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

CASE NO: 12994/21

In the matter between:

OBSERVATORY CIVIC ASSOCIATION First Applicant

**GORINGHAICONA KHOI KHOIN
INDIGENOUS TRADITIONAL COUNCIL** Second Applicant

and

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

HERITAGE WESTERN CAPE Second Respondent

CITY OF CAPE TOWN Third Respondent

**DIRECTOR: DEVELOPMENT MANAGEMENT
(REGION 1), 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

FOURTH AND FIFTH RESPONDENTS' ANSWERING AFFIDAVIT

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I, the undersigned,

ANTON WILHELM BREDELL

do hereby make oath and say:

INTRODUCTION

1. I am an adult male and currently hold the office of the Fifth Respondent, having been duly appointed as such.

2. The facts deposed to herein are to the best of my knowledge true and correct, and they fall within my personal knowledge, unless stated to the contrary or otherwise apparent from the context. Where I rely on information supplied to me by officials in the Department of Environmental Affairs and Development Planning (“the Department”), or other departments in the Western Cape Government, I believe such information to be true. Where I make legal submissions, I do so on the advice of the Department’s legal representatives, which advice I believe to be correct.

3. I make this affidavit in order to deal with the urgent interim relief claimed in Part A of the Applicants’ Notice of Motion. To the extent that it may be necessary, I shall deliver a further affidavit in due course to deal with the final relief which the Applicants seek. I have read the founding and confirmatory affidavits delivered on behalf of the Applicants, and deal, in the course of this affidavit, with the specific allegations made by, or on behalf of, the Applicants. Before doing so, however, I deal with certain background facts and



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circumstances, as well as the principal grounds relied upon by the Applicants and my responses to them.

DECISIONS

4. As appears from the Applicants’ founding affidavit, it seeks in these proceedings to impugn two decisions taken in terms of the National Environmental Management Act, 107 of 1998 (“NEMA”). Both decisions relate to the application by the trustees of the Liesbeek Leisure Properties Trust (“the Trust”) for environmental authorisation in terms of NEMA and the Environmental Impact Assessment Regulations (2014) (“EIA (2014) Regulations”) relating to certain immovable property in Observatory.
5. The first decision, taken on 20 August 2020, is that of the Director: Development Management (Region 1) of the Department, Mr Zaahir Toefy (“the Director”), which decision was made under sub-delegated authority from me. The decision was made in writing, and a copy thereof is annexure “LL24” to the Applicants’ founding affidavit. I respectfully refer this Court to such annexure, which reflects the nature of the decision; the procedures followed; and a summary of the reasons for the decision. For the sake of convenience, I deal in this affidavit with the first decision and matters which are relevant to it. The confirmatory affidavit of the Director, and any other confirmatory affidavits that are required, will be delivered along with this affidavit or shortly after filing hereof.
6. The second decision which the Applicants seek to impugn is the decision taken

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by me in respect of the appeals against the Director's decision, including the Applicants' appeals. Such decision was taken on 22 February 2021 and was made in writing: a copy of an extract from the second decision is annexure "LL26" to the Applicants' founding affidavit. As my decision is 128 pages long, I would wish to avoid overly burdening the already voluminous papers; however, I am advised that it is appropriate that the Court has my complete decision available. A copy is annexed marked "**AB1**". I respectfully refer this Court to the contents of such document, which reflects the nature of the decision; the procedures followed; and a summary of my reasons for the decision.

7. Before I turn to the specifics of the Applicants' complaints reflected in their founding affidavit, it is necessary for me to record that each decision involved a weighing up of various facts and circumstances; the consideration of an extensive range of documents and specialist reports; the assessment of the significance of various impacts which will result from the development, amongst others ecological, hydrological, heritage, and socio-economic impacts; the consideration of a number of complex issues; the views and representations of various parties; the interests of the various parties involved; and the principles reflected in the central statute, namely NEMA, as well as in various policy and planning documents. The attention of the Director, as well as my attention on appeal, to these various issues is reflected in the written recordal of each decision. It is my respectful submission that, both with regard to the decision of the Director, as well as that of myself on appeal, the decisions were

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properly, rationally, and lawfully taken with due regard to all relevant facts and circumstances.

8. I refer, in the course of this affidavit, to various documents that were considered by the Director and by me in reaching our respective decisions. While it is not practicable for me to annex to this affidavit all of such documents, certain of them will be referred to in greater detail in the course of this affidavit and are attached.

COMPLEXITY OF THE DECISIONS

9. Before dealing with the Applicants' challenges to the decisions, I also wish to stress that approving the environmental authorisation was a difficult decision. NEMA requires that when considering whether to grant an environmental authorisation, decision-makers must take into account the environmental, social and economic impacts of the activities applied for, including their benefits and disadvantages. Their negative impacts are to be minimised and the beneficial impacts are to be maximised.
10. Not only were the decisions controversial, but there were several factors which made them unusually complex, of which I mention a few, namely: the acknowledgement that the proposed site is a valuable asset and is sensitive from an ecological, cultural, social and economic perspective; the proposed scale and size of the development which will be considerably larger than neighbouring developments with a high visual impact; the physical location of the underdeveloped privately-owned River Club site of approximately

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14.8 hectares located within the larger development site of approximately 24.8 hectares within the Two Rivers Urban Park area of approximately 300 hectares around the confluence of the Liesbeek and Black Rivers, which includes a range of significant heritage institutions like the South African Astronomical Observatory (“the SAAO”), the Valkenberg Hospital, the Valkenberg homestead and hotel, the Oude Molen eco-village, and Maitland Garden Village, which broader area has high cultural values of historical, social, aesthetic, architectural, scientific and environmental significance; the attempts dating back to 1998 with the initiation of the Two Rivers Urban Park area (“TRUP”) to realise a coherent vision for the development of the TRUP; Heritage Western Cape’s (“HWC”) proposal to provisionally protect, first, the TRUP and then, later, its decision and the gazetting of the provisional protection of the River Club site only; the complexity of the overlapping legal regimes and concurrently running approval processes for the proposed development with several public consultation processes in terms of NEMA, the National Heritage Resources Act, 25 of 1999 (“the NHRA”), and the City’s planning laws; the indigenous people of the Cape Peninsula (“the First Nations people”) that claim intangible heritage interests in the TRUP and the area affected by the proposed development; the opportunity to recognise and commemorate the First Nations people’s history and its importance through an “indigenising” of the proposed development within the context of the Two Rivers Urban Park area; the significance of the ‘openness’ in the sense of place of the Liesbeek floodplain in which the proposed site is located, albeit

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surrounded by disparately-used, separated units of land for office blocks and sports fields, and the Liesbeek Parkway running parallel with the unlined channel of the Liesbeek river; the considerable social (as well as heritage, ecological, and security) benefits anticipated from extending the public movement corridor through the conversion of the canalised Liesbeek River to an unlined vegetated natural watercourse; the potential of the planned Berkley Road Extension, effectively to be a causeway stretching across the floodplain, connecting Maitland/Ndabeni across the Black River to Salt River/Observatory along the northern boundary of the site; biodiversity, ecological and hydrological issues given the site's location in a floodplain proximate to the Raapenberg Bird Sanctuary Wetlands; the potential investment and economic growth in the local and metropolitan area; and finally the employment opportunities during all phases of the proposed development.

11. These issues and more, along with numerous and differing views from a range of organs of state, community and specialist organisations, and other interested and affected persons, had to be (and were) taken into account by both the Director and me in considering and reaching our decisions. Various specialist studies were also conducted according to the requirements of the EIA (2014) Regulations and attached to the Final Basic Assessment Report ("the Final BAR"). The specialists' studies adequately identified and assessed all potential impacts, both positive and negative, that may be associated with the proposed development, and included studies on the ecological status and functioning of the rivers within the site, botanical, faunal and avi-faunal assessments, a





biodiversity impact assessment, a visual impact assessment, heritage impact assessments, geohydrological assessment, surface water hydrology assessments, urban design guidelines, traffic impact assessment, general services investigations, and a socio-economic impact assessment. The specialist reports provided recommendations and/or mitigation measures to ensure that the proposed development is acceptable from an ecological, cultural and socio-economic perspective. In principle, none of the specialist studies conducted found the preferred alternative, referred to as the Riverine Corridor alternative, which will include publicly accessible open spaces comprising more than 60% of the proposed development site, to be unacceptable.

12. In addition to taking the environmental constraints into account, the preferred alternative was also influenced by the responses from the First Nations people which led the Director, and subsequently me, to impose as conditions of approval the following place-making mechanisms to “indigenise” the site, namely: the establishment of an indigenous garden for medicinal plants used by the First Nations people at the site; establishing a Cultural, Heritage and Media Centre at the location of the Heritage Information hub at the site; establishing a heritage-eco trail that goes around the site; establishing an amphitheatre at the site for use and cultural performances by both the First Nations people and the general public; commemorating the history of the First Nations people in the area, by: establishing a gateway feature inspired by symbols central to the First Nations people’s narrative at the road crossing the eco-corridor; incorporating symbols central to the First Nations people’s

narrative in detailed design of buildings (e.g. pillars / supports, facades, building names, etc.); and naming internal roads after people or symbols central to the history of the First Nations people.

13. Ultimately, seen holistically through the requirement to achieve sustainable development and applying the precautionary principle and the criterion of need and desirability, the Director, and subsequently I, positively answered the question of whether the proposed development is a wise use of the land, namely whether it is the right time and the right place for locating the type of land-use activity being proposed. The Riverine Corridor alternative was approved as being the best practicable environmental option with the following positive impacts, namely: the inclusion of the heritage significance of the site and its historical associations to the First Nations people; the rehabilitation of a portion of the Liesbeek Canal; the creation of wetland pockets to serve as potential breeding habitats; the creation of an ecological park/corridor; the creation of functional public open space and associated public amenities; the provision of inclusionary housing opportunities; the improvement and upgrades to road infrastructure; the potential investment and economic growth into the surrounding area; and employment opportunities during all phases of the proposed development.

14. It is clear that the Applicants hold different views on what should be preserved and what should be rehabilitated and enhanced and how this should be done. The fact that the Applicants are, to the extent raised in their challenges, in disagreement with the decisions, I am advised, believe, and aver, provides no



basis for the review of either decision.

PRINCIPAL GROUNDS FOR THE APPLICATION

15. A reading of the founding affidavit will show that the Applicants have restricted themselves to limited challenges in respect of each of the decisions. As appears from paragraphs 17 to 20, and 197 to 199 of the founding affidavit, these are identified by the Applicants, and may be summarised as follows:

15.1. According to HWC, the heritage impact assessment (compiled by heritage specialists, Messrs Hart and Townsend and dated 2 July 2019, part of which is annexure “LL14” to the founding affidavit) (“the HIA”) and the supplementary heritage impact assessment (also compiled by the same specialists and dated 4 December 2019) (“the HIA supplementary report”), a copy of which is annexure “LL15” to the founding affidavit) did not meet the requirements of sections 38(3) and 38(8) of the NHRA. I refer to the HIA and the HIA supplementary report together as “the heritage assessments” unless it is necessary to distinguish between them;

15.2. The Director and I “*effectively ignored*” HWC’s consistent assertions of “*a fatally defective heritage impact assessment*”, and the Applicants variously contend that in doing so the Director and I “*undermined*” or “*breached*” the purpose of section 38(8) of the NHRA because the Director, and subsequently I, acted in excess of our powers by purporting to determine that the heritage assessments

were acceptable. The Applicants contend that in doing so we “*usurp[ed] the HWC’s exclusive power to determine*” that the heritage assessments met the requirements of section 38(8) resulting in a “*fatally defective*” environmental authorisation; and

15.3. The Director and I acted unreasonably or irrationally in taking our respective decisions; and I, moreover, allegedly did not appreciate that the evaluation was to be founded on, amongst other things, an assessment of the significance of the heritage resource in terms of the NHRA.

16. These issues are then expanded upon in the course of the founding affidavit as follows: in respect of the non-compliance with the section 38(3) issue, from paragraph 91 onwards; in respect of the issue relating to the breach of section 38(8), from paragraph 96 onwards; with the main consideration of these issues from paragraphs 114 to 176 as well as at various other places in the affidavit.

17. I wish to point out, at the outset, that all the relevant factors were fully considered by the Director, in taking his decision, and by me in taking my decision, in the process of considering the application and the appeal, respectively. In this regard, I refer to the written decisions themselves, annexures “LL24” and “LL26” read with “AB1” hereto, which reflect, amongst other things, a summary of the reasons for each decision, from which this can be seen. Because of the prominence given to the Applicants’ two main

challenges referred to above, I deal with them individually below.

ALLEGED USURPATION OF HWC'S EXCLUSIVE POWER

18. I deal first with the Applicants' second challenge which disputes that the Director, and later I, could proceed to take our decisions given the comments issued by HWC arising from discussions at two meetings of its Impact Assessment Committee ("IACom"), held on 22 August 2019 and 28 January 2020 respectively, that the HIA and the HIA supplementary report did not comply with section 38(3) of the NHRA. To retain the nomenclature chosen by the Applicants, these comments are:


18.1. HWC's interim comment dated 13 September 2019, a copy whereof is annexure "LL10" to the Applicants' founding affidavit ("HWC's interim comment"), and

18.2. HWC's final comment dated 13 February 2020, a copy whereof is annexure "LL17" to the Applicants' founding affidavit ("HWC's final comment").

19. I am advised, believe, and aver that the approach which the Director, and subsequently I, took in reaching our decisions despite HWC's comments on the heritage assessments is correct.

20. Legal argument about the interpretation of section 38(8) of the NHRA is referred to below and will be addressed further at the hearing of the application.

It is appropriate, though, first to place the views and attitude of HWC in their

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factual context.

21. In paragraph 70 of the founding affidavit, the Applicants refer to HWC's "*Guideline for Heritage Impact Assessments required in terms of section 38 of the National Heritage Resources Act*" ("the Guidelines"). As a copy was not attached, a copy of the Guidelines is annexed hereto marked "**AB2**". The Guidelines provide that if the proposed development triggers the requirement for a heritage impact assessment as part of other legislation such as NEMA or the Minerals and Petroleum Resources Development Act, then a process is followed in terms of section 38(8). Reference is made to an agreement and addendum (the operational agreement/ standard operating procedure) between HWC and the Department dated 10 December 2015, to which I return. The Guidelines then provide that "*HWC must provide comment on a submitted heritage impact assessment to the decision-making authority. However, section 38(8) states that any HIA submitted, must satisfy the requirements of section 38(3) of the NHRA*".

22. After providing guidance on the minimum requirements for an HIA and the possible submission of phased assessments depending on the scale of the development, on the final page of the Guidelines, it is stated that "*HWC must ensure that the evaluation fulfils its requirements and must make any comments and recommendations regarding such development. These comments and recommendations must be taken into consideration by the relevant approving authority prior to the granting of consent*".

23. A copy of the operational agreement referred to earlier is annexed hereto marked "AB3". In the preamble, it is acknowledged that to ensure environmental management and to achieve sustainable development:

23.1. *"procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must ensure, with respect to every application for an environmental authorisation coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state", and*

23.2. *"the different authorities must cooperate with one another in mutual trust and good faith by consulting with one another, coordinating their actions and legislative requirements and adhering to agreed procedures".*

24. At page 4 of the operational agreement, it is provided that when the approval of the heritage resources authority is not required, because of the operation of section 38(8), an environmental impact assessment process will be followed, and if a HIA is required, then it must be undertaken as one of the environmental impact assessment specialist studies, and the environmental authority must ensure that the heritage resources authority's requirements in terms of the assessment are met. In these situations, a separate heritage approval may not be issued, but the environmental authority must take into account the comments and recommendations of the heritage resources authority prior to the granting

or refusal of an environmental authorisation. To facilitate that HWC make a final comment on an environmental authorization application, the standard operating procedures provide for, as in this matter, a pre-application BAR first to be circulated for comment to interested and affected persons. HWC will then take these comments into consideration, especially those of any registered heritage conservation bodies, before submitting to the environmental authorities its final comments on a BAR.

25. As appears from his written decision (annexure “LL24”), the Director, as part of his summary of reasons, dealt specifically with HWC’s interim comment. This portion of his decision reads as follows:

“HWC indicated (in their comment dated 13 September 2019) that the HIA (dated 02 July 2019) does not comply with the provisions of Section 38(8) of the [NHRA]. HWC indicated, *inter alia*, that the identification and mapping of all heritage resources in the area affected was partially complied with, the assessment of the significance of the resources was inadequate, the assessment of the potential impacts of the proposed development was not fully identified or mapped and the failure of the consideration of alternatives. A supplementary report was therefore requested.”

26. The Director then referred to the HIA supplementary report compiled in response to HWC’s interim comment and noted that:

“Since the release of the HIA (dated 02 July 2019) two reports (compiled by Afmas Solutions and dated November 2019), which dealt with the views of several First Nations groupings regarding the wider Two Rivers Urban Park area and regarding the proposed site [were obtained (sic)]. The views

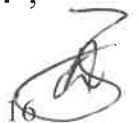
of the First Nations groupings to ‘indigenise’ the proposed site have been incorporated into the proposed development. This includes, *inter alia*, the establishment of an indigenous garden, the establishment of a cultural, heritage and media centre, the establishment of a heritage eco trail, an amphitheatre for cultural performances and the use of symbols and names throughout the proposed development.”

27. The Director then referred to HWC’s final comment stating that:

“HWC regards the wider TRUP of which the River Club site is an integral component, as a highly significant cultural landscape in the City with a significant interplay between natural and manmade landscapes. It is this interplay that defines cultural landscapes. HWC is of the opinion that this area is of at least provincial significance if not national significance’ and that the requirements contained in HWC’s [interim] comment ... have not been met and therefore the requirements of Section 38(3) of [NHRA] have not been met.”

28. Mindful of the HIA Guidelines and the cooperation agreement referred to above, the Director at page 21 of his decision recorded the following attempts to co-operate with HWC to reach agreement in mutual trust and good faith, namely:

28.1. On 4 March 2020 a meeting was held between officials of HWC and the Department, the Trust, the Environmental Assessment Practitioner (“EAP”), and the heritage specialists to discuss HWC’s final comment and the Directorate: Development Management (Region 1)’s (“the Directorate”) letter to the Trust dated 17 February 2020. The Directorate’s letter, a copy of which is annexed hereto marked “AB4”,



addressed numerous aspects regarding the draft BAR. As recorded in the Director's decision, the Directorate's letter requested the Trust to revise the HIA and conduct an external review of the Visual Impact Assessment, in light of HWC's final comment. I point out that, in addition to the Directorate's letter tabled at the meeting, a detailed table (of 41 pages) compiled by the Trust's consultants was produced, listing each issue raised or point argued by HWC in their comments and the heritage specialists' response thereto, a copy of which is annexed hereto marked "AB5". Also provided was a briefer summary (of six pages), which focused directly on HWC's contention that the heritage assessments did not adequately comply with section 38(3) of the NHRA, a copy of which is annexed hereto marked "AB6".

28.2. From the action points compiled by an independent facilitator for the meeting on 4 March, a copy of which is annexed hereto marked "AB7", it is recorded that the other attendees were informed that members of HWC's IACom had elected not to attend the workshop. Nonetheless, as recorded in the Director's decision and supported by the action points, **"[i]t was agreed that there would be further engagement with HWC, in the form of a meeting with the relevant HWC officials and the HWC IACOM committee and a written response to HWC's [final comment] was required."**

28.3. The Director's decision goes on to record that **"[o]n 10 March 2020, the heritage practitioner and the EAP met with HWC officials and**

discussed the way forward. However, the HWC IACOM meeting [scheduled for 12 March 2020] never materialised.”

28.4. A further written response to HWC’s final comment was provided by the heritage specialists, dated 31 March 2020, a copy of which is annexed hereto marked “**AB8**”.

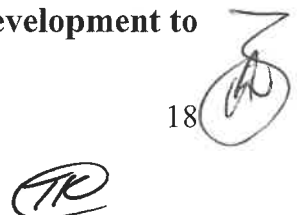
28.5. After consideration of all the relevant information, the Director concluded that the Directorate’s comment “**regarding the revision of the HIA and external review of the VIA, were adequately addressed in the heritage specialists written response... .”**

29. In paragraph 1.7 of HWC’s first ground of appeal against the Director’s decision (annexure “LL20”), HWC referred to their interim comment, the HIA supplementary report prepared in response thereto, their final comment, and the heritage specialists’ response thereto, and said that:

“the blanket acceptance of the responses by the consenting authority are accordingly unlawful as it is clear that S38(8) requires the endorsement of the HIA as compliant with its requirements to be made by HWC and no other party”.

30. When I considered the various appeals, including that of HWC, I too considered this issue. In this regard, I refer to my written decision (annexure “LL26”), at paragraphs 5.70 to 5.79 where I dealt with HWC’s first ground of appeal comprehensively and at length. I have summarised where possible:

“5.70 The applicant has made provision in the proposed development to

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commemorate the intangible heritage of the River Club site within the context of the greater TRUP area.

5.71 [I explained the purpose of section 38(8) of the NHRA and that] a separate HIA and approval from the heritage resources authority are not required, provided that the environmental authority must:

5.71.1 Ensure that if the relevant heritage resources require a HIA it fulfils the requirements of the heritage resources authority.

5.71.2 Any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the environmental authority's consent.

5.72 [I quoted from the Guidelines and Cooperation Agreement discussed above, emphasising that] the environmental authority must take into account the comments and recommendations of the heritage resources authority prior to granting or refusing the EA.

5.73 The DEA&DP's Directorate: Development Management (Region 1) stated that:

5.73.1 The heritage specialists' written response (dated 31 March 2020) was included in the Final BAR submitted to the Competent Authority on 8 June 2020.

5.73.2 The heritage specialists' written response (dated 31 March 2020) did not result in significant changes made to the BAR, where the need for additional public participation was not warranted. The requirements of Regulation 41 of the NEMA EIA Regulations, 2014 (as amended) were therefore met.

5.74 Based on the information contained in the Final BAR, the meeting that was agreed to between the DEA&DP and HWC did not take place before the granting of the EA although:

5.74.1 [I referred to the HIA produced] to identify, assess and communicate the impacts of the proposed development on the heritage resources on the site and its environs.

5.74.2 [I referred to HWC's interim comment] objecting to the proposed development on the site due *inter alia* to the following comments:

5.74.2.1 The River Club forms part of the wider Two Rivers Urban Park ("TRUP") and represents a microcosm of Cape history.

5.74.2.2 The HIA has been well researched but the actual mapping of identified heritage resources is illogical and flawed and is relegated to two diagrams in section 10.8 of the HIA report which is titled "*Conclusions regarding impacts on significance*".

5.74.2.3 The assessment of the significance of the heritage resources in terms of the heritage assessment criteria set in out in section 6(2) or prescribed under section 7 of the NHRA is inadequate.

5.74.2.4 The HIA Report downplays the irreversible impacts of transforming a green lung at the heart of the TRUP into a mega project.

5.74.2.5 While there may be economic benefits to developing the site, there has been no

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acknowledgement of the impact of the development balanced against a site which has been recognised previously by HWC as being of provincial or national significance.

5.74.2.6 There has been a lack of, or avoidance of a meaningful consultation with the First Nations Groups.

5.74.2.7 There is no meaningful consideration of alternatives although heritage resources will be adversely affected by the proposed development.

5.74.3 [I then referred to the HIA supplementary report in response to HWC's interim comment which] provided information in terms of the following requirements of section 38 of the NHRA [which I then set out].

5.74.4 [I then referred to HWC's final comment which] still object[ed] to the proposed development on the site.

5.74.5 In their Appeal lodged against the EA, HWC continues to object to the proposed development despite the HIA and the Supplementary Report to the HIA conducted to address their concerns.

5.74.6 On 25 November 2020, the Appeal Authority, as part of the Appeal process, requested HWC to supply the information/HIA requirements to supplement the current HIA that will enable HWC to consider that the HIA fulfils the requirements of the HWC and the NHRA. [This is a reference to my letter a copy of which is annexure "LL21" to the Applicants' founding affidavit.]

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5.74.7 On 11 December 2020, HWC responded as follows:

“2. HWC is of the opinion that all the information was supplied in the comments prepared by our Impact Assessment Committee which were appended to the Appeal and is appended again for ease of reference.

3. Your attention is drawn to paragraph 43 onward thereof, in which the committee detailed with specific reference to the provisions of S38(3) of the [NHRA] the information required in order to comply with said section.

4. HWC is concerned that, should certain of these requirements be highlighted, it would result in the impression being created that these are the only issues which must be addressed. It is re-iterated that all the issues stand to be addressed.”

5.75 [I referred to my further letter to HWC dated 26 January 2021, a copy of which is annexure “LL22” to the Applicants’ founding affidavit in which I said amongst other things that]

3. I have reviewed your comments dated 13 February 2020 and 11 December 2020 as well as the information provided in the Supplementary Report to the HIA Report dated 4 December 2019, as well as the Applicant’s Responding Statement dated 12 October 2020. I am of the view that the issues you raised in your response dated 11 December 2020, have been addressed in the Applicant’s Supplementary Report to the HIA Report, as well as the Responding Statement. [I point out that the Responding Statement referred to is the Trust’s response to all of the appeals.]

4. ...

5. *Should you not provide me with an indication of such information, I will then surmise that the Supplementary Report to the HIA Report does satisfy the NHRA and HWC requirements and that all issues raised by yourself have been adequately addressed.”*

5.76 [I referred to HWC’s response dated 3 February 2021, a copy of which is annexure “LL23” to the Applicants’ founding affidavit in which HWC said amongst other things that]

“Heritage Western Cape (HWC) cannot agree with your contentions as stated in paragraph 3 thereof. It is re-iterated that HWC is of the strong opinion that Supplementary Report to the HIA report dated 4 December 2019 and the Responding statement dated 12 October 2020 merely re-state the initial opinions expressed in the original HIA and do not in fact address the issues that HWC raised in its Final Comment.

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

5.77 As required by the 2014 EIA Regulations, SRK Consulting was appointed as an independent EAP to conduct the basic assessment process and various independent specialists were also appointed to conduct specialist studies which informed the basic assessment process which informed the granting of the EA. Independence is defined in the 2014 EIA Regulations [and I included the definition].

5.78 I concurred with the Responding Statements that:

5.78.1 The Appellant’s statement that *“the decision-maker was biased in the decision and that the decision-maker had decided long before the BA was finalised to get the proposal approved”* is refuted based on the lack of evidence provided.

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The Competent Authority based his decision on the information contained in the BAR (dated 06 April 2020).

5.78.2 The DEA&DP did not pre-empt the decision to grant an EA in its comments on the draft reports that were available for comment.

5.78.3 The Applicant, EAP and all the specialists who conducted a specialist study for this EIA process have signed and dated the declaration to confirm that the information provided in the BAR (dated 6 April 2020) is true and correct.

5.78.4 The EA takes cognizance of the fact that HWC indicated (in their correspondence dated 13 February 2020) that the requirements of Section 38(3) of the NHRA have not been met.

5.78.5 The Basic Assessment process is based on the findings of research undertaken by independent specialists, and not the “interpretations and assertions” of the developer.

5.78.6 Specialist independence is assured by the fact that EAPs and specialists must confirm that they do not have any material present or contingent interest in the outcome of the environmental assessment process, nor do they have any pecuniary or other interest that could be reasonably regarded as being capable of affecting their independence.

5.78.7 Appellants have not demonstrated any conflict of interest of any members of the basic assessment process project team and specialists.

5.79 Considering the above, HWC was adamant that the information provided was not sufficient. However, the Applicant’s heritage

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specialist was of the opinion that the information was more than sufficient. After repeated requests form (sic) the Appeal Authority to HWC by the Appeal Authority to clarify what was still required in terms of the HIA, no answer was forthcoming except that their original comment remained the same. I have to however, make a decision on this matter. I thus took into consideration all the different facets of the development as it also has an impact on the environment. The conclusion I came to was that the holistic overall need and desirability of the development supports the granting of the Appeal Environmental Authorisation.”

31. I too, therefore, considered HWC’s comments and the heritage specialists’ various responses to their comments and decided that, notwithstanding HWC’s comments, the application was correctly granted insofar as the heritage impacts had been properly evaluated, assessed, enhanced, and protected, and that the appeals should be dismissed.

32. In the circumstances, it is apparent that both the Director and I, when we took our respective decisions, were fully aware that HWC had expressed different views to the independent heritage specialists about whether the heritage assessments complied with section 38(3). Clarification and consensus were therefore sought from HWC, and when they could not be obtained, the Director, and subsequently I, had to reach our own evaluation of whether the heritage assessments complied with the assessments required by section 38(3) along with all the mandatory considerations imposed by NEMA. While HWC’s comments were taken into account, HWC’s position that the heritage assessments did not satisfy the requirement of section 38(3) was not rationally

connected to the information that was before HWC in respect of the relevant considerations. Both the Director's decision, and my subsequent appeal decision, were rationally connected to the information before us in respect of the relevant considerations.

33. The Director and I, as the consenting authority in terms of section 38(8), after taking HWC's comments into account, together with all relevant facts and circumstances, both on their own and in relation to the other issues impacting upon our respective decisions, then proceeded to take our decisions as authorised by section 38(8) of the NHRA and section 24 of NEMA.

34. It cannot reasonably be suggested that the decisions were fatally flawed because either the Director or I failed to ensure that the heritage resources were subject to an evaluation that complies with section 38(3) of the NHRA or that the views of the relevant heritage authority (in this case HWC) were not properly considered.

35. Further legal argument on the interpretation and application of sections 38(3) and (8) of the NHRA will be addressed to the Court at the hearing of the application. Without limiting the ambit of such argument, the following submissions will be made:

35.1. In terms of section 38(3) the heritage resources authority must specify the information to be provided in the relevant report, which must include the information described in the subsections which follow.



- 35.2. In terms of section 38(8) the consenting authority must ensure that the evaluation fulfils the requirements of the heritage resources authority in terms of subsection (3), and moreover take into account the comments and recommendations of the heritage resources authority.
- 35.3. The heritage resources authority accordingly has the power to specify the information to be provided in terms of section 38(3); it may therefore specify particular information which is to be provided in the relevant report. The heritage resources authority's power does not extend to a determination of whether or not there has been compliance with these sections (it is the consenting authority that must ensure that the heritage resources authority's requirements were met); nor are its comments and recommendations binding on the consenting authority.
- 35.4. Having regard to the facts set out above, all information required by HWC in terms of section 38(3) was provided in terms of the relevant reports; all of such information, as well as HWC's comments and recommendations, were considered and taken into account by the Director and subsequently by me; and neither the Director nor I "*usurped*" any power of HWC.

COMPLIANCE WITH SECTION 38(3) OF THE NHRA

36. I now turn to deal with the Applicants' first challenge which is to the effect that the conclusion of the Director, and later myself on appeal, is unreasonable in light of the assertions of HWC that the heritage assessments did not comply

with section 38(3) of the NHRA and were “*fatally defective*”.

37. As a starting point, I emphasise that the heritage assessments were compiled by two eminent heritage specialists whose expertise HWC does not dispute. On the contrary, at page 11 of their interim comment, HWC refers to “*the unquestionable qualifications and heritage standing of both heritage practitioners who compiled the report*”. HWC’s opinion that “*the HIA would benefit from input from a specialist consultant, with the requisite expertise in dealing with the intangible aspects pertaining to the wider TRUP area*” was taken into consideration. As indicated above, although the Directorate in their letter of 17 February 2020 (annexure “AB4”) acted on this recommendation, ultimately, and after unsuccessfully attempting to seek further clarification from IACom and resolve the differing opinions between them and the heritage specialists as to whether the section 38(3) requirements had been met, the Director, and subsequently I, as the consenting authorities in terms of section 38(8), had to take our decisions.

38. As already indicated above, it is apparent from reading, amongst other documents, the HIA and the HIA supplementary report, along with the 41-page table (annexure “AB5”), Appendix B to the Final BAR *Specialist responses to HWC’s Final Comment on the HIA for the River Club (Dr Stephen S Townsend)* (annexure “AB8”), and the six-page summary (annexure “AB6”), that the heritage specialists dealt with the types and kinds of investigations, gathering of information and assessments required by the seven sub-sections of section 38(3) of the NHRA. As the Applicants do not attach two important

sections of the HIA to its extract (annexure “LL14”), although I would wish to avoid further burdening the papers, I am advised that it is appropriate for the Court to have a complete copy of the HIA; a copy is therefore annexed marked “AB9”.

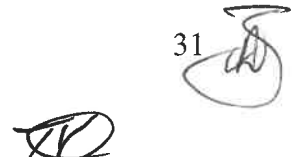
39. I turn briefly to a consideration of whether the specific requirements of section 38(3)(a) were met. In relation to section 38(3)(a), namely the requirement to identify and map all of the heritage resources in the area, HWC contended that the heritage specialists only partially mapped the heritage resources. This the specialists denied with reference to the *Executive Summary* (pages 3 to 5), *Preface* (pages 19 to 21) and section 6 *Identification of Heritage Resources* (pages 70 to 79) and section 10.8 *Conclusions regarding impacts on Significance* (pages 117 to 118) of the HIA, and section 4 *Identification and Mapping of Heritage Resources* (pages 12 to 15) and section 5 *Assessment of Significances* (pages 15 to 20) of the HIA supplementary report. At pages 13 to 15 of the HIA supplementary report, the specialists provided maps of three separate mapping exercises.
40. In section 6 of the HIA, the specialists identified the heritage resources as consisting of amongst other things, the site as part of the floodplain, early crossing points, the River Club site itself, and the heritage resources in the surrounding area, namely the SAAO and the TRUP and nearby elements.
41. In relation to section 38(3)(b), namely the requirement to assess the significance of such resources in terms of the heritage assessment criteria,

HWC contended that the assessments of significance were inadequate because if the identification and mapping of heritage resources is flawed, the grading of significance will be flawed (as will the conclusions of the HIA). This the specialists denied with reference to the *Executive Summary* (pages 3 to 5) and section 7 *Significances* of the HIA (pages 79 to 85) and section 5 *Assessment of Significances* (pages 15 to 20) of the HIA supplementary report.

42. In relation to section 38(3)(c), namely the requirement to assess the impact of the development on such heritage resources, the heritage specialists denied this had not been done and referred to the *Executive Summary* (pages 3 to 4), section 9.3 *The Alternative Development Proposals* (pages 96 to 109) and section 10 *Assessment of Impacts on Significance* (pages 109 to 118) of the HIA, and section 5 *Assessment of Significances* (pages 15 to 20) of the HIA supplementary report.

43. In relation to section 38(3)(d), namely the requirement to evaluate the impact of the development on heritage resources relative to the sustainable social and economic benefits to be derived from the development, the specialists indicated that the evaluation was done in section 10 *Assessment of Impacts on Significance* of the HIA (pages 109 to 118) of the HIA, and section 7 *Alternatives and Mitigation of Impacts* (pages 26 to 28) of the HIA supplementary report. I point out that the Final BAR also covers the sustainable social and economic benefits to be derived from the development and it is substantially addressed by the appropriate specialist socio-economic report attached as Appendix "G4" to the Final BAR.

44. Section 38(3)(e) deals with the requirement to consider the results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources. Issues of consultation were dealt with in section 5 *Consultation and Commentary of Interested Parties* (pages 52 to 70) and section 9.4 *Commentary of IAPs on the Development Proposal* (pages 106 to 109) of the HIA, and section 2 *Engagements with First Nations Groupings* (pages 4 to 9) and section 6 *The Revised Development Proposal* (pages 20 to 25) of the HIA supplementary report.
45. In HWC's Interim Comment, it stated clearly that the "*formal notice and commenting procedure*" had been "*complied with*"; but that there had not been a "*meaningful consultation with First Nations Groups*". The specialists dealt with this criticism in the HIA supplementary report. An appropriate expert was found and engaged. Section 2 in the HIA supplementary report (at pages 4 to 9) dealt extensively with the engagement with the First Nations people. Attached as appendix "F" to the Final BAR was a collection of all the comments received and responses on the pre-application and draft BAR. I dealt extensively with the engagement with the First Nations people on appeal from paragraphs 5.58.10 to 5.58.22 of my decision.
46. In relation to section 38(3)(f), namely the requirement to consider alternatives if heritage resources will be adversely affected by the proposed development, the specialists indicated the evaluation had been done. In the HIA the alternatives were discussed in section 9.3 *The Alternative Development*



Proposals (pages 96 to 106) and section 10 *Assessment of Impacts on Significance* (pages 109 to 117), and in the HIA supplementary report in section 7 *Alternatives and Mitigation of Impacts* (at pages 26 to 28). Appendix “J” to the Final BAR also detailed the impact assessments and included assessment tables.

47. Section 38(3)(g) deals with the requirement to provide plans for mitigation of any adverse effects during and after the completion of the proposed development. In the HIA the mitigation measures were incorporated and evaluated in section 9.3 *The Alternative Development Proposals* (pages 96 to 106), section 10 *Assessment of Impacts on Significance* (pages 109 to 117) and section 11 *Mitigations* (pages 118 to 119). In the HIA supplementary report they are dealt with in section 7 *Alternatives and Mitigation of Impacts* (at pages 26 to 28). Appendix “J” to the Final Bar also detailed the assessments of the impacts and the mitigation of these impacts.
48. I therefore deny the assertion on behalf of the Applicants that there was no compliance with section 38(3) of the NHRA. As I have demonstrated, and as the relevant reports show, there was full compliance. I furthermore deny that the decision of the Director, and my decision, were unreasonable or irrational. The Director, and later I, accepted that the heritage resources of the site are intangible, an aspect that the Applicants and HWC do not dispute. The Director captured this complexity at page 19 of his decision as follows: “**However, no tangible traces of early pre-colonial or colonial historic events have been found on the proposed site**” and at page 21 that “**this [high historical]**

significance is not visible or apparent". In paragraph 5.26.27 of my reasons I recognised this aspect by stating as follows - **"The difficulty in articulating the heritage-sensitivity of the River Club site is that although the site is historically important in terms of the role this area played in the history of the Cape, there is no or very little physical heritage on the site – it has been transformed and reclaimed from estuary mud; and the course and nature of the Liesbeek has been dramatically altered"**. And later, in paragraph 5.57.11 of my reasons, I recorded that **"[n]o tangible elements of the history of the broader area remain at the site, and the site is either entirely or almost entirely an infill site, it is therefore unlikely that the site could yield information about heritage"**. However, should any be found, I confirmed on appeal, specific condition 16 imposed by the Director which requires that any heritage remains exposed during excavations must immediately be reported to HWC.

49. As reflected in our decisions, apart from the fact that the relevant heritage resources on the site are intangible, as compared to those in the surrounding areas, there was no doubt in the Director's mind that the site is one of high historical significance, as is evident from the reasons for his decision where he said: **"much of the history that derives (from) the cultural significance of the site extends over a far broader area. The heritage specialists have however indicated that they recognise that the River Club site has high historical significance"**.

50. In paragraph 5.57.1 and following, I acknowledged that:

“5.57.1 The history of the broader area is comprehensively described in Section 4 of the HIA, and includes a history of:

5.57.1.1 Khoekhoe groups occupation and use of the area for grazing.

5.57.1.2 The importance of the rivers to the history of the area.

5.57.1.3 Conflict between Khoekhoe groups and European settlers.

5.57.1.4 The defensive line established by the Dutch.

5.57.1.5 The agricultural use of the Liesbeek River catchment by the Dutch.

5.57.1.6 Residential, commercial, and industrial encroachment on the agricultural and riverine floodplain and landscape.

5.57.2 Remaining heritage resources in the broader landscape [amongst others that the site is a heritage resource as part of the floodplain, early crossing points over the Liesbeek-Black River estuary, namely Vaarsche Drift, the SAAO, and the TRUP and nearby elements] are also documented (see Section 6 of the HIA)”.

5.57.3 The HIA confirms that the cultural significance of the area is derived from “*the history of and concentration of historic elements in this landscape as well as the symbolic values of the Black and Liesbeek Rivers*”.

51. Ultimately, what carried considerable weight was the specialists’ recommendation to translate the intangible to the tangible by rehabilitating the canalised portion of the Liesbeek River on the eastern boundary of the site restoring ecological functioning, and providing public access along the 40m wide bank as part of the restored Liesbeek River as a historical and

topographical feature thereby locating the site within the indigenous narrative of the broader Two Rivers Urban Park area associative cultural landscape.

52. At page 19 of his decision, the Director captured this concretisation in the following words: **“The Liesbeek River corridor and its confluence have been identified as a highly significant heritage feature. The specialist indicated that the Liesbeek River corridor and its confluence are powerful historical symbols of the early landscape of pre-colonial transhumance use, colonial settlement and agriculture, which is claimed as a living heritage site by the First Peoples groups. ... The existing buildings on the proposed site are of low heritage significance. The specialist noted that while the landscape remains, it is in a transformed state. Although no heritage resources that require intervention are located on the site, the specialists note that the Liesbeek River corridor should be recognised as a heritage resource if the Liesbeek River corridor is restored to its full ecological functioning”**.

53. At paragraph 5.57.9 of my appeal decision, I said **“the Liesbeek River is a tangible heritage resource that remains in this transformed landscape, is a potentially strong symbol of past events, reflects the history and significance of the area, is a common thread and the significant heritage resource that links the River Club, the Two River local area and the broader environs more generally, and is worthy of heritage protection”**.

54. In relation to the assessment of impacts, alternatives, and mitigation at page 20

the Director stated that:

“According to the BAR, the most significant heritage resource close to the site is the [SAAO], which has Grade I heritage status due to its scientific history. The core historic structure at the SAAO (built in 1822) is centrally situated, and is surrounded by a number of structures of ages ranging from 19th century staff buildings, telescope domes, to late 20th century structures. The setback of the development from the SAAO boundary was one of the key informants of the alternative evolution of the Riverine Corridor Alternative. This alternative mitigates impacts on the SAAO as far as practically possible by stepping back development by approximately 40m from the existing canal and rehabilitating (and therefore softening) the river course, while ensuring the financial viability of the development (i.e. developing the minimum amount of floor area, or bulk required). The potential impacts on the SAAO have been assessed as being of high negative significance, as the site is of national heritage significance. However, the current layout design is compliant with all of the urban design indicators identified in the Urban Design Indicators and recommendations produced by Urban Concepts and has taken account of local sensitivities as far as practicably possible.

The specialist further notes that the proposed development will result in a change in the appearance and character of the site, which is considered as a negative impact. Although the potential impacts are difficult to mitigate, the specialist recommended that the visual impact of the proposed development on the southern portion of the site are minimised. This has been addressed as the height of the buildings was reduced and is limited to a height of four storeys. The specialist further recommended that a range of building heights be applied and that an avenue of trees be planted along the edge of the riverine corridor. Mitigation measures with respect to the restoration of the Liesbeek River corridor and public open space corridor were recommended by the specialist. The recommendations of the

specialist have been included in the Riverine Corridor Alternative (i.e. the Preferred Alternative) and in the EMPr.”

55. The Director at page 21 of his decision concluded that:

“...that the proposed site creates a real and immediate opportunity, which could trigger meaningful planning of a much larger heritage site. Although the visual openness of the proposed site is highly valued, the existing development on the proposed site does not signal any heritage or cultural significance. An opportunity to commemorate and incorporate the views of the First Nations Collective exists in a space that currently displays no heritage significance. Given that significant input, research and engagement with the First Nations has been undertaken and that the views of the First Nations have been incorporated into the proposed development, the potential heritage impacts have been adequately assessed and concerns raised have been adequately responded to.”

56. The Director imposed as a specific condition 16.1 that the recommendations of the heritage assessments as included in the EMPr must be implemented, namely the incorporation into the proposed development of certain significant features in view of the heritage significance of the site and associations to the First Nations people:

56.1. An indigenous garden for medicinal plants used by the First Nations people will be established at the site,

56.2. A cultural, heritage and media centre at the location of the heritage information hub will be established,

56.3. A heritage eco-trail around the site will be established,

- 56.4. An amphitheatre for use and cultural performances will be established,
- 56.5. Commemorating the history of the First Nations people in the area through establishing a gateway feature inspired symbols at the road crossing of the ecological park/corridor, and
- 56.6. incorporating symbols into the detailed design of buildings and the naming of internal roads.
57. It is to be noted that the idea of incorporating these features into the development arose out of consultations with, and proposals by, representatives of certain First Nations groupings. I refer in this regard to the HIA supplementary report (annexure “LL15” to the founding affidavit) from page 4; and the report of AFMAS Solutions (annexure “LL16”).
58. In relation to the assessments of impact, alternatives, and mitigation in the appeal decision, I refer the Court to paragraphs 5.28 to 5.54.11.
59. From the foregoing it should be apparent that neither the Director, nor I, nor the authors of the HIA and the HIA supplementary report, were dismissive of the heritage impacts of the proposed development or of the historical and cultural matters raised by or in respect of the First Nations people. On the contrary, the challenge was to give meaning and practical form to these considerations, in a sensitive and balanced manner. Both the Director and I have sought to do so.

60. What, however, emerges from reading HWC's comments and the heritage specialists' detailed responses thereto, is that there were differences between HWC and the heritage specialists about how to assess and map the heritage resources of the wider floodplain and TRUP area.
61. The Applicants attach affidavits from Ms O'Donoghue and Ms Prins-Solani giving expert evidence on the question whether section 38(3) have been considered properly or not. I am advised that this is not a matter which turns on expert evidence. It does not help for the Applicants to refer to the affidavits of Ms O'Donoghue and Ms Prins-Solani and their opinion that the requirements of section 38(3) have not been met. It is for the Court to look and see whether there has been compliance. What is clear is that these persons do not agree with the outcome, but this does not assist the Applicants in their review of the lawfulness of the process that was applied by the Director and me in reaching the decisions we did in this matter.
62. The issue relating to the heritage assessments complying with section 38(3) of the NHRA was, moreover, raised and discussed in various of the other documents placed before the Director and, later, before myself. Different views were expressed thereon in such documents: there were those who supported the application, notwithstanding that there would be development, and those who opposed the application for this reason. All of such submissions were taken into account by the Director and by me, after taking HWC's comments and recommendations into consideration.



63. In the circumstances, I respectfully aver that there is no basis upon which it could reasonably be suggested that the circumstances in question provide a basis for impugning either of the decisions. The particular issue was thoroughly considered, in the light of all relevant circumstances. It cannot reasonably be suggested that the decisions were irrational or tainted in any way, and in particular not in any way which would justify either decision being set aside.
64. The heritage assessments were carefully considered in the course of the decision-making process of the Director and, subsequently, of myself. By saying this, I do not seek to suggest that either the Director or I simply accepted everything that was said therein; the reports were considered along with all of the other data and the information before each of us.

THE PROVISIONAL PROTECTION NOTICE

65. Although not highlighted as one of the main grounds upon which relief is sought in their application, the Applicants present an argument, in paragraphs 108 to 113 of their founding affidavit, to the effect that the provisional protection notice of HWC, published in terms of section 29 of the NHRA on 20 April 2018, is allegedly still in operation. The argument is based upon the averment that its operation was suspended by the administrative appeal in respect of the notice; and accordingly, that its period of operation has allegedly been prolonged with the effect that it has not expired and is still in operation.

66. I am advised, believe, and aver that the Applicants' contentions are incorrect.

In summary -

- 66.1. On a proper interpretation of section 29 of the NHRA, an appeal against a provisional protection notice does not suspend its operation – such a result would defeat the very purpose of such a notice.
- 66.2. In any event, section 29(1)(a) makes it plain that the provisional protection notice may operate “*for a maximum period of two years*”. The section itself is therefore inconsistent with the notion that it is extended by any period during which it is subject to an appeal.
- 66.3. HWC’s notice (annexure “LL13” to the founding affidavit) itself provides that it operates “*for a maximum period of two years from the publication of this notice*”. The notice itself is, therefore, also inconsistent with the notion that it may be extended for the period by which it might be subject to an appeal.
- 66.4. The Applicants also participated in the appeal hearings held in respect of the appeals submitted against the Council of HWC’s decision to provisionally protect the River Club site. The matter of whether the appeals suspended/interrupted the 2-year period was specifically raised during the appeal hearings and the Heritage Appeal Tribunal in paragraph 118 of its final decision dated 14 April 2020 indicated that “*In the circumstances, this Appeal Tribunal and the Respondent [Heritage Western Cape] will soon become functus officio when the provisional protection order expires on 20 April 2020. (...)*”. If the Applicants were of the view that the Heritage Appeal Tribunal erred

in this regard, they should have timeously taken the Heritage Appeal Tribunal's decision of 14 April 2020 on review. They failed to do so.

66.5. In the circumstances, the notice expired two years after it was issued, namely on 20 April 2020, and is no longer in operation.

Further legal argument on this issue will be advanced at the hearing.

APPLICANTS DO NOT MEET THE REQUIREMENTS FOR AN INTERIM INTERDICT

PRIMA FACIE RIGHT

65. Having regard to what has been set out above, it is my respectful averment that the Applicants have established no right to the relief which they seek. At best for them, such alleged right is open to serious doubt. In these circumstances, it is my respectful averment that the Applicants have failed to establish a basic requirement for an interim interdict.

BALANCE OF CONVENIENCE

66. In paragraph 205 of their founding affidavit, the Applicants seek to deal with the issue of the balance of convenience in this application. They start by referring to "*the magnitude of the destruction*" which will allegedly occur if the application for interim relief is not granted; and they weigh this up against the interest of the general public and those of "*a single developer*".

67. I deny, in the first place, that it is appropriate for the Applicants to refer to the alleged "*magnitude of the destruction*" which will take place if the interim order

they seek is not granted. As I have indicated above, particularly from a heritage point of view there are significant benefits for all interested persons, and in particular, representatives and members of the First Nations people, arising from the proposed development.

68. Moreover, I am advised and aver that it is inappropriate to refer simply to the “*the interests of a single developer*”. In considering whether or not interim relief should be granted, the Court may have regard to the interests not only of the immediate parties to an application, but also to the interests of other persons and the wider public. I point out, in this context, that the decision of the Director, which was upheld by me on appeal, identifies significant benefits to the broader public, being citizens of the Western Cape Province, of the proposed development, in the form approved by the Director and me. These include the benefits in respect of the proposed recognition of intangible heritage aspects referred to above. Also included are the rehabilitation of the currently degraded site in the respects set out therein, and the significant socio-economic benefits summarised in paragraph 3.12 of the Director’s decision. There he deals with the potential socio-economic impact of the development, which includes investment in the economy and employment opportunities, which would go some way to alleviating the disturbingly high rate of unemployment in the region, and also to the alleviation of the condition of poverty in which many of our people find themselves.

69. In addition, also included in the significant benefits of the proposed development to the broader public, as citizens of the Western Cape Province, in

the form approved by the Director and me, are the provision of inclusionary housing, and the creation of public open space in order partially to replace the existing private open space, involving landscaped areas, pathways, and river walks.

70. I am seriously concerned that the granting of an interim interdict as sought by the Applicants would bring the development activities to a halt, and that this may incline the developer not to proceed with the development. Were this to occur, all the benefits of the development referred to above would be lost, to the serious prejudice of the wide range of persons who would otherwise have benefitted from the development, directly or indirectly. In these circumstances, the losses that would be suffered would far outweigh any alleged inconvenience which the Applicants would endure if the interim interdict were not to be granted.

URGENCY

71. It is necessary also to deal with the procedure adopted by the Applicants in this matter, and the timing of their application. As indicated above, the Director took his decision on 20 August 2020, and I took my decision on appeal on 22 February 2021. The Applicants then served their papers in the application on 3 August 2021, after a delay of more than five months, requesting that the application be dealt with as one of urgency. They seek to deal with the issue of urgency in paragraphs 22 to 24 of their founding affidavit. However, their affidavit is devoid of an explanation as to why they waited for more than five



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months before launching their application.

72. In paragraph 24.1 the Applicants say that after the decision of the Seventh Respondent was taken on 10 April 2021, they “*set about finding and briefing suitable counsel to prepare papers*”. The statement is vague in the extreme - nowhere is it stated when counsel was sought, how long it took counsel to draft papers, and why papers were only served during August 2021. In particular, no explanation is provided as to why an application was not launched soon after 22 February 2021 in respect of my decision, and the previous decision of the Director. In the circumstances, no facts are put up which explain why the Applicants waited literally until the last moment before launching their application, and then did so by seeking to impose extreme and unrealistic time limits on the Respondents.

73. The delay of the Applicants, seen in the context of this matter as explained above, is unreasonable. Any urgency in the application is therefore entirely self-created. For this reason, I respectfully aver that this Court should not entertain the application, and that it should be struck from the roll. Nonetheless, I have not sought to rely solely on this ground in order to dispose of the application and have dealt with the merits of the application as set out above.

ANSWER TO INDIVIDUAL PARAGRAPHS OF THE FOUNDING AFFIDAVITS

74. In the course of the Applicants’ founding affidavit, the deponent embroiders on the key issues raised by them in various respects, and also raises other points

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which do not appear to form part of the key issues relied upon. I deal with all of these in the paragraphs which follow. In doing so, I do not repeat what I have already said above. I do not deal with the issues the Applicants raise in relation to the City's land use planning decisions.

75. **AD PARAGRAPH 1 OF THE FOUNDING AFFIDAVIT OF LESLIE LONDON**

This paragraph is not disputed.

76. **AD PARAGRAPH 2**

As appears from the contents of this affidavit, I take issue with certain of the facts and the conclusions set out in the Applicants' founding affidavit.

77. **AD PARAGRAPHS 3 - 4**

These paragraphs are not disputed.

78. **AD PARAGRAPHS 5, 6 AND 7**

These paragraphs are noted.

79. **AD PARAGRAPHS 8 AND 9**

These paragraphs are admitted.

80. **AD PARAGRAPHS 10 AND 11**

These paragraphs are noted.

81. **AD PARAGRAPH 12**

This paragraph is admitted.

82. **AD PARAGRAPH 13**

81.1. I do not dispute that the Applicants hold the belief expressed in the first sentence. However, I disagree with it.

81.2. I note that the Applicants speak on behalf of HWC as sharing their belief, again with which I disagree.

81.3. It is correct that HWC has the statutory responsibility averred but it is denied that HWC has sole responsibility in situations where section 38(8) of the NHRA applies.

81.4. I have already dealt above with the allegation that the Director and I usurped HWC's regulatory function, which is denied.

82. **AD PARAGRAPH 14**

I do not dispute this paragraph, which describes factors about the River Club site that were considered, together with a variety of others, by the Director and by myself when considering the application.

83. **AD PARAGRAPH 15**

I have already dealt above with HWC's granting of provisional protection to the River Club site and its recommendation to SAHRA that it be assessed for

national heritage status. As previously indicated, it is common cause that the environmental authorisation process could (and did) proceed despite these actions of HWC.

84. **AD PARAGRAPH 16**

This paragraph is not disputed.

85. **AD PARAGRAPH 17**

As already indicated, I dispute that the question of whether a heritage impact assessment meets the requirements of section 38(3) is solely within HWC's discretion. The determination of whether a HIA meets the requirements of section 38(3) must be rationally connected to the information before the decision-maker making the determination in respect of the relevant considerations. Save for this denial, the rest of the paragraph is admitted.

86. **AD PARAGRAPH 18**

86.1. I dispute the Applicants' categorisation of the cooperative process between the environmental and heritage authorities as "*a complete failure*". As I have already indicated, further changes and consultative processes with the First Nations people were conducted in response to HWC's comments.

86.2. I deny that either the Director or I issued an environmental authorisation on the basis of "*fatally defective*" heritage assessments.

It is correct that HWC maintained that the assessments did not

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comply, but as already said above, the Director and I were both satisfied that the requirements of section 38(3) had been met.

86.3. I deny that either the Director or I effectively ignored the HWC. I refer to the attempts described above which the Director and I made to reach consensus with HWC regarding compliance with section 38(3); which attempts HWC rebuffed.

86.4. I deny that the environmental authorisation process was not credible.

87. **AD PARAGRAPH 19**

87.1. I deny the Applicants' critical characterisation of the heritage assessments. I have already explained why the Director and I were satisfied that the assessments met the requirements of section 38(3) and the 2014 EIA regulations. By saying this, I do not seek to suggest that either the Director or I simply accepted everything that was said therein: the report was considered along with all of the other data and the information before each of us.

87.2. The reasons for the withdrawal of the First HIA, before it could be considered by HWC, is well documented in the heritage assessments. Both the Director and I were aware of it, and that other heritage specialists had made more limited development proposals, and took these into account in considering our decisions.

87.3. I deny that either the Director or I "breached" section 38(8).

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88. **AD PARAGRAPH 20**

I deny that the environmental authorisation was compromised in any way, and that either of the decisions is reviewable on the grounds set out in the founding affidavit or at all.

89. **AD PARAGRAPH 21**

This paragraph is noted.

90. **AD SUB-PARAGRAPH 21.1**

I dispute that the Applicants are entitled to an interim interdict for the reasons set out elsewhere in this affidavit.

91. **AD SUB-PARAGRAPHS 21.2 – 21.2.2**

I have already referred above to each of the decisions which the Applicants seek to impugn in these proceedings.

92. **AD SUB-PARAGRAPHS 21.2.3 – 21.2.4**

These sub-paragraphs are noted.

93. **AD SUB-PARAGRAPH 21.3**

This sub-paragraph is noted.

94. **AD PARAGRAPH 22**

94.1. I agree that the Applicants' conduct is regrettable. I refer to what has

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already been said above relating to the Applicants' self-created urgency.

94.2. Save to dispute the Applicants' assignment of value to the site based on it being "*a relatively untransformed open space*" because of what is said elsewhere in this affidavit, I have no personal knowledge of the communications in this paragraph between the OCA and the Trust.

94.3. As to our contentions about the balance of convenience, these are addressed above.

95. **AD PARAGRAPH 23**

This paragraph is noted.

96. **AD PARAGRAPH 24 AND SUB-PARAGRAPH 24.1**

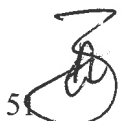
I have already addressed my concerns about the Applicants' lack of detail in relation to their finding and briefing suitable counsel. The issue of a water use licence is irrelevant to the question of urgency.

97. **AD SUB-PARAGRAPHS 24.2 – 24.7**

These paragraphs are noted.

98. **AD PARAGRAPHS 25 - 29**

These paragraphs are not disputed.

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99. **AD PARAGRAPH 30**

This paragraph is noted.

100. **AD PARAGRAPH 31**

While it is correct that the broader area has for a long time been known as the “Two Rivers Urban Park” (“TRUP”), in the draft Two Rivers Local Spatial Development Framework (“Draft LSDF”), which the City is in the process of finalising after a process of public participation, it is now referred to as the “Two Rivers area”. I gave extensive consideration to the TRUP and TRUP initiatives in my decision (see paragraphs 5.53.12 to 5.53.18, 5.57.4 to 5.58.32 of my decision (annexure “LL26” or “AB1”)).

101. **AD PARAGRAPHS 32 - 45**

I have already dealt with the history associated with the site and the Two Rivers Urban Park area and these paragraphs are not disputed.

102. **AD PARAGRAPHS 46 - 65**

These paragraphs are noted.

103. **AD PARAGRAPH 66**

I have no personal knowledge of the averments in this paragraph.

104. **AD PARAGRAPHS 67 - 73**

104.1. The contents and recommendations of what the Applicants refer to as

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“the First HIA” were discussed, dealt with and responded to in the heritage assessments and in the Director’s decision and my appeal decision, which acknowledged and considered that the First HIA promoted “*sensitive development providing it addresses its position within the highly significant TRUP cultural landscape*”.

104.2. The Director, and later I, considered the impact of the proposed development within this broader area, and how our decision would impact on the significance of the TRUP.

104.3. Subject as set out above, these paragraphs are not disputed.

105. **AD PARAGRAPHS 74 - SUB-PARAGRAPH 78.1**

105.1. The contents and recommendations of the TRUP Heritage Study (2016) which regarded the entire TRUP site “*as being of outstanding historical, symbolic scenic and amenity value, or a Grade 2 site*” were discussed and dealt with in the heritage assessments and considered in the Director’s and my decisions.

105.2. The aspects regarding the proposed “*heritage-related design informants*” which the authors advocated for this extensive area, amongst others, the retention of views particularly from the Observatory Hill and the retention of its context, were taken into consideration by the Director and, thereafter, by me.

105.3. Save as set out above, these paragraphs are not disputed.

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106. AD PARAGRAPHS 79 - 80

106.1. These paragraphs are not disputed.

106.2. I must, however, emphasise that the significance of the Two Rivers Urban Park Area was also taken into account in reaching our decisions, although the HIA for the Two Rivers Urban Park area is still underway, and the resources have therefore not yet been formally graded.

107. AD PARAGRAPHS 81 - 83

In these paragraphs the Applicants seek to draw inferences relating to the intentions of the Trust in withdrawing the First HIA, a phase 1 heritage impact assessment only, and commissioning a new assessment. It is not clear to me that the Applicants have any basis for doing so. Nonetheless, I do not intend to deal directly with these statements; I assume that Trust will do so, should it wish.

108. AD PARAGRAPH 84

108.1. The first sentence of this paragraph is not disputed.

108.2. With regards to the SAAO's objection, both the Director and I were aware of all the comments of the SAAO and took these into account in considering our decisions.

109. AD PARAGRAPHS 85 - 86

These paragraphs are not disputed.

110. AD PARAGRAPH 87

This paragraph is not disputed. As to the legal effect of HWC's provisional protection notice, this is a matter of legal argument which will be addressed at the hearing of this matter.

111. AD PARAGRAPHS 88 – 89

111.1. I note the Applicants' method of referring to documents without annexing them. This creates practical difficulties, in that the documents referred to are then not part of the evidence before this Court.

111.2. Moreover, the averments made in these paragraphs do not relate to the decisions which the Applicants seek to impugn in these proceedings.

111.3. Save as set out above, these paragraphs are not disputed.

112. AD PARAGRAPH 90

This paragraph is not disputed.

113. AD PARAGRAPH 91

This paragraph is not disputed, however, as already indicated, the Director and I gave considerable weight to HWC's interim (and later final) comments, tried to reach consensus with HWC that the requirements of section 38(3) had been met, but ultimately, after having taken HWC's concerns into account, had to make

our decisions having satisfied ourselves that the requirements of section 38(3) had been addressed in the documents we considered.

114. **AD PARAGRAPH 92**


114.1. As already dealt with above, I deny that the HIA supplementary report “*essentially re-argued*” the heritage specialists’ conclusions in the HIA. The specialists responded to HWC’s interim comment and its concerns by, amongst other things, making recommendations on how to concretise the intangible heritage resources and to mitigate the impact of the proposed development on the heritage resources accorded high significance pursuant to the further input of the First Nations Collective.

114.2. I note the Applicants’ use of the words “*purported investigation*” in relation to the First Nations report. As dealt with above, the Director and I took into consideration that complaints were raised as to whether there had been proper consultation with the First Nations people but were satisfied that the process of consultation was adequate.

114.3. Save as set out above, this paragraph is not disputed.

115. **AD PARAGRAPH 93**

It is noted that HWC is of the opinion that the heritage assessments do not meet the requirements of section 38(3). As already indicated above, the Director and


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I do not agree with HWC's opinion. It would obviously have been preferable for the Department and HWC to have presented a unanimous view on the proposed development, and therefore steps were taken to attempt to reach such a unanimous view. However, and as already indicated, this could ultimately not be achieved. Nonetheless, HWC's comments were taken into consideration by the Director and, subsequently, me.

116. **AD PARAGRAPH 94**

116.1. Save to point out that the Applicants do not attach the executive summary of the BAR as annexure "LL18", the first two sentences are not disputed.

116.2. The Director, and subsequently I, were apprised of the large number of comments generated by the proposed development, many of which were negative about, amongst other factors, cultural heritage, biodiversity, visual and sense of place. However, as already indicated, our decision cannot simply be based on the counting of comments, but we had to, and did, take all the considerations mandated by NEMA and the NHRA into account when taking our decisions.

116.3. Save as set out above, this paragraph is not disputed.

117. **AD PARAGRAPH 95**

This paragraph is admitted.





118. **AD PARAGRAPH 96**

118.1. I deny that HWC's appeal "*relied on a single ground*", as it also contended, in a second ground of appeal, that the Director had incorrectly emphasised the site's recent history and tangible remains.

118.2. In reaching my decision, I considered both grounds of appeal, but as already indicated above, I do not agree that the heritage assessments did not meet the requirements of section 38(3) nor that the Director misdirected himself.

119. **AD PARAGRAPHS 97 - 100**

Subject to what has already been discussed above about the Minister's engagement with HWC, these paragraphs are not disputed.

120. **AD PARAGRAPH 101**

This paragraph is admitted.

121. **AD PARAGRAPHS 102 TO 107**

The contents of these paragraphs are noted.

122. **AD PARAGRAPHS 108 TO 111**

122.1. I am advised that the Applicants' contentions in these paragraphs to the effect that the provisional protection notice is still in effect is incorrect. In paragraph 89 of the founding affidavit, the Applicants

themselves appear to have accepted that it lapsed on 20 April 2020.

122.2. Nonetheless, the averments in these paragraphs appear to contain legal argument, which will be addressed at the hearing of the application.

123. **AD PARAGRAPH 112**

I dispute this paragraph. The Council of HWC has not resolved that the site should be declared a national heritage site but has only recommended to SAHRA that the site be assessed for Grade I status, as reflected in the Record of Decision of the Council meeting of 22 July 2021, and recorded in the Council's letter dated 30 July 2021, a copy of which is annexed hereto marked "AB10".

124. **AD PARAGRAPH 113**

It is difficult to know what to make of the vague allegations in this paragraph, save to repeat what I have already said above relating to the application in question, and the decisions of the Director and myself which the Applicants seek to attack in these proceedings.

125. **AD PARAGRAPH 114**

This aspect has been dealt with above.

126. **AD PARAGRAPH 115**

126.1. I have already set out why the Director and I reached similar

conclusions that the requirements of section 38(3) had been complied with, and that the attempts we individually made to reach consensus with HWC were (unfortunately) unsuccessful.

126.2. Ultimately the Director and I had to take our decisions when it became clear to us that there was a deadlock between the Department and HWC.

126.3. I accordingly deny that either I or the Director “*complete[ly] fail[ed]*” to understand the nature of the enquiry called for in terms of section 38(8) and generally to perform the duties imposed by that section. On the contrary, HWC’s attitude only added to the complexity and the controversy of the issues involved, and it was for this reason, amongst others, that extensive consideration was given to these issues, over a relatively lengthy period.

127. **AD PARAGRAPH 116**

While it is correct that the approved development is substantial and that it received opposition from various quarters, the Director, and subsequently I, considered HWC’s concerns about the heritage assessments, and as indicated above took all these considerations into account in reaching the conclusion that the development of this nature and the approval of the Riverine Corridor alternative met the required standard of sustainable development.

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128. AD PARAGRAPH 117

132.1. I deny the averment that the Director did not consider the question whether the heritage assessments met the requirements of section 38(3).

132.2. I deny the averment that I “*woefully misconceived*” these requirements and evaluated them in an illogical and confused manner, or in a manner untethered from the provisions of the NHRA.

132.3. I have already dealt with the Applicants’ contention that there was “*a wholesale failure to engage with the issues at stake*”, which is denied.

132.4. I deny the last sentence of this paragraph, in particular that section 38(8) reserves the discretion exclusively to HWC to determine whether a heritage impact assessment is acceptable in terms of section 38(3). Not only is this not the way the authorities have interpreted and applied section 38(3), as already discussed above, but I am advised that such an interpretation is legally untenable. Further legal argument about the correct interpretation of section 38(8) will be addressed at the hearing of the application.

133. AD PARAGRAPH 118

I have previously denied that the Applicants’ critical characterisation of the heritage assessments is correct, and repeat that my denial does not seek to suggest that either the Director or I simply accepted everything that was said

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therein: the report was considered along with all of the other data and the information before each of us.

134. **AD PARAGRAPH 119**

Save to deny that HWC's views were not considered in the Director's, and my decisions, this paragraph is noted.

135. **AD PARAGRAPH 120**

This paragraph is not disputed.

136. **AD PARAGRAPH 121**

The sections speak for themselves.

137. **AD PARAGRAPH 122**

I deny the Applicants' characterization of the heritage assessments as being *"framed essentially as a motivation for the preferred Riverine Corridor alternative which is structured around the subjective opinion of the authors"*.

These aspects have already been discussed above, as well as the approach which the Director and I took, as mandated by NEMA and the NHRA, in the consideration of alternatives.

138. **AD PARAGRAPH 123**

138.1. As already indicated above, I deny that the heritage specialists did not undertake any systemic mapping or identification of heritage resources

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on the site.

138.2. I deny that the specialists referred to “*two potential dimensions of heritage significance*” as the Applicants aver. What the specialists said at page 80 of the HIA is that “*there are only two but very **closely related high-order significances**: one is environmental and the other is historical (emphasis added)*”.

139. **AD PARAGRAPH 124**

139.1. The Applicants’ averment that the heritage specialists concluded that the significance of, to use the Applicants’ words “*the association of the natural features – the river and the floodplain – with the First Nations people ...*” is “*notional*” is incorrect. In the HIA at section 5.3 at page 63, amongst other places in the heritage assessments, identifies “*The landscape, the riverine corridor within its wider floodplain with its historical pre- colonial and early-colonial associations, is identified in this report as the most interesting and most important heritage resource associated with the site and affected by the proposed development; and it is clear that this is the most important set of issues*”.

139.2. The quote at page 80 of the HIA should be read within the context of the rest of the heritage assessments, in particular at page 15 of the HIA supplementary report, where the heritage specialists state that “*it seems that HWC has not recognized (or they disagree with) the essential*

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*underpinning logic or argument of the HIA regarding or assigning relatively low **current** significances and/or value of the lower reaches of the Liesbeek floodplain (and of the site in particular) and the two river courses (stormwater ditch and canalized river) as place and/or as a (tangible) heritage resource despite the high historical significance of the immediate and wider environs (emphasis in the original)". The central recommendation of the heritage assessments is captured at page 30 of the HIA supplementary report:*

"the restoration of the Liesbeek River as river, as life-bearing water running in an ecologically complete corridor, is to restore the Liesbeek River itself to completeness and to meaningfully add to the significance of the floodplain and the location and setting (even if there are interruptions to the visual completeness of the floodplain)".

140. **AD PARAGRAPH 125**

- 140.1. I deny that the specialists found that it was "*not feasible to accord it any practical significance because it does not take any tangible form*".
- 140.2. I have already discussed above the way the heritage assessments recognised the high historical significance of the site.
- 140.3. It appears that the Applicants confuse attributing significance to the history of the site with how this intangible and associative history is best to be translated or manifested into a concrete and practical expression on the site.

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141. AD PARAGRAPH 126

141.1. As already indicated above, I deny that the heritage specialists' approach does not comply with the scheme and principles of the NHRA.

141.2. I note the requirements of section 3 of the NHRA and the definition of "living heritage" quoted in the second and third sentences of this paragraph. The requirements of NEMA (section 24(4)(b)(iii)) and the EIA 2014 regulations require environmental decision makers to evaluate the impact of a proposed development on any national estate referred to in section 3(2) of the NHRA.

141.3. As already discussed above, there was no doubt in either the Director's or my mind that the site has a high significance of associative historical meaning. In the record before us were numerous documents, comments, and submissions from indigenous persons to this effect.

141.4. As already indicated above, within the context that the living heritage sought to be preserved is intangible, the Director and I were satisfied that it had been properly identified and evaluated, and the approval of the Riverine Corridor alternative best translated these intangible aspects of inherited culture into a tangible expression on the site.

141.5. As indicated above, the expert opinions of Ms O'Donoghue and Ms Prins-Solani are not relevant to the determination of the review.

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142. **AD PARAGRAPH 127**

142.1. As already discussed above, the heritage specialists' assessment of the conservation-worthiness of the site is far more nuanced than represented by the Applicants.

142.2. As is evident from the quotation from the HIA in the paragraph under response, the specialists considered not only the site itself, but also the wider environs, consisting of the low spur of raised land on which the Royal Observatory, amongst other things, is situated. This is an area which they described as a "*historically significant place, a 'frontier zone'*", which however has over time been transformed, but which with the proposed rehabilitation of the Liesbeek river corridor offered "*an opportunity for the articulation or making public, even celebration, of the significance of the place and its historical associations, and second, an opportunity to restore ecological life to the Liesbeek River*".

143. **AD PARAGRAPH 128**

I dispute that the intangible significance of the site was not properly evaluated and further deny that the affidavits of Ms O'Donoghue and Ms Prins-Solani are relevant to these proceedings.

144. **AD PARAGRAPH 129**

144.1. I have already discussed the Applicants' apparent confusion between,

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on the one hand, the historical significance of the site, and on the other the translation of that historical significance in a concretised manner by the rehabilitation and restoration of the Liesbeek River corridor and the commemoration of the First Nations people.

144.2. I deny that the heritage specialists did not consider restrictions on the built form necessary. In both the HIA (at amongst other places, section 9.1.1 to 9.1.5 at pages 90 to 94) and the HIA supplementary report (at amongst other places pages 21 to 25) the question of the built form was considered and how the impact of the development could be mitigated.

145. **AD PARAGRAPH 130**

I note the contents of this paragraph, and point out that the documentation the Director and I considered before granting the approval was substantially more than the HIA.

146. **AD PARAGRAPH 131**

It is not clear to me what the deponent intends to convey in this paragraph.

147. **AD PARAGRAPH 132**

The restrictions are incorporated into the decisions themselves as I deal with below. Again, it is not clear to me what the deponent intends to make of these allegations.

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148. AD PARAGRAPHS 133 - 135

Save to point out that HWC's interim comment is annexure "LL10" and not "LL11", these paragraphs are noted.

149. AD SUB-PARAGRAPHS 135.1 - 135.7 GENERALLY

I have already dealt above with the substance of each of the alleged criticisms of HWC as set out in these paragraphs. As I have indicated, and moreover as appears from the heritage assessments, the criticisms are without foundation. The requirements of section 38(3) have clearly been met. Nonetheless, in the paragraphs which follow I deal with certain of the criticisms as expressed in these paragraphs.

150. AD SUB-PARAGRAPH 135.1

150.1. The Director, and subsequently I, considered that the heritage specialists had adequately mapped and identified the heritage resources adhering to the site, consisting of amongst other things, the site as part of the floodplain, early crossing points, the River Club site itself, and the heritage resources in the surrounding area, namely the SAAO and the TRUP and nearby elements. That the mapping of heritage resources is complicated by the fact that certain of these heritage resources are intangible was equally recognised.

150.2. I deny therefore that the mapping of heritage resources was illogical or flawed, in any of the respects alleged. I also deny that the mapping

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of heritage resources was formulated to justify a preconceived development concept: this conclusion is not supported by the contents of the HIA itself.

150.3. The further criticisms reflected in this paragraph are also unsupported by the heritage assessments and are denied.

151. **AD SUB-PARAGRAPH 135.2**

151.1. We understood HWC's criticism that the assessments of significance were inadequate to be based on their premise that the identification and mapping of heritage resources was flawed.

151.2. It appears that the dispute between HWC and the heritage specialists is whether the 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 resources. The specialists argued that determining the significances must come first whereas, in HWC's opinion, the identification and mapping must come first.

151.3. Without consensus being reached on this point, and given that the question of what the heritage resources are on the site is complicated by their intangible nature compared to those in the surrounding area, there was no doubt in the Director's or my mind, as reflected in our decisions, that the site is one of high historical significance requiring

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concretisation and commemoration of the First Nations people associative cultural narrative.

151.4. There appears to us to be no dispute on this issue with HWC, which in paragraph 2.2 of its appeal referred to the “*intangible significance of the site as being at the confluence of the three rivers*”. There is disagreement as to the extent of how these “*tangible based ecological values*” are to be protected. Apart from this fundamental disagreement, there is no substantial dispute on the significance of the site’s intangible heritage.

151.5. I accordingly deny that the assessment of significance in the HIA was inadequate. A perusal of the heritage assessments will show that this is clearly not that case.

152. **AD SUB-PARAGRAPH 135.3**

152.1. As already discussed above, we do not agree with HWC’s starting premise that the mapping and identification of the intangible heritage resources is flawed.

152.2. We were satisfied by the heritage specialists’ contention that the assessments of significance of the heritage resources of the site were clearly articulated, and their impacts described at length in the heritage assessments. Again, while HWC may have different perceptions of the environs and of their significances and it may differ with respect

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to the recovery of significance, we were of the opinion that HWC's perceptions did not make the assessment of impacts which had been conducted "flawed".

152.3. In the circumstances, the criticisms described in this paragraph are rejected. There was a clear and extensive evaluation of the impact of the proposed development on heritage resources.

153. **AD SUB-PARAGRAPH 135.4**

153.1. It appears that HWC has not grasped, or does not have the expertise to grasp, the potential social and economic benefits of the development (outside of potential social benefits and impacts from changes to the cultural value of the site).

153.2. Based on other specialist reports placed before us, it is apparent that there are substantial ecological benefits to the development, and very considerable social and economic benefits, including: investment in the economy; creating wealth; increased employment; income and skills development; increased State and local government revenue; increases in centrally located housing and other facilities; densification facilitating improved connectivity, transport systems and the Two Rivers Urban Park area implementation; and creation of new publicly accessible areas, especially, but not only, for the First Nations people.

153.3. It is accordingly denied that the evaluation of the impact of the



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proposed development of heritage resources relative to the sustainable social and economic benefits to be derived from the proposed development was inadequate in any way. A perusal of the relevant reports will show that this was not the case. Similarly, these aspects were thoroughly considered by the Director and by me.

154. **AD SUB-PARAGRAPH 135.5**

154.1. That the First Nations people have a deep, sacred linkage to the site through lineage and collective memory is not disputed. While there is clearly a difference of views about the extent to which the larger area associated with these memories and the smaller area of the development site are to memorialise this associative cultural narrative, the Director, and subsequently I, were satisfied that sufficient opportunity had been given for consultation with the First Nations people.

154.2. The vague statement to the effect that there was an “*avoidance*” of consultation, and that consultation with the First Nations people was not “*meaningful*”, is unsupported by any facts, is inconsistent with the contents of the relevant reports, and is plainly untrue.

155. **AD SUB-PARAGRAPH 135.6**

155.1. We took into consideration that the development proposal has been formulated in collaboration with a multi-disciplinary team that has

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responded to independent environmental and specialist inputs with multiple changes to the development proposal, and the assertion that the heritage assessments post rationalise a pre-conceived development concept is therefore rejected.

155.2. Alternatives were clearly considered in terms of the HIA and the HIA supplementary report, and were moreover considered by the Director and subsequently by me. There is accordingly no substance to this criticism.

156. **AD SUB-PARAGRAPH 135.7**

156.1. As already indicated above, the rehabilitation of the Liesbeek River corridor does not ignore the broader issues pertaining to the Two Rivers Urban Park area.

156.2. As appears from the heritage assessments, thorough and proper consideration was given to the mitigation of any adverse effects during and after the completion of the proposed development. These included, amongst other things, height reductions and setting back from, and respecting the SAAO site and lines of site from and within the site. While the current “openness” of the site will be changed, even transformed (which would happen with any form of development), this change will be off-set by the positive transformation of the current Liesbeek canal into a restored riverine corridor which will open the way for the regeneration of the area.

156.3. I also refer to what has already been set out above relating to the specific condition imposed on the developer in respect of concrete and tangible means of respecting the heritage aspects of the site.

157. **AD PARAGRAPH 136**

This paragraph is not disputed.

158. **AD PARAGRAPH 137**

As already indicated, I dispute the Applicants' simplistic characterisation of the HIA supplementary report as a "re-argu[ing]" of the HIA.

159. **AD PARAGRAPHS 138 - 139**

These paragraphs are not disputed.

160. **AD PARAGRAPHS 140 - 147**

160.1. The quotations taken from the AFMAS reports and the HIA supplementary report are noted. As dealt with above, the Director and I took into consideration that complaints were raised as to whether there had been proper consultation with the First Nations people, but were satisfied that the process of consultation was adequate even if there was no consensus between them, consensus not being required by the applicable legislation (section 38(3)(e) of the NHRA).

160.2. The criticisms of the AFMAS report, and in particular the suggestion that it involves an exercise "*in obfuscating and diluting the strongly*

held views of sections of the Goringhaicona people” is not based on any facts, and is denied. A perusal of the AFMAS report (annexure “LL16” to the founding affidavit) will show that this is not the case.

161. **AD PARAGRAPHS 148 - 152**

Save to point out that the Draft MSDF identifies the area as strategically placed to unlock development potential, subject to the requirement that such development must “[a]t the same time, [enhance] the ecological role of the river corridors, the importance as a regional amenity and significance placed on the cultural and built heritage”, these paragraphs are not disputed.

162. **AD PARAGRAPHS 153 - 158**

162.1. It would, of course, have simplified matters had there been a single position as to how the section 38(3) requirements were to be fulfilled in respect of the heritage impacts of the proposed development. As already discussed, consensus could not be reached. This added to the complexity of the matter.

162.2. The fact that different views were expressed on this question was taken into account by both the Director and me in considering and reaching our decisions.

162.3. I have already dealt above with the substance of the issues raised in these paragraphs. The criticisms repeated in these paragraphs are therefore denied.


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163. AD PARAGRAPH 159 AND ITS SUB-PARAGRAPHS

I deny that the AFMAS report was unreliable, and refer to what has already been said above, and in the HIA supplementary report, in this regard and in relation to the spatial planning tools.

164. AD PARAGRAPH 160

This paragraph is admitted.

165. AD PARAGRAPHS 161 - 162

165.1. In these paragraphs it is suggested that the Director did not consider nor impose any restriction on the design and layout of the proposed development. This is denied.

165.2. Design and Layout Alternatives for the proposed development, which had been amended during the environmental impact assessment process in response to the concerns and issues raised by I&APs and state authorities, were considered during the decision-making process.

165.3. The preferred alternative (the Riverine Corridor Alternative) described and authorised in condition 1 of the Director's decision was informed by the recommendations of various specialists (amongst others heritage, ecological, architectural, urban design, visual impact). At page 15 of his decision, the Director noted that **“the heights of buildings were reduced in order to reduce the potential visual impacts and to maintain the view sheds towards Table Mountain”**.

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At page 20 the Director further noted that **“The specialist further notes that the proposed development will result in a change in the appearance and character of the site, which is considered as a negative impact. Although the potential impacts are difficult to mitigate, the specialist recommended that the visual impact of the proposed development on the southern portion of the site are minimised. This has been addressed as the height of the buildings was reduced and is limited to a height of four storeys”**. Condition 17 specifically incorporates into the decision, and EMPr, the recommendations of the visual specialist.

165.4. Finally condition 5 provides that **“[a]ny changes to, or deviations from the scope of the alternative ... must be accepted or approved, in writing, by the Competent Authority ... and [for which change] it may be necessary for the holder to apply for further authorisation in terms of the applicable legislation”**.

166. **AD PARAGRAPH 163**

166.1. The contents of the extract from the Director’s decision in this paragraph is noted, but the attention of the Court is drawn to the full exposition of the heritage evaluation contained in section 3.2 (starting at page 19) of the Director’s decision.

166.2. To the extent that the Applicants appear to suggest that the Director did not *“meaningful[ly]”* consider the heritage impacts, this is denied.

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The Director made the appropriate decision by approving the preferred alternative after evaluating the actual and potential impact on the environment, cultural heritage, socio-economic conditions, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management.

167. **AD PARAGRAPH 164**

167.1. It is correct that the Directorate's request to the Trust to conduct an external review of the HIA was ultimately not acted upon. The request was withdrawn pursuant to further engagement with the heritage specialists, the EAP, and HWC, as indicated above. As indicated previously, the Director was satisfied the heritage assessments complied with section 38(3) and approved the environmental authorisation after having taken HWC's comments into consideration along with other relevant considerations.

167.2. It is further correct that an external review of the visual impact assessment was not undertaken. The visual assessment issue was also thoroughly considered as part of each decision, as reflected in the written decisions themselves. In addition, I refer to the mitigation measures reflected therein. As already mentioned, the Director took account of the concerns regarding the proposed development's impact

on views, as discussed in paragraph 3.3 at page 21 of his decision.

168. **AD PARAGRAPH 165**

I deny that the Director did not consider or address the substance of HWC's objections. The Director took these objections into consideration when evaluating the application. As already indicated above, attempts were made to reach consensus between HWC and the heritage specialists, without success. Furthermore, section 38(8) imposes no obligation on the consenting authority to seek independent advice on whether the requirements of section 38(3) are met, and as is evident from the Director's decision he was satisfied that the requirements had been met.

169. **AD PARAGRAPH 166**

This paragraph is admitted. The Court is referred to my decision in full (annexure "ABI").

170. **AD PARAGRAPHS 167 - 168**

The allegations and criticisms in these paragraphs are denied. A perusal of my decision will indicate that they are untrue. It should be borne in mind, in this context, that I was required to deal with a large variety of issues on appeal, and it was therefore not possible merely to do so in a succinct way. I dealt with all of the issues on appeal, to the best of my ability.

171. AD PARAGRAPHS 169 - 171

171.1. I am advised, believe, and aver that it was open to me to assess the impact of the development on heritage, as required by section 38(3) of the NHRA, by reference to the significance of that impact as I did in paragraphs 5.28 to 5.53.10 of my decision.

171.2. In particular, it is denied that I was confused about the need to assess the significance of any heritage resources and the relevance of factors in the assessment of the actual and potential impact on the environment, socio-economic conditions and cultural heritage. I deny that there is a “fatal defect” in my decision, or that I “in error” adopted irrelevant considerations. I furthermore deny that my analysis was “irrational” or “nonsensical”, as alleged in these paragraphs.

171.3. Further legal argument will be presented at the hearing of this matter as to the interpretation and implementation of NEMA and the NHRA, which are both concerned with the investigation, assessment and evaluation of the impact of any proposed activity on any national estate as referred to in the NHRA.

172. AD PARAGRAPH 172

172.1. Although the Berkeley Road extension is not a given, I took into account the impact the intended extension would have on the existing character of the site. In the context of my decision, and particularly in

relation to the appeal ground that the environmental authorisation does not align with relevant national and provincial legislation, provincial and City policy and spatial plans, the extension, which is identified the City's Road Network Plan as a new mobility route and would play a role as an activity corridor, was a relevant consideration to be taken into account.

172.2. I deny that I “*uncritically*” simply adopted the observation by the authors of the second HIA, or that this was merely “*recited*”. I deny that I made any error in this regard.

173. **AD PARAGRAPHS 173 - 175**

173.1. I refer to what has already been said above regarding the design of the proposed development, and restrictions placed on its built form. Moreover, I refer to the conditions imposed by the Director, and confirmed on appeal, relating to the recognition of heritage factors, which also impact upon the design of the development.

173.2. In the circumstances, the criticisms in these paragraphs are rejected. Clearly, I had regard to the heritage assessments and quoted portions thereof, where appropriate. My consideration of the issues did not merely involve a “*copy and paste*” exercise, or the simple extraction of paragraphs from these reports.

174. AD PARAGRAPH 176

In the circumstances, the allegations in this paragraph are denied. I deny that any such conclusion is justified by the material referred to above, and there is no basis upon which such conclusion may reasonably be reached.

175. AD PARAGRAPHS 177 - 196

The content of these paragraphs are noted and are for the City to answer.

176. AD PARAGRAPH 197

For the reasons already discussed, I deny that there is any basis for either the Director's decision or mine to be reviewed and be set aside.

177. AD PARAGRAPH 198 - 199

177.1. I deny that there are any grounds for reviewing my decision, or, for that matter, the Director's decision, the basis of that denial being set out above.

177.2. It is my respectful submission that the decision-making process was not compromised in any way, and there is no basis upon which it could reasonably be found that the grounds raised in these paragraphs and their sub-paragraphs are a basis for impugning the Director's decision or mine on appeal.

177.3. It is clear that the Applicants are unhappy with the result of our decisions, and that they disagree with them. I am advised, however, that this does not constitute a basis for a review application.

178. **AD PARAGRAPHS 200 - 201**

The content of these paragraphs are noted and are for the City to answer.

179. **AD PARAGRAPHS 202 - 207**

For the reasons already discussed above, I am advised, believe, and aver that the Applicants have not made out a case for an interim interdict and their prayer for such relief should be dismissed.

180. **AD PARAGRAPH 208**

As already indicated, I am advised that there is no basis for the relief sought.

181. **AD THE CONFIRMATORY AFFIDAVIT OF TAURIQ JENKINS**

181.1. I do not intend to deal in detail with the affidavit of Mr Jenkins. This is mainly because there is no material dispute regarding the historical matters of which he speaks, and no dispute regarding the significance of the heritage aspects mentioned by him. This is apparent from what has been said previously in this affidavit.

181.2. It is apparent, however, from the affidavit of Mr Jenkins that there are disagreements between different groups of the First Nations people regarding the proposed development. In this regard, he identifies the

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AFMAS report referred to above, and the views of persons referred to by Mr Rudewaan Arendse. His criticisms of Mr Arendse, and of the AFMAS report, are not accepted, and I refer to what has already been said above.

181.3. It is also apparent that Mr Jenkins disagrees with the decision of the Director and with my decision. I am advised, believe, and aver that this provides no grounds for setting aside the decisions on review.

181.4. I note that views expressed by Mr Jenkins to the effect that there was no compliance with section 38(3) of the NHRA. For the reasons set out above, I disagree with this view.

181.5. To the extent that it might be necessary to do so, I shall in due course deal further with the affidavit of Mr Jenkins in the context of the relief sought by the Applicants in part B of their notice of motion.

182. AD THE CONFIRMATORY AFFIDAVIT OF BRIDGET O'DONOGHUE

182.1. Similar considerations apply to the affidavit of Ms O'Donoghue. As indicated, the intangible heritage, insofar as it relates to the proposed development site, is not in dispute, and has been given full and proper consideration and recognition.

182.2. I disagree with the views of Ms O'Donoghue regarding the compliance of the heritage assessments with sections 38(3) and section 38(8) of

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the NHRI. I am advised, believe, and aver that the question of whether there has been such compliance is not one which can be based upon expert evidence, and the opinions of Ms O'Donoghue in this regard are therefore irrelevant. The facts, as set out above, will indicate that there has been compliance.

183. AD THE CONFIRMATORY AFFIDAVIT OF DEIRDRE PRINS-SOLANI

183.1. I deal with the affidavit of Ms Prins-Solani on a similar basis. As indicated, there is no dispute about the relevance of intangible cultural heritage in respect of the site, nor in respect of the relevant statutes.


183.2. The fact that Ms Prins-Solani agrees with the opinions of HWC is not of assistance in this matter. Similarly, her opinions regarding whether or not the requirements of section 38(3) were met are not of assistance; and they are denied.

CONCLUSION

184. I deny that there are any grounds for reviewing my decision, or, for that matter, the Director's decision. The Applicants have not established that they have a *prima facie* right and, indeed, the very bringing of this voluminous application with such urgency is unreasonable. The engagement by the Fourth and Fifth Respondents of two counsel was a reasonable precaution. The Applicants should consequently be ordered to pay the Fourth and Fifth Respondents' costs.

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185. In the premises, the Fourth and Fifth Respondents pray that the application be dismissed with costs including the costs of two counsel.



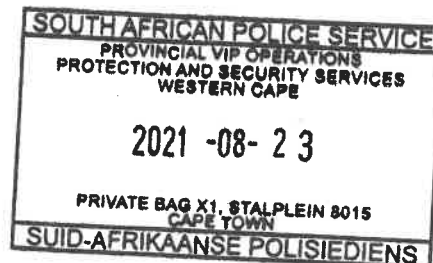
ANTON WILHELM BREDELL

I certify that:

- I the deponent acknowledged to me that:
 - (a) he knows and understands the contents of this declaration;
 - (b) he has no objection to taking the prescribed oath;
 - (c) he considers the prescribed oath to be binding on his conscience;
- II the deponent thereafter uttered the words “I swear that the contents of this declaration are true, so help me God”;
- III the deponent signed this declaration in my presence at the address set out hereunder on this the 23rd day of AUGUST 2021.

COMMISSIONER OF OATHS

FULL NAMES: *Thumetephi Komphela*
CAPACITY: *w/o*
ADDRESS: *7 WALE STREET PROVINCIAL PARLIAMENT*
CAPE TOWN





APPEAL DECISION

AB1

REFERENCE NO: 14/3/1/A7/17/0478/20

In the matter between:

Heritage Western Cape and 20 Others:

The Appellants

Director: Development Management (Region 1) (Western
Environmental Affairs and Development Planning):

Cape Department of
First Respondent

Liesbeek Leisure Properties Trust:

Second Respondent

**APPEALS LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL
MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE ENVIRONMENTAL
AUTHORISATION GRANTED FOR THE PROPOSED REDEVELOPMENT OF THE RIVER CLUB FOR
MIXED USE DEVELOPMENT AND ASSOCIATED INFRASTRUCTURE ON THE REMAINDER OF ERF NO.
15326 AND ERVEN NO. 26169 – 26175, 26426 – 26427, 108936 AND 151832, OBSERVATORY**

1. The Appeals lodged against the Environmental Authorisation ("EA") granted by the Department of Environmental Affairs and Development Planning's ("DEA&DP") Director: Development Management (Region 1) on 20 August 2020, refers.
2. After careful consideration of the Appeals, as well as supporting documentation received, in terms of section 43(2) of the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* ("NEMA") and regulation 7(3) of the *2014 National Appeal Regulations*, I have decided to **dismiss** the Appeals and **vary** the abovementioned decision of the Competent Authority granted on 20 August 2020 in respect of the following conditions:

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Condition E9.1:

"The Stormwater Management Plan, to be compiled must be approved by the City of Cape Town's Catchment, Stormwater and River Management Branch and must be included in the EMPr. A copy of the Stormwater Management Plan must be submitted to the Ministry of Local Government, Environmental Affairs and Development Planning ("Ministry") (for the attention of Mr Marius Venter, email: DEA&DP.Appeals@westerncape.gov.za) prior to the commencement of the construction for record purposes."

Condition E9.2:

"A rehabilitation/ restoration plan for the rehabilitation of the Liesbeek Canal must be compiled in consultation with CapeNature and the relevant City of Cape Town's Biodiversity Management Branch prior to the commencement of rehabilitation work to be undertaken. A copy of the final rehabilitation/ restoration plan must be submitted to the Ministry (for the attention of Mr Marius Venter, email: DEA&DP.Appeals@westerncape.gov.za) prior to the commencement of the rehabilitation work for record purposes."

3. The abovementioned EA and the conditions under which the authorisation was granted must be complied with.
4. **AMENDMENTS/EXCLUSIONS TO THE ENVIRONMENTAL AUTHORISATION:**
 - 4.1 Section G of the EA and Condition E8 are excluded from this authorisation.
 - 4.2 The following conditions of the EA are substituted and must be complied with:

SECTION E: CONDITIONS

Condition E2:

"The holder must **commence** with the listed activities on site within a period of **ten (10) years** from the date of issue of this Appeal Environmental Authorisation."

Condition E7:

"The holder must, in writing, within 14 (fourteen) calendar days of the date of this decision notify registered Interested and Affected Parties ("I&APs") of-

- 7.1 The outcome of the Appeal;
- 7.2 The reasons for the decision; and
- 7.3 The date of the decision."

5. **REASONS FOR THIS APPEAL DECISION:**

The reasons for dismissing the Appeals and varying the Appeal EA are contained in the EA and the following additional reasons:

Appeal ground 1: The decision does not adequately take into account the previous comments on the issues set out below and the public was not afforded an opportunity to comment on the Basic Assessment Report ("BAR") of April 2020

- 5.1 The general objectives of integrated environmental management, under sub-section 23(2) of the NEMA, is to: "*(d) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;*"
- 5.2 The 2014 EIA Regulations state that:
*"40(1) The public participation process to which the—
(a) basic assessment report and EMPr [Environmental Management Programme], and where applicable the closure plan, submitted in terms of regulation 19; and ...
was subjected to must give all potential or registered interested and affected parties, including the competent authority, a period of at least 30 days to submit comments on each of the basic assessment report, EMPr, scoping report and environmental impact assessment report, and where applicable the closure plan, as well as the report contemplated in regulation 32, if such reports or plans are submitted at different times...
43(1) A registered interested and affected party is entitled to comment, in writing, on all reports or plans submitted to such party during the public participation process contemplated in these Regulations and to bring to the attention of the proponent or applicant any issues which that party believes may be of significance to the consideration of the application, provided that the interested and affected party discloses any direct business, financial, personal or other interest which that party may have in the approval or refusal of the application."*
- 5.3 In terms of Regulation 41 of the 2014 EIA Regulations a 30 days public participation process must be conducted to provide an opportunity to the Interested and Affected Parties ("I&APs") to submit comments on the proposed development.
- 5.4 To give effect to the NEMA and regulations 40 to 44 of the 2014 EIA Regulations, the public participation process detailed in the reasons for the EA was undertaken.
- 5.5 It is noted that "*[t]he City of Cape Town provided comments on both the Draft BAR (January 2019) and the Final BAR (January 2020)...*" On page 136 of the Final BAR it is confirmed that various departments of the City of Cape Town commented on 15 July 2019 and 14 February 2020. When I&APs stated that the time allowed for review and comment on the BAR is short to do justice to the issues, the Environmental Assessment Practitioner ("EAP") responded that:
- 5.5.1 A 30-day comment period on the BAR was allowed, as required in terms of the EIA Regulations. It is also relevant that a 60-day pre-application comment period was allowed for on the BAR – this pre-application engagement period is not a requirement of legislation / exceeds legislative requirements.
- 5.5.2 All comments received up until the 1 March 2020 have been recorded and responded to, and all comments received by SRK were submitted to the Department of Environmental Affairs and Development Planning ("DEA&DP") with the revised Final BAR.

- 5.6 Therefore, the City of Cape Town was afforded opportunities to comments on the Draft and Final BARs as required by the 2014 EIA Regulations.
- 5.7 It is noted that there is no requirement in NEMA or the EIA Regulations, 2014, to release the final BAR for stakeholder engagement, provided that no material new information is provided in that report. The final BAR report was uploaded to the SRK website on 13 May 2020. The Applicant stated that the final BAR formally submitted to DEA&DP on 8 June 2020 to all intent and purposes, was the same BAR that the City of Cape Town had previously reviewed and commented on.
- 5.8 The Environmental Impact Assessment Practitioner did respond to the comments in the BAR.
- 5.9 Considering the above, this ground of appeal has been addressed as the comments received during the basic assessment process were responded to and addressed by the EAP.

Appeal ground 2: The decision does not align with the following relevant national and provincial legislation, provincial and city policy and spatial plans and the Environmental Management Framework

- 5.10 In terms of the identification of legislation, policies, plans, guidelines, spatial tools, municipal development planning frameworks and instruments that are applicable to the development proposal and associated listed activities being applied for and that have been considered in the preparation of the BAR, the following *inter alia* were considered:

National Heritage Resources Act, 1999 (Act No. 25 of 1999) ("NHRA")

- 5.10.1 The Applicant notified HWC of the proposed activities via the submission of a Notice of Intention to Develop on 17 December 2015. On 7 January 2016 Heritage Western Cape ("HWC") confirmed that a HIA, including an archaeological study and urban design framework, will be required to assess impacts of the proposed redevelopment on heritage resources. The HIA was undertaken as part of the EIA process in terms of NEMA.
- 5.10.2 HWC invited comment from certain of the property owners inside the Two Rivers local area for their views on HWC's intention to provisionally proclaim the entire Two Rivers local area as a Provincial Heritage Site in terms of Section 29 of the *National Heritage Resources Act, 1999 (Act No. 25 of 1999)* ("NHRA"). Subsequently, notwithstanding objections from the owners of the River Club and from the provincial and local authorities, in March 2018 HWC provisionally proclaimed only the River Club property.
- 5.10.3 This prompted appeals from four parties (the River Club owners, two provincial government departments and the Cape Town City Council). The Provincial Member of the Executive Council for Cultural Affairs and Sport ("MEC") appointed a three-person Tribunal to hear the appeals – the Tribunal met at three hearings in October and November 2018 and again in November 2019.
- 5.10.4 Importantly, both HWC (in its submissions to the Tribunal) and the Tribunal (in its Directive) confirmed that the NEMA and NHRA Section 38(8) processes may continue in the interim.
- 5.10.5 By conducting the HIA (the Basic Assessment process and not commencing development prior to the granting of the EA) and receiving comment from HWC on the HIA, the Applicant is compliant with the NHRA.



City of Cape Town Municipal Planning By-law

- 5.10.6 The Municipal Planning By-law ("MPBL") gives effect to the municipal planning function allocated to municipalities in terms of Part B of Schedule 4 of requirements set in the SPLUMA and the Western Cape Land Use Planning Act ("LUPA") – both of which came into operation on 1 July 2015. All land use and municipal planning applications are made in terms of the MPBL.
- 5.10.7 An application has been submitted to the City of Cape Town in terms of the MPBL, including the Cape Town Development Management Scheme, for the approval of the following:
- 5.10.7.1 Deviation from the Table Bay District Plan, to permit urban development on land designated as "open space", "core 2" and "buffer 1", in accordance with section 16 of the MPBL.
 - 5.10.7.2 Rezoning of the property from Open Space Zoning 3: Special Open Space to Subdivisional Area Overlay Zoning, in terms of section 42(a) of the MPBL.
 - 5.10.7.3 Approval to raise the level of the ground / construct retaining structures, in terms of section 42(i) of the MPBL and in accordance with item 126 of the Cape Town Development Management Scheme.

Cape Town Integrated Development Plan (2017 - 2022)

- 5.10.8 The City of Cape Town Integrated Development Plan (IDP - 2017-2022) is built on five key pillars: the opportunity city; the safe city; the caring city; the inclusive city; and the well-run city. Four of these key pillars are relevant to the proposed development.
- 5.10.9 According to Planning Partners, the Applicant's Urban Planning Consultant, the following development aspects have relevance to these four pillars:
- 5.10.9.1 The proposed development will attract investment into a strategically located site within the City (Planning Partners, 2018). Investment into the site at the scale proposed has potential to benefit both the local economy and the economy of metropolitan Cape Town as a whole, including the creation of a substantial number of jobs.
 - 5.10.9.2 A development such as the one proposed at the River Club will improve safety and pedestrian permeability and promote 24-hour surveillance in this part of the Two Rivers local area (Planning Partners, 2018). Increased safety in the Two Rivers local area should be regarded as essential to the process of reinvigorating this area for use by all Capetonians.
 - 5.10.9.3 The development will include a social housing component and the development will be mixed use.
 - 5.10.9.4 The River Club will have positive externalities for the rest of the Two Rivers local area because people residing in / visiting the River Club will have the opportunity to visit other parts of the Two Rivers local area, and vice versa (Planning Partners, 2018).
 - 5.10.9.5 The proposed development will involve capital investment of approximately R4-billion. Estimations are that the development will contribute approximately R40-million per annum in rates and taxes. This is substantial revenue for the City and can be utilised in a variety of positive ways, including the provision of social housing, service infrastructure upgrades and public transport upgrades and implementation (Planning Partners, 2018).

Cape Town Municipal Spatial Development Framework (2018)

- 5.10.10 The Municipal Spatial Development Framework ("MSDF") is the approved urban development structure plan for Cape Town in terms of Municipal Systems Act, 2000 (Act No. 32 of 2000) and the 'municipal spatial development framework' in terms of section 3(2) of the City of Cape Town MPBL.
- 5.10.11 The MSDF identifies areas suitable for urban development and catalytic interventions to achieve spatial transformation; areas where the impact of development must be managed; and areas not suited for urban development.
- 5.10.12 The revised MSDF was approved by Council on 25 April 2018 and the effective date is 1 July 2018. In terms of the revised MSDF the site is categorized as "urban inner core", where private sector development is incentivized. Further, the River Club site falls within the broader Metro South-East Integration Zone, as well as within the broader Voortrekker Road Corridor ("VRC"). According to the MSDF, Integration Zones *"represent the City's commitment to plan, fund and implement projects and approaches that are best able to transform the spatial structure of the City through effective transport links and spatially defined mobility and activity corridors"*.
- 5.10.13 The following maps contained in the MSDF relate to the site and do not preclude development:
- 5.10.13.1 Spatial consolidation concept.
 - 5.10.13.2 Areas of high agricultural significance.
 - 5.10.13.3 Biodiversity network.
 - 5.10.13.4 Precautionary areas reflecting natural and man-made potential development constraints.
- 5.10.14 The heritage resources map contained in the MSDF identifies the site as falling within a "proposed heritage area". However, according to Planning Partners, this does not supersede the MSDF designation as urban inner core where development is incentivised.
- 5.10.15 A small portion of the site also falls within an area classified as "Critical Natural Assets Spatial Transformation Area". Notwithstanding, the following statement on pg. 72 of the MSDF in relation to the "conceptual designations" mapped in the MSDF (including "Spatial Transformation Areas"):
- 5.10.15.1 *"Most are not precisely geographically defined (or exclusive) areas and have been identified at a broad metropolitan scale. The Spatial Transformation Areas (STAs) defined in the preceding chapter are based on four-hectare grid cells that span the entire metropolitan area."*
- 5.10.16 The above statement is further qualified by the following footnote contained on page 72 of the MSDF:
- 5.10.16.1 *"Map 5.1d cannot define STA designation at a property scale without reference to the additional spatial informants in Maps 5.1 a-c."*
- 5.10.17 An extract of Map 5.1b: Biodiversity Network and Marine Protected Areas that zooms in on the local area of the River Club site shows that no land on Erf 151832 Cape Town is identified as "Critical Natural Areas".
- 5.10.18 In terms of the City of Cape Town Biodiversity Network (2017) which informs the MSDF:
- 5.10.18.1 *"Conservation, low impact recreation & enviro education (could be supported in sensitive areas) as outlined in site management plan; hard infrastructure (should) only (be located) outside Critical Biodiversity Areas (CBAs) or adjacent or in existing highly degraded areas. Higher impact activities may be permitted on highly degraded areas."*;
 - 5.10.18.2 The River Club property (Erf 151832) is degraded, and hosts no CBAs;

- 5.10.18.3 The western boundary of the site, or the eastern bank of the unlined, degraded course of the Liesbeek River is classified as an Ecological Support Area (ESA) – the potential impacts of infilling this feature are reported in Impact FE4 and FA2 (Appendix J of the BAR) – in summary, a net ecological benefit in aquatic habitat quality is anticipated from the selection of either development alternative;
 - 5.10.18.4 The eastern boundary of the site as it banks onto the Black River is classified as an ESA – the potential impacts on this ESA are reported in Impact FE2 (Appendix J of the BAR) – a very low significance impact is anticipated following mitigation (i.e. reinstatement of the wetland following construction); and
 - 5.10.18.5 The Raapenberg Wetland is listed as a CBA – the potential impacts on which are reported in Impact FE5 (Appendix J of the BAR) and are found to be insignificant.
- 5.10.19 Therefore, while it is recognized that there may be local features which apply to a particular site that could influence development, but Planning Partners (2018) note that the presumption is that property inside the Urban Inner Core is a priority investment and development area. Furthermore, the location of the site in relation to the VRC and Metro South-East Integration Zone, in particular, means that it is a highly strategic site for development.
- 5.10.20 It is possible that lower order plans, such as a District Spatial Development Framework, may be inconsistent with the new MSDF. The Municipality is currently going through a process to iron out any inconsistencies. Until the applicable District Spatial Development Framework is repealed or amended, it will be necessary to motivate for a deviation and to demonstrate circumstances for such deviation.

Table Bay District Plan (2012)

- 5.10.21 In terms of section 20(1) of the MPBL, any structure plan listed in Schedule 1 of the MPBL, including the Table Bay District Plan, and which remains in force in terms of section 16(1)(b) of Land Use Planning Act ("LUPA"), is deemed to be a district spatial development framework in terms of the MPBL. The Table Bay District Plan is informed by the city-wide Spatial Development Framework ("SDF") and its purpose is to guide spatial development processes in the district over an approximate 10-year planning period.
- 5.10.22 As with the City of Cape Town SDF, the Table Bay District Plan is underpinned by a composite Spatial Development Plan. This plan identifies 'broad spatial planning categories' for all land in the Table Bay District, as well as various structuring elements that are critical to the future development and restructuring of this part of the City.
- 5.10.23 It is evident in Figure 56, which is a plan for Sub-District 3 Two Rivers Urban Park ("TRUP") / Salt River / Observatory / Paarden Eiland, that the land on which the River Club is situated is categorised as a mixture of "open space", "core 2" and "buffer 1" and therefore deviation from this plan is required; however, it is not irregular to deviate from a District Plan. According to the Table Bay District Plan, if a "...proposal is in conflict with the statutory designation and/or text of the District SDP and / or any other structure plan in terms of s4(10) of the LUPA..." then "...the City of Cape Town can consider condoning a deviation from the approved policy. This deviation should be fully motivated as part of any LUPO or building plan applications that may be required".
- 5.10.24 It must be noted, however, that according to Planning Partners the Table Bay District Plan is outdated (refer above). The proposed development represents a change in the way development of the site is considered. Whereas the Table

- Bay District Plan does not consider the site developable, it has been demonstrated from detailed technical studies that the site is indeed developable, with the major motivating factors being:
- 5.10.24.1 Raising the level of the site above the 1:100 floodplain will not have any significant effect on flood hazard (as demonstrated in the surface water hydrology report, attached as Annexure H to the motivation report);
 - 5.10.24.2 The City of Cape Town's desire to develop the Berkley Road extension, which will change the existing character of the site, and will provide enhanced access opportunities onto the site; and
 - 5.10.24.3 The policy objective of the authorities for the Two Rivers area to become a mixed use and mixed tenure environment.
- 5.10.25 Furthermore, the 2018 MSDF states that specific and immediate implementation actions that the City must undertake include "reviewing district plans to interpret the reviewed MSDF" (pages xv and 90 of the MSDF).
- 5.10.26 According to the "Consistency principles and post-2012 amendments, as contained in Technical Supplement D of the 2018 MSDF, lower order spatial plans and policies must be consistent with higher order spatial plans and policies. The MSDF identifies the land as "urban inner core" and therefore the lower order Table Bay District Plan is inconsistent with the higher order MSDF (and must be updated by the City in any event).
- 5.10.27 Nevertheless, the requirements of section 13(2) of the MPBL, means that it is necessary to apply to the City of Cape Town in order to amend the Table Bay District Plan. This amendment will be to reclassify the portion of land upon which the proposed River Club development is situated from "open space" and "buffer 1" to "urban development" (as indicated in the SDF) and is fully motivated with reference to contextual and site-specific informants (Planning Partners, 2018 – also see rezoning motivation below). Regarding the site's designation in terms of the District Plan, a summary of the planning motivation for the deviation follows:
- 5.10.28 Regarding the open space, *"Open space" is defined in the District Plan as: "Open space which is not part of the biodiversity network or significant agricultural areas but has been identified to promote access to open space for active and passive recreation. Whilst the focus is on areas that are usable and accessible for most of the year, the identification has included cemeteries, detention ponds, servitudes, river corridors and road reserves in order to promote the notion of a linked open space system."*
- 5.10.29 It is acknowledged that the River Club does currently form part of an open space system of sub-metropolitan significance (Planning Partners, 2018). This open space system plays an important role as:
- 5.10.29.1 A structuring element of the city.
 - 5.10.29.2 Part of the floodplain of the Black River and Liesbeek River, which has associative cultural significance.
- 5.10.30 Impacts on views, the sense of place, and historical character of the site have been assessed in Appendix J of the BAR (Impacts V2, V3 and H3) and have been found by experienced specialists to be significant, but acceptable, after mitigation.
- 5.10.31 Notwithstanding the site's current role in the regional open space system and anticipated change in character as assessed in the BAR, it does not necessarily mean that development of the site should be precluded, as motivating factors exist from a town planning perspective (also refer to rezoning motivation below).
- 5.10.32 Relating to open space specifically, Planning Partners note that:
- 5.10.32.1 The site is currently privately owned, plays a limited role in accommodating people seeking recreational open space, and the right of admission is reserved.

- 5.10.32.2 The development will be publicly accessible, ~65% of the site and River Club property would be retained as open space if developed as proposed (excluding roads), and ~25% of the River Club property would be made available for recreational activities in open space areas - the open space provided is considered sufficient by Planning Partners for a development of this nature.
- 5.10.32.3 The development would allow the public to enjoy open space vistas associated with the Raapenberg Bird Sanctuary more meaningfully.
- 5.10.32.4 The wider open space system of which the site forms part of contains campus style development (e.g. Observatory 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).
- 5.10.32.5 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.
- 5.10.32.6 Within the greater 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) will continue to form part of the regional public open space system.
- 5.10.32.7 Further afield, there are other significant open space areas that are accessible to the public (such as the Table Mountain National Park).
- 5.10.32.8 The development would enhance faunal connectivity through and around the site (see Impact FA4 in Appendix J of the BAR).
- 5.10.32.9 Considerable social (as well as heritage and ecological) benefits are anticipated from extending the public movement corridor along the "new" Liesbeek River corridor should the Riverine Corridor Alternative be selected for development (see Impacts SE7, FE3 and H4 in Appendix J to the BAR).
- 5.10.32.10 The latest spatial policy plan relating to the site is the Draft Two Rivers Local Spatial Development Framework. This Framework is both a City of Cape Town and a Western Cape Provincial Government local spatial planning initiative. The proposed River Club development is generally in line with this framework.
- 5.10.33 The areas designated "Core 2" are associated with the rivers. These areas will not be developed (as per the proposed river buffer setbacks) but will instead be rehabilitated - the impacts and benefits of which are described in Impacts FE2 - FE5, FA2 and FA3 (Appendix J of the BAR) - a net benefit in aquatic habitat quality is anticipated.
- 5.10.34 "Buffer 1" land on the site falls within and adjacent to the Berkley Road extension road reserve. "Buffer 1", is defined in the Table Bay District Plan as: *"Rural areas, game and livestock farming areas and other natural vegetation areas that do not form part of the core areas but are recognised as areas that could provide opportunities to establish biodiversity offsets. Essential utility service infrastructure may be located in Buffer 1 areas."*
- 5.10.35 The Berkley Road extension may be considered as "essential utility service infrastructure" and may therefore be considered as appropriate development within a "Buffer 1" designated area. Furthermore, no natural vegetation remains in this area and it is submitted that this designation is inaccurate as the area shows no signs of any remnant indigenous vegetation (refer to Appendix G2 to the BAR and Impact FL1 in Appendix J of the BAR).
- 5.10.36 It is also noteworthy that the latest spatial policy plan relating to the site is the Draft Two Rivers Local Spatial Development Framework. This Framework is both a

City of Cape Town and a Western Cape Provincial Government local spatial planning initiative / proposal. It is pertinent that the development is *largely* in line with this framework.

Environmental Management Framework 2012

- 5.10.37 The Environmental Management Framework ("EMF") for the City of Cape Town has been incorporated into the City District Plans. Each EMF provides support mechanisms which must be considered in the planning, development and environmental and land management decisions.
- 5.10.38 The EMF is a component of each District Plan as it informs the spatial proposals contained therein. In this regard, the Table Bay District Plan indicates the site to fall within or adjacent to:
- 5.10.38.1 An area subject to flooding / and is classified as a coastal risk area in terms of the EMF - recent detailed surface water hydrology assessment of the catchment indicates that development can occur at the site without significant impacts on the structural integrity of other properties and on public safety.
 - 5.10.38.2 An "other natural area" at the Berkley Road Extension and the PRASA owned land to the north of the site - studies have concluded that there is no natural vegetation remaining in this area.
 - 5.10.38.3 Protected areas at the "unlined course" of the Liesbeek River, Raapenberg Wetland, Liesbeek Canal and Black River – while impacts on well represented wetlands are anticipated, a net ecological improvement of aquatic habitat quality is anticipated.
- 5.10.39 The EIA has considered ecological and cultural impacts, and potential benefits of the development to inform a decision by authorities about the environmental (and social) acceptability of the development. The proponents project motivation as well as potential benefits (ecological, heritage, and socio-economic) of the development form the basis of the planning application for deviation from the District Plan.

The Two Rivers Local Spatial Development Framework (Draft October 2019)

- 5.10.40 In terms of sections 12 to 14 of the MPBL, a Local Spatial Development Framework ("LSDF") has been compiled for the Two Rivers study area to align proposals for the area with the new 2018 MSDF and the principles outlined in the Spatial Planning and Land Use Management Act, 2013.
- 5.10.41 The draft Two Rivers LSDF provides direction for short, medium and long term spatial and investment planning in the Two Rivers area, previously known as TRUP. This area extends from Hartleyvale and Malta sports fields to Alexandra Road, including Ndabeni Triangle and Pinelands Station.
- 5.10.42 The draft Two Rivers LSDF was released for public comment from 15 October 2019 to 15 December 2019. The City of Cape Town are in the process of finalising the document following the outcomes of the comment period.
- 5.10.43 According to Planning Partners, the LSDF vision is to actively intensify the residential, economic, recreational and institutional urban activities by developing limited vacant land and connecting the Mosaic of Precincts at the confluence of two rivers and two urban corridors to:
- 5.10.43.1 Provide more residential units;
 - 5.10.43.2 Create more job opportunities;
 - 5.10.43.3 Celebrate complex layers of memory, cultural heritage, science and diversity;

- 5.10.43.4 Enhance the structured and Open Space recreational and natural network;
- 5.10.43.5 Support healing and environmental resilience; and
- 5.10.43.6 Promote spatial integration & urban intensification within an efficient mobility and infrastructure network.
- 5.10.44 The Draft LSDF includes a change in the vision for the Two Rivers area. In terms of the revised vision, the Draft LSDF identifies the area as a *“significant area of underutilized state owned and private land, strategically placed within the Urban Inner Core of the city”*, with opportunities to promote public transport, promote integration and unlock development potential. At the same time, the LSDF advocates that the ecological role of the river corridors, the regional amenity, as well as the significance of the cultural and built heritage of the area must be enhanced.
- 5.10.45 With regard to the River Club site, the following provisions are noteworthy:
 - 5.10.45.1 Berkley Road extension is identified as a new mobility route, but also with a role as an activity corridor;
 - 5.10.45.2 Congruence and continuity of the Liesbeek River is promoted along the eastern side of the site, with the canal transformed into a riverine corridor;
 - 5.10.45.3 The 'old' Liesbeek River channel on the western side of the site is identified as public open space with a related non-motorised transport route;
 - 5.10.45.4 A significant open space corridor is provided across the River Club site running east-west; and
 - 5.10.45.5 The remainder (and larger portion) of the site is identified for mixed use intensification is two distinct precincts on either side of the east-west open space corridor.
- 5.10.46 Planning Partners assess that the proposal for the River Club reflected in the current application is largely consistent with the proposals of the Draft LSDF, which was workshopped within the City of Cape Town and Provincial Department of Transport and Public Works prior to release. While it is recognised that this document is currently a draft, it nevertheless reflects the future intentions of these authorities.

Management of Urban Stormwater Impacts Policy (2009)

- 5.10.47 The Management of Urban Stormwater Impacts Policy (2009) was prepared by the City of Cape Town’s Catchment, Stormwater and River Management Branch in order to address stormwater impacts and ensure that new developments incorporate water sensitive urban design elements.
- 5.10.48 Urbanisation typically impacts on natural watercourse health in two key ways:
 - 5.10.48.1 The quantity of stormwater runoff is increased as the proportion of impervious area within a catchment is increased, leading to larger peak flows and more frequent runoff which may have detrimental effects on river health and can cause flooding in downstream areas; and
 - 5.10.48.2 The quality of runoff is also negatively impacted with additional pollutant loads in the form of gross pollutants, suspended sediments and various other pollutants such as nitrogen, phosphorus and heavy metals.
- 5.10.49 According to the policy, the River Club site fits within the category of a “Brownfield and Existing Development Site (area > 50 000m²)”. As such, specific pollutant objectives and stormwater flow restrictions for the developments apply, including onsite detention. However, since the site is located within a

flood plain and its surrounds are inundated even during low order storm events, such as the 1:2-year storm event, attenuation of stormwater adds no significant value and thus the rate at which runoff is released from the development becomes irrelevant.

- 5.10.50 Thus, the following deviations from the Stormwater Policy in terms of attenuation are requested:
 - 5.10.50.1 Permission to deviate from the requirement to attenuate the 1-year Return Interval, 24-hour storm event;
 - 5.10.50.2 Permission to deviate from the requirement to reduce discharge from the development for the 10-year Return Interval to pre-development levels; and
 - 5.10.50.3 Permission to deviate from the requirement to reduce discharge from the development for the 50-year Return Interval to pre-development levels.

Cape Town Floodplain and River Corridor Management Policy (2009)

- 5.10.51 The City of Cape Town Floodplain and River Corridor Management Policy (2009) seeks to balance flood risk, ecological and socio-economic considerations in developments near watercourses and wetlands. The guidelines contained in this policy are pertinent to the River Club because of its position in the floodplain of the Black River / Liesbeek River.
- 5.10.52 The objective of the policy is to manage development in a manner that:
 - 5.10.52.1 Limits or reduces exposure to flood risk by avoiding hazardous, uneconomic or unwise use of floodplains, thereby protecting life, property and community infrastructure;
 - 5.10.52.2 Protects the natural flood carrying capacity of watercourses and wetlands;
 - 5.10.52.3 Protects and enhances the intrinsic value and the environmental goods and services provided by watercourses, wetlands and associated riparian areas and floodplains;
 - 5.10.52.4 Facilitates the beneficial integration of watercourses into the urban landscape by creating an aesthetically pleasing public resource which will ultimately allow for the social and economic upliftment of communities adjacent to watercourses and wetlands;
 - 5.10.52.5 Provides an effective decision-making tool for officials, developers and consultants by introducing an element of predictability with regard to applications for development along watercourses / river corridors and adjacent to wetlands; and
 - 5.10.52.6 Promotes sustainable development from engineering, environmental and socio-economic perspectives.
- 5.10.53 In this regard:
 - 5.10.53.1 The surface water hydrology assessment (Appendix G3 to the BAR) found that only a marginal change in flood depth is anticipated (and is mitigable) and that a significant increase in flood risk / hazard is not anticipated as a result of the development;
 - 5.10.53.2 The development is assessed by the ecologists to lead to a net ecological benefit;
 - 5.10.53.3 The River Club property is currently inaccessible to the public. A key component of the proposal is to enhance the ecological condition of surrounding freshwater environments and incorporate non-motorised transport and recreational facilities in these areas thereby integrating watercourses into the urban landscape and creating an aesthetically pleasing public resource;

- 5.10.53.4 Deviations are required from sections of the City's Floodplain and River Corridor Management Policy, and City of Cape Town's Catchment, Stormwater & River Management Branch and the Branch will not oppose an application for departure from the requirements of the Stormwater By-Law or the River Corridor Management Policy for hydraulic reasons; and
- 5.10.53.5 The proposal is for a sustainable economic and social development, which will create jobs and increase investment.
- 5.10.54 Notwithstanding the departures that are required, the proposed development does not conflict with the primary objectives of this policy.
- 5.10.55 In addition, the following key statements are made in the policy:
- 5.10.55.1 The permissible extent and nature of land use, development or activities within floodplains must be subject to stringent evaluation and control in the interests of public safety.
- 5.10.55.2 Obstruction to the free flow of water within the 20-year floodline area shall not be permitted without deviation.
- 5.10.55.3 Between the 50 and 100-year floodlines, some developments or activities may be permitted, subject to such conditions as the City may in its discretion impose.
- 5.10.55.4 Developments with particular evacuation or emergency response issues and high-risk developments will only be permitted above the 100-year floodline.
- 5.10.55.5 Any proposed development or redevelopment within the floodplain must be supported by a report by a registered professional engineer to ensure that any new or existing structure can withstand the forces and effects of floodwaters.
- 5.10.55.6 Watercourses and wetlands with their adjacent riparian areas and associated fauna and flora must be protected or "buffered" from the impacts of adjacent development or activity.
- 5.10.56 Raising the ground surface at the River Club to an elevation slightly above the 100- year flood elevation is not expected to have any detrimental effects on neighboring properties (provided that mitigation is effectively applied). This means that the infilling of the site above the 1:50 year flood level can occur in line with a specific guideline contained in the Cape Town Floodplain and River Corridor Management Policy (2009); however, deviations are required from the following sections of the City's Floodplain and River Corridor Management Policy:
- 5.10.56.1 Permission to develop / obstruct the free flow of water within the 20-year flood line area.
- 5.10.56.2 Deviation from the policy, allowing the developer to fill (considered development).

The Western Cape Biodiversity Spatial Plan, 2017, the National Environmental Management: Protected Areas Act, 2003 and the City of Cape Town Bionet, 2015

- 5.10.57 In terms of the City of Cape Town Biodiversity Network (2017) which informs the MSDF:
- 5.10.57.1 *"Conservation, low impact recreation & enviro education (could be supported in sensitive areas) as outlined in site management plan; hard infrastructure (should) only (be located) outside Critical Biodiversity Areas (CBAs) or adjacent or in existing highly degraded areas. Higher impact activities may be permitted on highly degraded areas."*
- 5.10.57.2 The River Club property (Erf 151832) is degraded and hosts no CBAs.




- 5.10.57.3 The western boundary of the site, or the eastern bank of the unlined, degraded course of the Liesbeek River is classified as an Ecological Support Area ("ESA") – the potential impacts of infilling this feature are reported in Impact FE4 and FA2 (Appendix J of the BAR) – in summary, a net ecological benefit in aquatic habitat quality is anticipated from the selection of either development alternative.
- 5.10.57.4 The eastern boundary of the site as it banks onto the Black River is classified as an ESA – the potential impacts on this ESA are reported in Impact FE2 (Appendix J of the BAR) – a very low significance impact is anticipated following mitigation (i.e. reinstatement of the wetland following construction).
- 5.11 In terms of the allegation that the decision does not align with the City of Cape Town's Floodplain and River Corridor Management Policy, 2009 and Stormwater By-Law, the EAP responded in the Comments and Responses Report as follows:

Stormwater

- 5.11.1 The site currently performs a limited storm water attenuation function. "Swales" are proposed at the development to attenuate and treat stormwater flow for frequent storm events, and increased run-off would have no impact on the flood levels. Swales are designed to slow and capture runoff by spreading it horizontally across the landscape (along an elevation contour line), facilitating runoff infiltration
- 5.11.2 The site would be able to provide limited stormwater attenuation capacity if developed for this purpose (which is not the proponent's intention as the owner of the site) as demonstrated in Section 4.5 of the Surface Water Hydrology Impact Assessment – Appendix G3 to the BAR.
- 5.11.3 The surface water hydrology report (Appendix G3 to the BAR) considered the potential impacts of climate change, including:
- 5.11.3.1 Sea level rise.
- 5.11.3.2 Increased rainfall intensity.
- 5.11.4 In this regard, the study demonstrated that there is a negligible increase in flood levels even when considering climate change.
- 5.11.5 Arguably, by providing high-density mixed-use development near the CBD, this development is supporting the City in reducing its per capita impact on climate change by reducing reliance on private vehicle use (i.e. CO2 emissions).
- 5.11.6 The "original course" of the Liesbeek River offers no 'amelioration' function. Furthermore, should the "original course" of the Liesbeek River be transformed into a swale it will provide additional stormwater attenuation and amelioration function than is the current situation.
- 5.11.7 No portions of the Liesbeek Parkway road will be used for stormwater management for the proposed development. However, these properties are associated with the Liesbeek Parkway road and Liesbeek River – which currently serves a stormwater conveyance function. The infilled river (and therefore these properties) would continue to serve a stormwater conveyance function should the development proceed.
- 5.11.8 The City of Cape Town's Property Management Department's signed landowner consent (dated 14 June 2018) includes (*inter alia*): The (possible) infilling of the "unlined course" of the Liesbeek River where it fronts the site (to be rehabilitated as a stormwater swale...). The City of Cape Town has also been informed of the intention to use these properties for the management of stormwater.
- 5.11.9 The intention of the City of Cape Town's 'Management of Stormwater Impacts Policy' (CSRM 2009) is "to minimise the undesirable impacts of stormwater runoff from developed areas by introducing Water Sensitive Urban Design principles to urban planning and stormwater management in the Cape Town metropolitan area".