or quantified) could be adversely affected.

318.11. Accordingly, Ms Prins-Solani's failure to have read the further submissions by Dr Townsend, Mr Hart and Mr Arendse means that her

views (R: 793, para. 39.1 - 39.4.2) on the thoroughness and comprehensiveness of "(t)he HWC response to the HIA" and her conclusions (R: 794, para. 40 - 40.4) are irrational and irrelevant.

319. Insofar as the affidavit of Ms O'Donoghue is concerned, I am advised by Dr Townsend, Mr Hart and Mr Arendse as follows:

319.1. It is apparent from her affidavit (R: 757, para 4) that, while Ms O'Donoghue lists the Dec. 2019 HIA Supplement among the documents she considered, she too failed to consider Mr Arendse's First Nations report of Nov 2019 and the further submissions made by Mr Hart and Dr Townsend in response to HWC's final comments and appeal in March and September 2020, respectively. No explanation for these *lacunae* in her assessment is provided either by Mr London or Ms O'Donoghue herself. Given the limited information upon which her opinions are based, they are irrational and irrelevant.

319.2. Ms O'Donoghue correctly says that in the ordinary course of events an HIA prepared in terms of section 38(8) must still comply with the provisions of section 38(3) (R: 764, para 17). However, it is not correct to refer to the section 38(3) requirements as "minimum requirements". These are requirements for <u>information</u> to be supplied. By way of example, when Ms O'Donoghue submitted a NID in 2016 (under NEMA), HWC responded saying that her HIA should satisfy the provisions of section 38(3) and that it should "consist() of an archaeological study and highlighting the urban design framework of

the proposed development". Her construction, following HWC, regarding "legal compliance" is just that, a construction.

319.3. Ms O'Donoghue contends (R: 765, paras. 20 – 21) that in an HIA, heritage resources must be adequately and/or accurately identified and she makes the same mechanistic argument put up by HWC in this regard. Importantly, however, she does not indicate how such identifications are to be "adequate" or "accurate".

319.4. She provides a brief and not very accurate precis of what she thinks the Jul 2019 HIA identifies as heritage (R: 765, paras. 22.1 to 22.4). By this very account, however, she concedes that she has not read or taken account the Dec. 2019 HIA Supplement, Mr Arendse's Nov 2019 River Club First Nations report, the March 2020 Hart/Townsend specialist response to HWC's final comment ("**JA15**"), or the Sept. 2020 Hart/Townsend response to the appeals to the MEC ("**JA16**"). As a consequence, her complaints about the July 2019 HIA are irrelevant, as they do not acknowledge the content of any of the aforesaid documents (R: 767, paras. 23 to 25).

319.5. The views expressed at paragraphs 26.1 - 26.3 (R: 767) on what she characterises as a "a particularly curious oversight" of the Jul 2019 HIA constitute a significant oversight on her part, inasmuch as it is unreasonable and scientifically unsound to criticise and express an expert view on a decision on the basis of an incomplete reading and analysis of the documentation taken into account by the decision-maker.

319.6. At paragraphs 27- 31 (R: 768) Ms O'Donoghue simply gives a précis of HWC's final comment, repeating most of HWC's misunderstandings and she fails to engage adequately with the Hart/Townsend submissions. In particular, she does not deal with the assessment by Hart/ Townsend of the high significance of the Two Rivers area and of the place of the River Club site in that context. She also does not deal with their agreement with the Attwell/Jacobs 'baseline' studies (R: 768, para 28 – 29).

319.7. Notwithstanding these defects, and referring only to the Jul. 2019 HIA, she goes on to state that: "HWC comments' on the 2019 HIA are thorough and comprehensive, and I am in agreement with the critiques made of the 2019 HIA by Heritage Western Cape".

319.8. As an aside, it should be noted that although she lists the Dec. 2019 HIA Supplement among the documents she considered for the purpose of her expert affidavit, and purports to criticize the HIA supplement (R: 768, para 30.3) she does not refer to the contents of the Dec 2019 HIA Supplement or the River Club First Nations report. As already noted above, her criticisms of the Dec. 2019 HIA Supplement and her support of HWC's comments do not take into account the Hart/ Townsend March 2020 response to the HWC's final comment. On the basis of limited documents and without meaningful analysis of the contents of the documents she did in fact review, she simply concurs with HWC.

319.9. In her conclusion (R: 771, paras. 32.1 - 32.5), she merely repeats her agreement with HWC, *viz.* that the Hart/Townsend Jul. 2019 HIA is

inadequate, that it does not comply with section 38(3) of the NHRA, that HWC's assessment is "comprehensive and accurate", and that the Jul. 2019 HIA is not compliant with the "minimum requirements of Section 38(3)".

319.10. Ms O'Donoghue's views lack merit and relevance for the following reasons:

319.10.1. HWC's assessment is unsustainable, as it did not take adequate account of the information, analysis and assessment before it;

319.10.2. Ms O'Donoghue's opinion is not based on all the relevant information;

319.10.3. Section 38(3) concerns information requirements; rather than a set of "minimum requirements" as referred to by Ms O'Donoghue;

319.10.4. In light of the legal submissions made elsewhere in this affidavit regarding the proper construction of HWC's role and the discretionary powers of the consenting authority under section 38(8), Ms O'Donoghue's failure to take into account the Hart/ Townsend response to HWC's final comments in March 2020 is fatal. As already detailed above, the authors expressed frustration at the IA committee's refusal to meet with them and provide

clarification on the information requirements the committee deemed to be outstanding.

Ad paragraph 127

320. The record of decision demonstrates that it is highly inaccurate and unfair to characterise the views of Dr Townsend and Mr Hart on the heritage value of the River Club site as "intractable" or to suggest that they were "dismissive" of the views expressed by the Goringhaicona commentators in their discussion and treatment of these submissions. Indeed, the distress of these independent experts at the antagonism they were subjected to is clear from the passage that Mr London cites.

321. In this regard, I refer also to the authors' comments in the Jul 2019 HIA (at page 20-21), in respect of attacks by the GKKTC, accusing them of "downplay[ing] [their] history for what [they] feel are for purposes of greed and avarice". The authors emphasised their professional role in undertaking the HIA and emphasised the dilemma thus:

> "We emphasise the context and dilemmas faced here and in circumstances like these more generally: yes, the significance of this place, and of the particular subject site within the wider environs is great; and yes, the rights of indigenous peoples should be affirmed and promoted. However, it must be recognised that the significances associated with this particular site are also attached to the wider environs; and that these significances are difficult to attach directly to this particular property and, perhaps most starkly, it is always difficult to see how intangible cultural heritage, practises, and beliefs, can be "brought to ground" in the practical world of property ownerships, legal frameworks, and the making of the modern city, in a context of urbanisation, growth and development; and it must be said that the submissions of the First Peoples groups have not given us grounded reasons or evidence, enabling us to promote greater or more tangible race to tuition or access".

322. The authors underscore that, cognisant of the degraded state and use of the site and its "very great significance", they recognise the potential for the "creation of a public good of the highest order through the recovery and restoration of the Liesbeek River/ canal as a historically and spatially meaningful and ecologically functional Liesbeek riverine corridor" (at page 20 of the Jul. 2019 HIA).

323. The authors further note the contradictory nature (from a heritage perspective) of the implicit position by most commentators (except the GKKITC who wanted no development) that while some form of development should proceed, the current scale is simply too great. That is so, because from a heritage management perspective, any development of the River Club property (even single storey row houses like those in nearby Observatory) would transform the site and the floodplain, affecting the wider environs in the same way. More importantly, however, a lesser development would not generate adequate funds for the greater public good; being the restoration of the Liesbeek riverine corridor. The authors go on to crystalise the "stark but clear [choice]": "accept the ... riverine corridor alternative with what [the authors] consider are very considerable public benefits [from a heritage perspective] or accept that the River Club property will remain as it is" (at page 20-21 of the Jul. 2019 HIA).

324. I say that any objective reading of the aforesaid portions of the Jul. 2019 HIA and the Dec. 2019 HIA Supplement does not support the accusation that the authors were "dismissive" of the GKKITC's concerns and comments or the serious allegations elsewhere in the affidavit of partiality. As the authors conclude in their introductory comments in the Jul 2019 HIA: "[while they] are

... paid for their professional endeavours ...[they] are independent professional advisers and ... have nothing to gain or lose from the success or failure of the development proposal" (at page 21 of the Jul. 2019 HIA).

Ad paragraph 128

325. Again, Mr London's criticises the Jul. 2019 HIA and the authors' so-called "approach", without providing any adequately detailed factual basis. To the extent he relies on the expert affidavits of Ms O'Donoghue and Ms Prins-Solani, I reiterate what I have stated above regarding the defects in their assessment of the adequacy of this HIA against the information requirements of section 38(3) of the NHRA.

Ad paragraphs 129 - 132

326. The contents of the paragraphs under reply are denied, save to point out that the extract from the Jul. 2019 HIA quoted in paragraph 130 is not accurately recorded. In the HIA, this paragraph (after the enumeration, "fifth") commences with the word "although", which gives a rather different sense to the sentence.

327. The issue of "indicators" or "urban design indicators" was extensively dealt with in the 31 March 2010 Specialist Response on HWC's final comment (attached above as Annexure "**JA15**"). I reiterate that the founding papers neither refer to, nor attach this important document. In this document (at page 8) Hart/ Townsend provides the following analysis of the role of "indicators" in HIAs:

> "We note also that there is no legislated requirement for the development of "indicators": "indicators", whether they are called design indicators, heritage indicators or spatialised indicators, may assist designers, their clients, interested parties, and the authorities in their various roles, but are most useful as criteria for decision-making. As a consequence, they

> are most useful when framed in general terms rather than as pre-emptive instructions to designers limiting both invention and non-heritage factors or criteria. Indeed, it seems that the root of HWC's critique of the HIA and its documentation is its differences regarding this non-statutory 'requirement', the heritage-related design indicators or criteria for decision-making discussed in Section 8 of the HIA (pp85-89); and we note that, while these indicators/criteria are framed in general terms, HWC did ask for an "urban design framework" which was attached to the HIA and the HIA incorporates its urban-design-related design indicators (pp89-96)."

328. The authors go on to deal with what appears to be HWC's greatest concern regarding "the impact of the development" on "the most important heritage resource: the site's open, green qualities as a remnant of landscape that has considerable intangible historic and cultural heritage significance". In this regard, I reiterate what I have already stated above in my *seriatim* response to paragraph 22 of the founding affidavit.

329. In respect of the claim at paragraph 132 under reply, I point out that – (1) the proposal, as detailed and dimensioned in the drawings attached to the HIA (as supplement), shows a set of built-form restrictions; and (2) the distances and heights of the buildings are described. I am advised by Dr Townsend and Mr Hart that it would be unusual for heritage practitioners to prescribe a "style" on a development of this sort in similar circumstances. Indeed, even Mr London is silent in this respect. In any event, as detailed elsewhere, the design proposal specifically provides for the incorporation of symbols central to the First Nations narrative.

_Ad_ paragraph 133 – 135: HWC's "interim comment' on the Jul 2019 HIA

_Ad_ paragraphs 133 - 135

330. The contents of the paragraphs under reply are noted. Given that HWC merely repeated its interim comments in its final comments on the HIA (as supplemented), I deal with the substance of the interim comments in my *seriatim* response to paragraph 159 of the founding affidavit. It should be noted, however, that in contrast to the detailed analysis of HWC's interim comments, Mr London deals with HWC's final comment in three brief sub-paragraphs. More significantly, he fails to attach or refer to the Hart/ Townsend March 2020 specialist response to the final comment or their specialist response to HWC's appeal dated September 2020.

331. Indeed, given that the July 2019 HIA was significantly overtaken by the Dec. HIA Supplement, the River Club First Nations report, and the specialists' responses referred to above, this lengthy argument reliant on HWC's interim comment is redundant, at best.

_Ad_ paragraph 136 - 139: The supplementary HIA

_Ad_ paragraph 136

332. The contents of the paragraph under reply are noted, save to reiterate that the Dec. 2019 HIA Supplement considered and took into account the stand-alone River Club First Nations report by Mr. Arendse, which formed an annexure thereto.

Ad paragraph 137

333. Mr London's characterisation of Dec 2019 HIA Supplement is denied. The absence of any particularised allegations precludes a more meaningful response.

Ad paragraphs 138 - 139

334. The contents of the paragraphs under reply are noted.

_Ad_ paragraphs 140 – 147: The Supplementary HIA ("Engagements with First Nations Groupings")

Ad paragraph 140

335. For reasons detailed below, Mr London's attempt to cast doubt on the reliability of Mr Arendse's River Club First Nations report finds no support in the documents which served before the Director and the MEC.

336. As to Mr Arendse's engagement by the Western Cape Provincial Government, I say as follows:

336.1. AFMAS Solutions (of which Mr Arendse is the principal) was appointed on 28 May 2019 by the DTPW to conduct research on the First Nations' history and narrative for the wider Two Rivers Local Area. As such, he became a leading authority in that particular history and narrative, with particular reference to intangible heritage significance.

336.2. Mr Arendse's First Nations' report for the wider Two Rivers Local area undertaken at the behest of the DTPW was signed off on 27 September 2019 (TRUP First Nations report).

337. Pursuant to HWC's interim comment and in an abundance of caution, Mr Arendse was contracted to engage directly with the First Nation Collective he had previously held workshops with as part of the broader Two Rivers area research. The aim of engagement was as follows:

337.1. To develop an understanding of the River Club site's significance to the First Nations by identifying site-specific indigenous intangible cultural heritage;

337.2. To locate the River Club site within the indigenous narrative of the broader TRUP cultural landscape;

337.3. To identify First Nation aspirations with regard to indigenous cultural heritage and the River Club site;

337.4. To propose ways in which the key recommendation of the TRUP First Nations report could be implemented, *viz.* to "acknowledge, embrace, protect and celebrate the indigenous narrative in design and planning".

Ad paragraph 141

338. The suggestion that the Jul. 2019 HIA was not the product of meaningful public participation is denied. In its interim comment (p. 9), HWC acknowledged that the "formal notice commenting procedure" had been "complied with".

339. It is so, that HWC was nonetheless of the view there had not been "meaningful consultation with First Nations groups". However, the record demonstrates that the heritage consultants made considerable efforts to engage with First Nations groupings and to find a willing and capable expert to assist in this regard.

340. Indeed, although the GKKITC and its representatives were fully aware of the BAR process and registered as an IA&P in 2018 in the appeals against HWC's provisional protection directive, the GKKITC declined to comment on a draft HIA published in March 2018. In this regard, I am advised by Dr Townsend that he addressed several email messages to Mr Jenkins, offering to meet and provide additional time to comment.

341. It also bears emphasis that Mr Jenkins, as a former management committee member of the OCA (and chairperson and vice chairperson at various times in 2017/2018) was fully aware of the various public participation process in relation to this development, yet he did not see fit to initiate input from the GKKITC until much later in 2018 (and then in respect of the provisional protection process).

342. Turning again to the engagement of Mr Arendse, when he became available after the submission of the TRUP First Nations report, the LLPT engaged AFMAS Solutions to consult with the First Nations groupings with a view to obtaining their input on the basic assessment report. The Dec. 2019 HIA Supplement provides a detailed account of the interactions with and the views of the First Nations Collective, an assembly of five groupings (at page 4-9).

343. This engagement of the First Nations is conveniently summarised in the 31 March 2020 Hart/ Townsend specialist response to HWC's final comment (attached above as Annexure "**JA15**"). In their response (at page 9), the authors state as follows:

343.1. All the First Nations groups who are regarded amongst the First Nations groups as the historical custodians and who are the contemporary

claimants and custodial owners of the indigenous heritage narrative of the site and of the broader Two Rivers-area and who are the authentic First Nations Voice are part of the First Nations Collective. This includes the Gorinhaiqua, Cochoqua, Gorachouqua and the San First Nation groups who in pre-colonial times used the River Club site and the wider Two Rivers-area. (In this regard, I refer also to page 4 of the First Nations report attached above as "**JA9.2**", which lists the First Nations Informants and provides the details of the First Nations Collective).

343.2. Despite every effort to reach consensus with other First Nations groupings who were not historically located at the River Club and Two Rivers area, the other groups elected not to engage with LLPT. However, these groups submitted written submissions as I&APs in the BAR/HIA process; these issues and comments are addressed in the detailed Issues and Responses report prepared by SRK and attached to the Final BAR (a copy of which is attached as Annexure "**JA30**").

343.3. The First Nations Collective attributed the withdrawal to a variety of possible reasons, including potential conflict of interests or representing Nguni groups or groups from outside South Africa or individuals and groups with no historical, ethnic, geographic, cultural or heritage linkages to the River Club land or the Two Rivers landscape as a whole.

343.4. The requirement of the applicable legislation (NHRA) in this instance is to "consult with communities affected by the proposed development and other interested parties"; it does not require consensus.

Ad paragraph 142

344. To the extent the contents of the paragraph under reply accurately record the relevant extract from the River Club First Nations report, it is admitted.

Ad paragraphs 143 - 144

345. It is telling that Mr London provides no factual basis whatsoever for his vague and open ended-claim claim that the River Club First Nations report sought to "obfuscate" and "dilute" the views of certain sections of the Goringhaicona people.

346. In this regard, the Hart/ Townsend March 2020 Specialist Response ("**JA15**") is again instructive. In response to HWC's final comment that the "results of the consultation with communities affected by the proposed development and other interested parties … still does not comply with the NHRA", the authors noted *inter alia* that-

346.1. Without offering any evidence whatsoever, HWC simply dismissed Mr. Arendse's engagement with the First Nation Collective, his attempts to engage with other groupings, and the River Club First Nations report itself.

346.2. The methodology followed accepted oral history interviewing protocols. Parties who participated in and signed-off individually and collectively on the TRUP First Nations report had no concerns with methodology in that instance. In this regard, I note that Mr Jenkins was among these individuals. I am advised by Mr Arendse that Mr Jenkins never expressed any misgivings or concerns about the methodology adopted

in the engagement of First Nations for purposes of the TRUP First Nations report. Among the groups which participated in the latter process, the GKKIC is the only one which refused to participate in the engagement process for the River Club First Nations report.

346.3. Informed consent around purpose and use of information was obtained from all participants in both First Nations reports. Generally accepted ethical protocols for such cases were followed. In appropriate cases, the anonymity of participants was protected in order to prevent harassment and threats.

346.4. In the authors' view, several First Nations groupings and the First Nations Collective led by the Gorinhaiqua Cultural Council explicitly and clearly support the development proposal which is evidenced by the First Nations report in respect of the Two Rivers area, the River Club First Nations report, as well as letters from several First Nations leaders. While there may be some First Nations groupings who do not share this view, the First Nations Collective is authoritative; and Mr. Arendse's report is persuasive in its method, its argument and in its conclusions.

347. The Hart/Townsend March 2020 specialist response also attached a comment from Chief Zenzile published in the *Cape Argus* on 26 February 2020, in which he voiced the disappointment of the First Nations Collective in HWC's remarks regarding the River Club First Nations report. Notably, Chief Zenzile criticised HWC for ignoring the First Nations Collective's decision to support the project, which they consider a "strategic act of indigenous cultural agency to secure a

legacy for [them] and for seven generations into the future for which [they] are responsible." He goes on to describe their experience of the LLPT in this engagement process as being "open" and "empathetic to their concerns". Finally, while he acknowledges that there will inevitably be detractors, he decries the "paternalistic" notion that "indigenous people stand diametrically opposed to development".

Ad paragraph 145

348. For the reasons detailed above, it is difficult to see how the refusal of the GKKITC to participate in the River Club First Nations report process compromises the report's findings and recommendations.

349. Moreover, I deny that the recordal of certain public pronouncements by Paramount Chief Aran of the GKKIT was somehow "unedifying" or reflected poorly on the report or its author. Having regard to the 14-page extract of the 120-page report attached to the founding papers (R: 265 – 267, "LL16"), it is clear that the report merely records concerns expressed by First Nations participants regarding the credibility of Paramount Chief Aran as a leader and "voice of the Indigene". The report does not "analyse" his public pronouncements; it merely records the various social media posts. Among these is a claim that the real Nelson Mandela died on Robben Island and that the person who was released in 1990 was an imposter (R: 265, "LL16").

350. Given the applicants' central claim that the HIA failed adequately to identify and consider the intangible heritage resources associated with the River Club site, it is revealing that they have elected to attach only 14 pages from Mr Arendse's River Club First Nations report. Instead of analysing substantive aspects of Mr

Arendse's report to demonstrate the main premise of their application, they elected to focus on social media posts recorded in the report in order to support their narrative that the LLPT's heritage consultants deliberately set out to marginalise the GKKITC. As already detailed above, there is no substance to the claim that the LLPT's heritage consultants lacked independence or failed in their professional duty to give due and proper consideration to comment and input from First Nations groups, including the GKKITC.

Ad paragraph 146 - 147

351. To the extent the contents of the paragraphs under reply accurately record the relevant extracts from the River Club First Nations report, it is admitted.

_Ad_ paragraphs 148 - 152: The Supplementary HIA (Land-Use Planning in the Two Rivers Area)

Ad paragraph 148 - 152

352. To the extent that the contents of the paragraphs under reply accurately record relevant sections of the Dec. 2019 HIA Supplement, they are noted.

353. I note, however, that Mr London fails to provide any specific example to support the clear inference he purports to draw, *viz.* that the HIA (as supplemented) did not give adequate consideration to the various planning frameworks.

354. In this regard, I refer to the responses set out in Appendix G5 to the BAR (the "HWC Issues and Responses" table attached above as Annexure "**JA28**"), at items no. 80 – 83 (pages 27 - 28). Given the severe time constraints under which this affidavit has been prepared, compounded by the applicants' failure

to provide specific examples of alleged non-compliance, I can do no more than refer the Court to these items.

_Ad_ paragraphs 153 - 154: The Supplementary HIA (Identification and Mapping of heritage resources)

_Ad_ paragraphs 153 - 154

355. Given the failure to articulate any factual basis for the averment that the authors' discussion of the relevant diagrams "fell short" of what was required, I am unable to provide any meaningful response for my denial of this criticism.

356. I note that in their March 2020 response to HWC's final comment, Dr Townsend and Mr Hart provided a detailed answer to the unsubstantiated view that the Dec. 2019 HIA Supplement only "partially complies" with the identification and mapping requirement (at page 5-6 of Annexure "**JA15**" attached above).

357. I refer also to the responses set out in Appendix G5 to the BAR (the "HWC Issues and Responses" table attached above as Annexure "**JA28**"), in respect of item no. 60 (page 22); item no. 33 (page 13); item no. 17 (page 7); item no. 22 (page 9); items no. 60 - 61 (page 22) and item no. 69 (page 25). I reiterate that given the severe time constraints under which this affidavit has been prepared, compounded by the applicants' failure to provide specific examples of alleged non-compliance, I can do no more than refer the Court to these responses.

_Ad_ paragraphs 155 - 156: The Supplementary HIA (Assessment of significances)

_Ad_ paragraph 155- 156

358. Again, Mr London fails to make any particularised allegations to support his mischaracterisation and unfounded criticism of the HIA, as supplemented. In this regard, I refer to the detailed discussion in the Hart/ Townsend March 2020 response to HWC's final comment that the "assessment of the significance of [the heritage] resources" is "inadequate" (at page 6 - 7 of Annexure "**JA15**" attached above).

359. I refer also to the responses set out in Appendix G5 to the BAR (attached above as Annexure "**JA28**"), in respect of item nos. 63 - 67 (pages 23 - 24). I reiterate that given the severe time constraints under which this affidavit has been prepared, compounded by the applicants' failure to provide specific examples of alleged non-compliance, I can do no more than refer the Court to these items.

_Ad_ paragraphs 157 - 158: The Supplementary HIA (Alternatives and mitigation of impacts)

_Ad_ paragraph 157 - 158

360. The contents of the paragraphs under reply are noted.

361. Given that Mr London fails to analyse the relevant sections of the Dec. 2019 HIA Supplement in this regard, I can do no more than refer the Court to the detailed response in the Townsend/ Hart March 2020 dealing with HWC's final comments regarding the assessment of alternatives and mitigation at page 11 of Annexure "**JA15**" attached above, as well as the responses set out in

Appendix G5 to the BAR (attached above as Annexure "**JA28**"), in respect of item nos. 29 (page 11), items 36 – 38 (pages 15-16) and item 88 (page 30).

_Ad_ paragraphs 159: HWC's final comment on the Second HIA and the Supplementary Report

_Ad_ paragraph 159

362. In contrast to the discussion of the alleged defects of the Jul 2019 HIA (R: 62 - 75, paras. 120 –135.7), the applicants limit their averments regarding the alleged defects in the Dec. 2019 HIA Supplement and the Nov. 2019 River Club First Nations report to a 3-paragraph high-level summary of HWC's final comment. While they purport to provide an "analysis" of the HIA supplement at R: 75 – 83, paras 136 – 158, these allegations (except perhaps the allegations regarding engagements with First Nations groups), consist of selective summaries, without making any adequately particularised allegations to support the claim that the HIA did not meet the information requirements of section 38(3) of the NHRA.

363. Accordingly, it is exceedingly difficult to provide any meaningful response to these allegations.

364. The 3-paragraph reference to HWC's final comment is prefaced by the statement that HWC "reiterated its views set out in the interim comment" and proceeds to focus on only two "additional points", viz. (1) the alleged unreliability of the River Club First Nations report; and (2) that the spatial planning tools cited in the HIA (as supplemented) do not "override heritage considerations".

365. Given the applicants' failure to deal with the factual basis of their attack on the HIA (as supplemented) and that they simply repeat the vague and open-ended

statements of HWC, it is necessary to provide a brief summary of the heritage consultants' responses to HWC's final comment on the aspects specifically raised in the papers.

366. Before turning to this overview, however, it bears emphasis that the heritage consultants' task was made very difficult by the IA Committee's refusal to meet with DEADP officials and the heritage consultants, who - in good faith - sought clarification on the reasons underpinning HWC's final comments.

367. At this juncture, it is also convenient to draw the Court's attention to the comments made by HWC in its appeal to the MEC:

> "[L]ikewise, the response to the final comment which was prepared in response to HWC's final comment dated 13 February 2020 was a further re-statement of the views of the applicant, with no true evaluation of HWC's concerns. As such, HWC could not see the purpose in having further meetings with the applicant and the applicants' representatives, whose views on the matter appeared to be intractable" (at R: 296, para 1.6., Annexure "LL20").

368. These comments appear to relate to appendix G5 to the BAR (attached as "**JA28**" above), a copy of which was provided to HWC before the workshop scheduled for 4 March 2020. Even a brief survey of the comments set out in this appendix belies HWC's characterisation thereof. I am advised that the refusal of the IA Committee to meet with DEADP officials and the LLPT's heritage consultants was inconsistent with their functions and obligations under section 38(3) of the NHRA.

369. I turn now to a brief overview of the heritage consultants' responses to the issues raised in relation to the HWC's interim comment, but not dealt with in paragraph 159 under reply.

Inadequate Mapping and Identification of Heritage Resources

370. As already detailed at paragraphs 310~~309~~ - 325~~324~~ above, the applicants fasten on HWC's interim comment that the Jul. 2019 HIA failed to undertake any systematic mapping or identification of heritage resources on the River Club site, but they fail to provide any adequately particularised factual basis to sustain these averments in their discussion of HWC' interim comment or their averments regarding the alleged defects at paragraphs 153 - 154 of the founding papers.

371. In this regard, I say as follows:

371.1. The Jul. 2019 HIA contains an extensive description of the heritage resources on the River Club site and in the area (at pages 70 – 80).

371.2. The Dec. 2019 HIA Supplement included no less than three additional diagrams of heritage areas, potentially sensitive sites and heritage resources, viz. the grading map of the City, the "composite diagram of heritage areas, potentially sensitive sites and heritage resources" of Attwell/Jacobs (TRUP baseline heritage study dated Oct. 2016), and the composite diagram of "tangible and some intangible heritage resources" of Postlethwayt (September 2019, *Draft Two Rivers Heritage Impact Assessment for the Site 'Two Rivers' (formerly TRUP,)* and some discussion of these exercises (at pages 13 – 14 of "**JA9.1**" attached above).

371.3. Notably, neither HWC nor the applicants have been able to articulate why the HIA (as supplemented) "only partially complie[s] with" the information requirements in section 38(3) of the NHRA.

Assessment of significances of resources is inadequate

372. I reiterate what is stated at paragraphs 330~~329~~ - 331~~330~~ above, regarding the applicants' reliance on HWC's interim comment in respect of the significance assessment. What the applicants state at paragraphs 125 – 128 of the founding affidavit consists of little more than extracts from the impugned HIA Supplement and unspecific claims that the authors did not follow the "normal best practice approach when evaluating intangible significance". For reasons already detailed at paragraphs 315~~314~~ - 319~~318~~ above, the affidavits by Ms Prins-Solani and Ms O'Donoghue are of little assistance to the applicants.

373. Notwithstanding the unsubstantiated nature of the claims in the founding papers, I say as follows:

373.1. The significance of heritage resources at the site and the area is dealt with in some 35 pages in the Jul. 2019 HIA (section 7, pp. 79 – 84; section 8, pp. 85 – 106 and section 10, pp. 109 – 117).

373.2. As noted in the March 2020 Specialist Response (page 6 of Annexure "**JA15**" attached above), the authors note that HWC's argument is in the reverse. Discussion, articulation and assessment of the significances of a place and its surrounds must *precede* the identification of that place and its parts as heritage and/or heritage resources. It is therefore irrational for HWC to argue that because (in

its opinion), the identification and mapping is incomplete, the grading of these resources will also be flawed and/or wrong. Moreover, the assessment of significance is not equivalent to grading. Grading is a separate exercise and discourages a proper assessment of the significances in places with complex histories and overlapping significances.

373.3. In section 5 of the Dec. 2019 HIA Supplement (pp. 15 – 20 of Annexure "**JA9.1**"), the authors provide a detailed analyses of the relevant significances. Notably, they underscore that HWC often elides the wider site, including both rivers and their flood plains with the river club site in question (at page 15).

373.4. The HIA (as supplemented) does not "[reduce] the identification of heritage resources, and subsequently significance to tangibly based ecological values rather than cultural heritage values", as alleged by HWC, but iteratively refers to the high political-historical significance of the entire Liesbeek River corridor from mountain to sea and gives detailed discussion of the significance of the Liesbeek River and its environs to "a broad community". Indeed, the Dec. 2019 HIA Supplement, read together with the River Club First Nations report, went to great lengths to articulate an argument about the various significances of the site and its surrounds (at pages 15 – 20 of Annexure "**JA9.1**" attached above).

373.5. Despite a succinct explanation and rebuttal in the Dec. 2019 HIA Supplement (pages 15 – 16 of Annexure "**JA9.1**"), HWC repeats its

erroneous contention that "the concept of significance is broadly underpinned by authenticity". It then makes confusing references to stakeholder opinions, concluding that "this is a methodological problem that the HIA does not address".

373.6. As explained in the Dec. 2019 HIA Supplement, the authors' position is that- firstly, while the historical significance of the site is high, the ecological, typographical and visual significances are currently low from a heritage perspective as a result of the loss of authenticity (location apart) and of a reduced integrity. Secondly, the recovered integrity of the Liesbeek River course as an ecologically functioning riverine corridor would constitute a recovery of several attributes of authenticity and, in turn, a recovery of several attributes of significance (at page 16 of "**JA9.1**").

373.7. The Dec. 2019 HIA Supplement also refutes HWC's apparent contention that the pre-1958 river course is the "authentic" river course. At the hand of 1934 aerial photographs (page 17 of "**JA9.1**"), the authors demonstrate that – (1) the Black River was already canalised (presumably concrete-sided and floored) to a point generally in line with an extension of Station road; (2) the Liesbeek riverbed is a simple, narrow and straight ditch or artificially created canal; (3) all of the land to the immediate west of the Liesbeek if filled is in part an island or promontory, projecting into the water-filled wetland to the north and east, protected by drainage canals; (4) wetlands to the north and east have the marks of a drag-line excavator, that has taken soil from the

estuary to create the reclaimed land of the River Club site; and (5) the only, as yet (relatively) natural area is the SAR&H land to the north, which was gradually reclaimed and encroached on by the railway sheds.

373.8. The authors also cited the tendency of lower reaches of a river to change course periodically due to sudden flooding (especially in the case of slow flowing rivers through very flat floodplains). They accordingly concluded that the "authentic course" of the Liesbeek is uncertain and prone to displacement or change (page 17 of "**JA9.1**"),

373.9. For these reasons, the authors considered it competent to consider the current canalised bed of the Liesbeek River as a legitimate and feasible course for the recovered riverine corridor; the ecological-, visual-, cultural-, amenity-significance of which can be enhanced without damaging its historical or locational significance and authenticity (page 17 of "**JA9.1**").

Assessment of impact of development on heritage resources is flawed

374. I reiterate what is stated at paragraphs 330~~329~~ - 331~~330~~ above, regarding the manner in which the applicants seek to rely on HWC's interim comment on the adequacy of the impact assessment. As far as the applicants' articulation of their case at paragraphs 120 - 130 is concerned, I reiterate my *seriatim* response at paragraph 326~~325~~ - 329~~328~~ above.

375. In respect of this leg of the applicants' case, albeit stated in terms which preclude any meaningful response, I say as follows:

375.1. The Jul. 2019 HIA considers the impacts of the proposed development in detail at pages 109 – 117.

375.2. The Dec. 2019 HIA Supplement queries the rationality of HWC's linear argument that, because the identification and mapping of the heritage resources themselves are flawed the assessment or grading of the heritage resources is flawed, which in turn means the assessment of the impact must likewise be flawed (at page 7 of "**JA9.1**"). While the authors stand by the identification, mapping and significance determination, they explain that even if HWC disagrees with any one of these aspects, that does not prevent them from assessing the development's impacts they have identified. Under this heading, the authors further deal with the alleged requirements of "indicators" and the development's impact on the site's qualities of "openness" and "greenness", already dealt with above at paragraph 173~~172~~ and paragraphs 327~~326~~ - 329~~328~~, respectively.

Evaluation of development's impact on heritage resources relative to sustainable social and economic benefits

376. The applicants' case in this regard consists of nothing more than a summary of HWC's interim and final comments. I have already dealt with the applicants' "summary" of HWC's interim comment in this regard (R: 73, para 135.4) at paragraphs 330~~329~~ - 331~~330~~ above.

377. Given the applicants' failure to articulate any factual basis for their challenge of the HIA in this regard, I simply note the following:

377.1. The impact of the development on heritage resources relative to the sustainable social and economic benefits to be derived, is detailed at pages 20 – 26 of the Dec. HIA Supplement ("**JA9.1**") (focussing on the social benefits of the revised development proposal, including most notably design changes to include First Nations heritage as a design informant).

377.2. As further noted by the authors in their March 2020 Specialist Response (page 9, "**JA15**"), HWC fails to recognise the heritage resource-related benefits of the development, the ecological benefits of the development, the public amenity gains for the general public, or the very significant gains in access and memorialisation of the First Nations. The authors add that HWC does not have the expertise to assess the very considerable social and economic benefits of the development including: investment in the economy, creating wealth; increased employment, income and skills development; increased State and local government revenue; increase in centrally located housing and other facilities; densification facilitating improved connectivity, transport systems and Two Rivers area implementation; and creation of new publicly accessible areas, especially but not only to First Nations groupings.

377.3. It is revealing that the applicants do not even attempt to articulate their case in this respect and merely put up a perfunctory summary of HWC's comments, instead of articulating any facts in support of their claim or explaining why the heritage consultants' aforesaid explanation is objectively wrong, irrational or unreasonable.

Alternatives & Adequacy of proposed mitigation measures.

378. The applicants' discussion regarding the consideration of alternatives and the adequacy of proposed mitigation measures in the Dec. 2019 HIA Supplement appears under the same heading at paragraphs 157 – 158 (R: 82 – 83). In this regard, I reiterate what is stated at paragraphs 360 - 361 above.

379. The fact that HWC saw fit to repeat, word-for-word, what appeared in the interim comment is difficult to square with Mr Arendse's extensive engagement with First Nations groups and their support for the noteworthy changes in the development proposal as outlined at pages 21 - 26 of the Dec. 2019 HIA Supplement. Without offering any reason, HWC effectively dismissed the views of the Western Cape First Nations Collective as to how their intangible heritage should best be given acknowledgement, respect and manifestation in the physical world. In this regard, I have referred to the specialist response dated March 2020 at page 11, marked Annexure "**JA15**" above.

380. HWC's final comment regarding the adequacy of proposed mitigation measures comprises just two paragraphs. These paragraphs merely restate the interim comment. No reference is made to the heritage practitioners' subsequent explanations regarding the proposed mitigation over a four-year period, or their analysis of amendments to the design proposal. As noted by the heritage consultants in their specialist response of March 2020, HWC seeks to avoid the essential argument about off-sets. It is so that the current "openness" of the site will be changed, even transformed (by any form of development), which in turn will constitute a loss of a quality currently deemed to be significant by many stakeholders. However, this change - at least from a heritage perspective - will

be off-set by the positive transformation of the current Liesbeek Canal into a restored riverine corridor. A contributor to the River Club First Nations report expressed this transformation as follows:

> "The reason this development is good for us, is that the developer has taken the concern of rehabilitating the rivers. When you purify the water, you open up the way through which life can regenerate. When you purify water, you purvey the sense that life can regenerate where death has come. Regenerate at so many levels. At individual level, as a collective, and the environment.
>
> We bless this development by ensuring that the wells that were poisoned, the waters that were poisoned, once again regenerate life and reflect as close as possible as we can come to what gave life to that sweet water" (page 50 of "**JA9.2**").

381. I turn now to deal with the "additional aspects" specifically raised in the founding papers in relation to the Dec. 2019 HIA Supplement.

Ad paragraph 159.1

382. HWC's characterisation of the River Club First Nations report as "unreliable" for the "reasons" set out at paragraph 9 of its final comment are denied for the reasons already detailed in my *seriatim* response at paragraphs 335~~334~~ - 351 above.

Ad paragraph 159.2

383. The applicants' discussion regarding the manner in which the Dec. 2019 HIA Supplement considered various land use planning frameworks appears at paragraph 148 – 152 of the founding papers. In this regard, I reiterate what I have stated at paragraphs 352 - 354 above.

384. The EAP provided the following response, which I am advised is dispositive of this issue:

> "The project planners do not agree with this view.... the adopted 2012 district plan is outdated and is in process of revision through the local area spatial development framework mechanism of the MPB-L. The MSDF which supports "Urban Inner Core" development, is the overarching Framework that sets out the current vision and policy of City and Province. The draft LSDF implements this vision and policy at precinct level..." (Comment in response to items 80 – 83 at pages 27 – 28 of Appendix G5 to the BAR, attached above as Annexure "**JA7**").

_Ad_ paragraphs 160 – 165: Decision of the Director

_Ad_ paragraph 160

385. The contents of the paragraph under reply are noted.

_Ad_ paragraph 161 - 162

386. I deny that the Director failed to impose adequate restrictions regarding the design and lay-out of the development.

387. The project description, as described in Section B of the Environmental Authorisation, provides *inter alia* for the following restrictions-

387.1. Reducing the heights of buildings directly opposite the SAAO, and locating taller buildings to the north of the site;

387.2. Setting back from the SAAO as far as practically possible;

387.3. Splitting the development into two precincts to retain a faunal movement corridor and views through the site;

387.4. Rehabilitating the Liesbeek Canal and infilling the unlined, western course of the Liesbeek River (in line with detailed specialist design input, with associated ecological and cultural benefits);

387.5. Providing a cultural centre and memorialising the history of the First Nations People in the design of the development;

387.6. Realigning the link road between precinct 1 and precinct 2 to an orthogonal geometry instead of a diagonal geometry to create a better "fit" in terms of urban design and a better functioning central ecological corridor and park; and

387.7. Realigning of other internal roads (to improve views from the through the site).

Ad paragraphs 163 - 164

388. As demonstrated in this affidavit, the Director's decision is reasonably supportable on the facts provided in the HIA (as supplemented) together with the specialist responses of 31 March 2020 to HWC's final comment ("**JA15**").

389. As to the visual impact assessment, I note that the founding papers neither attach nor analyse the visual impact assessment. Notwithstanding the fact that the reference to the visual impact assessment (VIA) appears opportunistic in this context, I say as follows:

389.1. The VIA provides an independent and dispassionate assessment of visual and sense of place impacts. While the cognitive and narrative association to the site is considered when describing the existing sense of place to receptors, it delegates the assessment of impacts on the cultural landscape to the heritage specialists.

389.2. With regard to the visual impact, the VIA finds that: (1) the scale of the development will have visual impacts; and (2) the location or context of the site, *viz.* the surrounding built fabric and topography, visual absorption capacity, visibility, and landscape integrity, effectively reduces such impacts to the assigned medium rating after mitigation.

389.3. The visual specialist is qualified, competent and experienced (and has compiled VIAs to the satisfaction of HWC previously, using the same assessment template).

_Ad_ paragraphs 166 – 176: Appeal decision of the Minister

_Ad_ paragraphs 166 - 168

390. For reasons detailed below in my *seriatim* response to paragraphs 169 – 176, I deny the characterization of the MEC's reasoned decision. Given the lack of particularity of specifically paragraph 167, I am precluded from giving a more meaningful response.

_Ad_ paragraphs 169 - 171

391. For reasons which fall to be dealt with in heads of argument, it is denied that the Minister conflated the objective test under section 38(3)(b) of the NHRA and item 2(d)(i) of Appendix 1 to the EIA Regulations.

_Ad_ paragraph 172

392. It is difficult to understand the applicant's line of reasoning in the paragraph under reply. As detailed in the BAR, the Berkley Road extension was included in the assessment and the listed activities applied for, regardless of whether or

not the relevant activities were exclusively required for the development, or already contemplated in the City's planning independent of the development. In this regard, I refer to pages 8 – 9 of the BAR.

Ad paragraphs 173 - 174

393. In respect of "design indicators", I reiterate what I have already stated at paragraph 327~~326~~ above.

394. As already detailed elsewhere, the HIA (as supplemented) did indeed provide for built form indicators in respect of the SAAO and the Liesbeek River course. Pursuant to the River Club First Nations report, the development proposal has also been amended to provide for a line of sight from the centrally located Heritage Centre to Lions Head. In this regard, I refer to pages 21 – 26 of the Dec. 2019 HIA Supplement ("**JA9.1**").

Ad paragraph 175

395. For reasons which will be elaborated upon in heads of argument to the extent necessary, it is denied that the relevant references to "design indicators" support the construction contended for by the applicants.

Ad paragraph 176

396. The contents of the paragraph under reply constitute legal submissions, which will be dealt with in heads of argument.

_Ad_ paragraphs 177 – 188: Land Use Planning Decisions

_Ad_ paragraphs 177 - 179

397. The characterisation of the MPT's decision is denied. I deal with the specific grounds relied upon by the applicants further below.

_Ad_ paragraphs 180 – 188: Failure to appreciate duties in light of HWC process

398. I have no personal knowledge of any "active investigation" by HWC with a view potentially to list the River Club site in the Western Cape Heritage Resources Register. Notably, Mr London does not provide any documentation in this regard, or explain how he is aware of this investigation.

399. Mr London also mischaracterises the resolution of HWC Council of 22 July 2021. The Council merely resolved to: "approve HWC notifying SAHRA of its opinion that the TRUP area should be assessed for Grade 1 heritage status in terms of section 24(1)(e) of the NHRA". This resolution is recorded in HWC's letter addressed to Mr Jenkin and dated 30 July 2021, a copy of which is attached as Annexure "**JA31**".

400. Given that the Executive Mayor was made aware of HWC's interim and final comments, any purported prejudice before the MPT was cured on appeal.

401. The balance of the paragraphs under reply constitutes legal submissions and will be dealt with in the heads of argument to the extent necessary.

Ad paragraphs 189 – 196 (Irrational deviation from applicable policies)

402. I have already dealt with the applicants' reliance on the alleged significance of any departure from the Table Bay District Plan elsewhere in my affidavit.

403. I am advised that it is impermissible for an applicant to rely on annexures to an affidavit without setting out the relevant portions upon which he seeks to make out his case in the body of the affidavit itself. In paragraph 193 of Mr London's affidavit, he merely lists the conclusions of each specific appeal ground, without making any attempt to set out the factual basis for such conclusions. Particularly given the time constraints under which this affidavit has been prepared and the scope of the records of decisions of the impugned decisions, it is impermissible to challenge the land use planning decisions in this manner.

_Ad_ paragraphs 197 – 201: Grounds of Review

404. I reiterate what I have stated at paragraphs 40 - 61 above.

_Ad_ paragraphs 202 – 209: Entitlement to an Interim Interdict & Conclusion

405. For reasons already detailed above, I'm advised that the applicants have failed to demonstrate a sufficient factual basis for the relief they seek.

406. I turn now to deal with the affidavits accompanying the founding affidavit. As I have already addressed many of the allegations contained in these affidavits, I will not respond to each and every allegation made. To the extent the contents of these affidavits are not in accordance with the LLPT's version as set out above, they must be taken to be denied.

***AD* AFFIDAVIT OF MR JENKINS**

Ad paragraphs 3 - 5

407. I reiterate what is stated at paragraph 213~~212~~ above.

Ad paragraphs 6 - 7

408. I note that Mr Jenkins (like Ms O'Donoghue and Ms Prins-Solani) does not claim to have read the decisions which are the subject matter of this application, or the 31 March and 22 September specialist responses attached above as Annexures "**JA15**" and "**JA16**". It is therefore difficult to know quite what they say about the impugned decisions generally and, more specifically, in respect of the question of objective compliance with section 38(3) and the question of rationality and/or reasonableness.

409. Given his reliance on the opinions of Ms O'Donoghue and Ms Prins-Solani, I assume that he has at least read the same documentation seen and referred to by these experts. I am advised, however, that given the limitations of these expert affidavits as already detailed above, Mr Jenkins' support of their conclusions is of limited, if any, legal relevance.

410. I am advised by Dr Townsend, Mr Hart and Mr Arendse that they refute Mr Jenkins' characterisation of the HIA (supplemented) as "denigrating" the Goringhaicona or "distorting" their history. In this regard, I note that Jenkins has failed to point to any particular finding or statement in the HIA (as supplemented) to provide a factual basis for these serious allegations.

411. For reasons already dealt with extensively above, it is denied that the HIA process failed adequately to assess or take into account the intangible heritage associated with the River Club site.

Ad paragraphs 10 - 11

412. I am advised by Dr Townsend, Mr Hart and Mr Arendse that they do not deny the main thrust of the arguments in the paragraph under reply and, indeed, share his views.

413. However, they deny the concluding sentence of paragraph 11 under reply. They did not employ any "technique" to "discredit" the "narrative" of the GKKITC or Mr Jenkins. Rather, the consideration of their comments and input involved a rational inquiry. That is, to consider whether such comment or input rises to the level of evidence which is sufficient to sustain or discredit opposing and supporting propositions. In this regard, I reiterate what I have stated at paragraphs 320~~319~~ - 324~~323~~ and 345 - 347 above.

Ad paragraphs 12 - 18

414. I am advised by Dr Townsend, Mr Hart and Mr Arendse that they do not deny the account of the "indigenous peoples of the Cape Peninsula" recounted in Mr Jenkins' paragraphs under reply. Indeed, they share in his rejection of "ethno-nationalism".

415. In particular, they accept it is probable that a wide range of groupings of people (including the indigenous groupings listed in Mr Jenkins' paragraph 19) may claim or feel that their cultural heritage is affected by the proposed development.

Ad paragraphs 21 - 25

416. I am advised by Dr Townsend, Mr Hart and Mr Arendse that they do not deny any of the account of the Khoi and San peoples' worldview described by JMr enkins in the paragraphs under reply.

Ad paragraphs 27 - 30

417. I am advised by Dr Townsend, Mr Hart and Mr Arendse that they do not deny any of Mr Jenkins' (perhaps poetic) description of what he refers to as the spiritual and ritual significance of the wider Two Rivers area. However, they are of the view that this significance is associated with a much wider area than just the Two Rivers area and even the entire Cape Peninsula.

418. However, in respect of Mr Jenkins' claims that the "area" is known as *Igamirodi ikhaes*, I reiterate what is stated at paragraphs 224~~223~~ - 226~~225~~ above.

Ad paragraphs 31 - 41

419. I am advised by Dr Townsend, Mr Hart and Mr Arendse that they do not deny the contents of the oral tradition recounted by Mr Jenkins in the paragraphs under reply, insofar as it is the oral record of the parties he refers to and represents. However, as oral tradition, it is a present-day representation of the past and must be interpreted; and, like all historical sources, its reliability must be examined.

420. In this regard, I am advised that the following exposition of the role of oral traditions by Vanisna is instructive:

> "Oral traditions have a part to play in the reconstruction of the past. The importance of this part varies according to place and time... Wherever

> oral traditions are extant they remain an indispensable source for reconstruction. They correct other perspectives just as much as much as other perspectives correct it."
>
> "Where there is no writing or almost none, oral traditions must bear the brunt of historical reconstruction. They will not do this as if they were written sources. Writing is a technological miracle. It makes utterances permanent while not losing any of their faithfulness, even though the situation of immediate intimate communication is lost. Hence, where writing is widely used, one expects very detailed and very diverse sources of information, which allows for a very detailed reconstruction of the past... The limitations of oral tradition must be fully appreciated so that it will not come as a disappointment that long periods of research yield a reconstruction that is still not very detailed. What one does reconstruct from oral sources may well be of a lower order of reliability, when there are no independent sources to cross-check, and when structuring or chronological problems complicate the issues. This means that particular research questions remain unsettled for much longer periods of time than when a reconstruction rests on massive and internally independent written evidence." (Vansina, J, 1985, *Oral Tradition as History*, p199.)

421. I am advised further that this exposition is not referred to in an attempt to undermine Mr. Jenkins' views. Rather, the purpose is to assist this Court in understanding that oral tradition/history is but one historical source amongst many others.

422. By way of example, the LLPT's aforesaid heritage practitioners refer to the Attwell/Jacobs' Supplementary Report of October 2017 (pp.51-63) ("**JA24**"). In response to a question from HWC, the authors gave an account reliant on the written record (accounts by three Portuguese 'chroniclers' reliant, so it is assumed, on survivors' accounts) of the 1510 d'Almeida battle, which is different from that given by Mr Jenkins. Most significantly for present purposes, these authors conclude that no part of the battle took place on the River Club site, then a wetland on the eastern side of the Liesbeek River.

Ad paragraphs 40 - 41

423. I am advised by Dr Townsend, Mr Hart and Mr Arendse that they have difficulty in understanding the relevance of Mr Jenkins' contentions in respect of Afrikaans and the influences of San and Khoi on Nguni languages in the context of the present application and the criticisms of the HIA (as supplemented).

Ad paragraph 42

424. I am advised by Dr Townsend, Mr Hart and Mr Arendse that the generalised claim in the paragraph under reply pertains also to much of the Cape Peninsula and, indeed, much of the Western Cape and beyond.

Ad paragraphs 43 - 45

425. I have already dealt with the limitations and inaccuracies of the affidavits of Ms O'Donoghue and Ms Prins-Solani. I am advised by advised by Dr Townsend, Mr Hart and Mr Arendse that although they have read the article cited in paragraph 44 under reply, the arguments and contentions contained therein is too diffuse to address adequately in the present context. I am advised further that the failure by Mr Jenkins to refer to the specific portions of the article upon which he seeks to place reliance and the case he wishes to make out on that basis precludes any meaningful response from the LLPT's heritage practitioners.

Ad paragraphs 46 - 63

426. I reiterate what I have already stated at paragraphs 147 - 152~~151~~ above regarding the provisional protection order and that it is of no legal relevance.

427. For reasons already articulated at paragraphs 335~~334~~ 343 above, I also deny the contents of paragraph 50 of Mr Jenkins' affidavit.

428. I further reiterate my denials at paragraphs 118, 138 - 144 and 169~~168~~ - 174~~173~~ above that the development will result in the destruction of a sacred site, as well as my denials at paragraphs 270~~269~~ - 272~~271~~ and 338 - 347 above that the heritage consultants failed to engage sufficiently with the First Nations groups.

429. As to the allegation at paragraph 52 under reply, I am advised by Mr. Arendse that he indeed observed all relevant ethical requirements for purposes of the TRUP First Nations report. Given that the TRUP First Nations report did not deal with the heritage significance of the River Club site itself, it is difficult to understand the relevance of this paragraph other than to cast aspersions on the integrity of Mr. Arendse.

430. As I have no personal knowledge of the allegations at paragraph 53 under reply, I am unable to provide any meaningful response.

431. For reasons already detailed at paragraphs 270~~269~~ - 272~~271~~ and 338 - 347 above, I reject the claim that Mr Arendse' appointment was tainted by any conflict of interest, as is suggested at paragraph 55 under reply. In any event, on Mr Jenkins' own version, the presentation of the TRUP First Nations report referred to at paragraph 55 took place *after* this report had already been presented to and accepted by the Department. Accordingly, I submit that the timing of Mr. Arendse's appointment did not constitute a rational or reasonable basis for Mr Jenkins' conclusions regarding his trustworthiness or for the GKKITC's "refus[al] to engage further with Mr Arendse".

432. For reasons already stated at paragraphs 343 - 350 above, the characterisations and criticisms of the River Club First Nations report at paragraphs 56 – 58 under reply are denied.

433. Given Mr Jenkins' failure at paragraph 59 under reply to provide specific references to the portions of the River Club First Nations report which he alleges formed part of his interview with Mr Arendse, I am precluded from offering any meaningful denial.

434. Finally, I am advised by Mr Arendse that he rejects the suggestion at paragraphs 60 – 63 under reply that his quotations from historical records were selective or otherwise designed to denigrate, attack, or undermine the Gorinhaicona.

Ad paragraphs 64 - 65

435. The contents of the paragraph under reply are noted.

Ad paragraphs 66 - 68

436. For reasons extensively dealt with above, it is denied that the HIA (as supplemented) did not comply with the information requirements of section 38(3) or did not provide a reasonable basis to support the impugned decisions of the MEC and the Director.

437. I am advised by Dr Townsend, Mr Hart and Mr Arendse that the criticisms of the HIA (as supplemented) contained at paragraph 68 of Mr Jenkins affidavit are so vague and open-ended, so as to be meaningless. The lack of specificity of Mr Jenkins' allegations stands in stark contrast to the *bona fide* attempts by

the heritage practitioners to provide a detailed analysis of HWC's comment and an explanation of the heritage practitioners' response to its criticisms. (In this regard, I refer to the responses attached as "**JA15**" and "**JA16**" attached above).

Ad paragraphs 69 - 71

438. For reasons already detailed at paragraphs 410~~411~~, 413~~414~~, 421~~422~~ and 434~~435~~ above, the contents of the paragraphs under reply are denied.

Ad paragraphs 72 - 80

439. For reasons already detailed at paragraphs 270~~269~~ - 272~~271~~ and 338 - 347 above, I deny the inference which Mr Jenkins seeks to draw about the alleged purpose of the establishment of the Western Cape First Nations Collective or that they do not represent the legitimate view of the First Nations Peoples they represent.

440. For reasons set out at paragraphs 36.1, 52, 195.1~~194.1~~, 339 - 350 and 379-380 above, I deny the serious allegation at paragraph 75 under reply. I deny in particular, that any members of the Western Cape First Nations Collective are deriving any unlawful or unethical "financial benefits" from the "social compact".

441. In the absence of confirmatory affidavits of the First Nations organisations listed at paragraph 78, I am unable to provide any meaningful response in this regard. I reiterate, however, what I have stated about the lack of urgency and/or self-created urgency elsewhere in my affidavit.

442. Moreover, I reiterate that the heritage practitioners accept there may indeed be a range of First Nations groupings who do not support the development. However, I am advised that this goes to the very heart of polycentric decision-making, *viz.* carefully weighing up competing interests and divergent views and arriving at a decision which is supportable on the facts.

Ad paragraphs 81 - 84

443. For reasons already dealt with extensively in my affidavit, I deny that the development will result in the "irreparable damage" to the River Club site and its associated cultural heritage as alleged.

_AD_ AFFIDAVITS OF O'DONOGHUE & PRINS-SOLANI

444. Having dealt extensively with the contents of the affidavits by Ms O'Donoghue and Ms Prins-Solani in my *seriatim* response to Mr London's affidavit (with specific paragraph references where indicated), I do not repeat those allegations here.

CONCLUSION

445. In the circumstances, I submit that the application falls to be dismissed with costs, including the cost of two counsel.

JODY AUFRICHTIG

I certify that:

The deponent acknowledged to me that:
1. He knows and understands the contents of this declaration;

2. He has no objection to taking the prescribed oath;
3. He considers the prescribed oath binding on his conscience.

The deponent thereafter uttered the words: "I swear that the contents of this declaration is true and correct, so help me God".

The deponent signed the declaration in my presence at the address set out hereunder on this the **25th** day of **AUGUST 2021**.

COMMISSIONER OF OATHS

Full names: .....
Capacity: .....
Address: .....
.....
.....
.....

LISA BRYONY JAMES
COMMISSIONER OF OATHS
IN TERMS OF ARTICLE 5 (1)
OF ACT 16/1963
5TH FLOOR, 42 BURG STREET
CAPE TOWN
practising attorney