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
THE DIRECTOR: DEVELOPMENT MANAGEMENT (REGION 1), LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT	Fourth Respondent
THE MINISTER OF 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

CITY'S ANSWERING AFFIDAVIT IN RESPECT OF PART A

I, the undersigned,

DANIEL PLATO

do hereby make oath and say that:

INTRODUCTION

1. I am the Executive Mayor of the City of Cape Town (the seventh respondent) and I was the appeal authority in respect of the land use authorisation which the applicants impugn.

2. In addition to deposing to this affidavit in my capacity as the seventh respondent, I am duly authorised to depose to this affidavit on behalf of the City of Cape Town (the third respondent) and the Chairperson of the City's Municipal Planning Tribunal (the sixth respondent). In this affidavit, where relevant, '**the City**' refers collectively to the third, sixth and seventh respondents.

3. The facts in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct. Where I make averments not directly within my knowledge, I do so based on information made available to me. I believe such information to be true and correct. To the extent that reliance is placed on any hearsay evidence, I submit that it is in the interests of justice for it to be admitted in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988.

4. Legal submissions in this affidavit are made on the advice of the City's legal representatives. I believe the advice to be correct.

OVERVIEW

5. This application concerns a substantial development that has been approved to take place in Observatory, Cape Town, on a site that currently features a recreational facility known as '*the River Club*'. The River Club comprises a golf course, offices, conference facilities, restaurants and a parking lot. It is on a site that is bounded by the Liesbeek River and is near its confluence with the Black River.

6. At present, the site's environmental resources are polluted and degraded. No measures are in place to identify or protect the subject property's heritage, let alone to celebrate and enhance it. The River Club facility is of limited commercial utility and has no residential offering.

7. The development represents a significantly improved and more efficient use of the land. It will introduce buildings that range in height from 15 to 44.7 metres to accommodate housing and commercial uses. It will facilitate public interest infrastructure projects that will benefit the people of Cape Town and have long been desired, but which the City has been unable to achieve. These include the re-establishment of a natural, concrete-free watercourse for the Liesbeek River and the construction of transport infrastructure that is critical to improving linkages within the Cape Town metropolitan area.

8. The development will also protect and celebrate the site's centuries-old heritage: at present, the River Club pays no respect and gives no recognition to the seminal role the site has played in South Africa's indigenous history and resistance to colonialism. However, working in partnership with indigenous groups and representatives, the development has been revised to include various celebrations of the subject property's history, including the establishment of an on-site cultural, heritage and media centre.

9. To proceed with the development, the developer had to obtain, among other things, an environmental authorisation from provincial authorities and a land use planning authorisation from the City. After thorough public participation processes and scrutiny, those authorisations were duly granted, subject to numerous conditions.

10. In Part B of these proceedings, the applicants seek to review and set aside the two abovementioned authorisations, as well as the appeal decisions that confirmed the authorisations. Their contention is that the development's impact on the subject property's heritage resources was not properly assessed when the authorisations were granted.

11. In Part A of these proceedings – with which we are presently concerned – the applicants seek an urgent order interdicting the developer from acting on the environmental and land use authorisations to begin construction. The interdict is sought pending the final determination of the review in Part B (prayer 2.1) and is framed as an interim interdict. The applicants also ask for an interdict until 8 April 2022 which is when they say a provisional protection order under section 29(1) of the

National Heritage Resources Act 25 of 1999 ('**the Heritage Act**') expires (prayer 2.2). Prayer 2.2 is a final interdict for a limited period.

12. The City submits that the interdict application must be dismissed because: (i) it lacks urgency; (ii) the grant of an interdict will cause massive prejudice while its refusal will cause none; (iii) the applicants make out no *prima facie* right that is threatened by irreparable harm; (iv) the applicants make no case for a review; (v) the provisional protection order has expired; and (vi) the applicants have another satisfactory remedy.

13. First, the application lacks urgency.

    13.1. While the applicants have brought this application as a matter of urgency, any urgency is entirely self-created. The last of the impugned decisions was communicated to the applicants on 19 April 2021. This application was only served on the respondents three and a half months later, on 3 August 2021. When it was served, the application numbered more than 800 pages, but the applicants gave the respondents a matter of hours to deliver a notice of intention to oppose and four working days to deliver answering papers.

    13.2. The applicants' conduct in initiating and prosecuting these proceedings has been demonstrably unreasonable and unnecessarily prejudicial to the respondents.

14. Second, the grant of an interdict will cause massive prejudice while the refusal will cause none.

14.1. The applicants ask this Court to put a stop to the overwhelming public benefits that will flow from the development. These include heritage commemoration; environmental rehabilitation; thousands of square metres of residential accommodation, including affordable housing dedicated to low-income households; the construction of a multimillion-Rand public road network; and economic regeneration with billions of Rand in investment and the creation of thousands of jobs.

14.2. Many of these benefits will be realised in the immediate future. The construction jobs have already commenced. The building plans expected between now and February 2022 have a total construction investment value of R2.2 billion, with a further R1 billion by August 2022.

14.3. As explained in the accompanying affidavit of Mr Greyling, the City is in the midst of a fourfold economic crisis: economic output, construction and confidence are at worryingly low levels, while unemployment is at an alarming and record-breaking peak. The development is an essential component of the City's recovery from the crises as it will address, and materially counteract, each aspect of the crises. Even a postponement of the development, and therefore of its economic and other benefits, is simply unaffordable – it will do irreparable harm to the economic recovery of Cape Town and its residents.

14.4. In Part A of these proceedings the applicants ask this Court not only to ignore these valuable benefits, but to grant an order that will risk them never being realised.

14.5. The Covid-19 pandemic has wrought havoc across the globe. Millions of lives have been lost and many millions more have been severely disrupted. The pandemic has not only affected lives, but also livelihoods. Economies have receded, investments have been withdrawn and unemployment has scaled to devastating proportions. In Cape Town, at present, there are few large-scale projects that will guarantee capital investment, the creation of long- and short-term economic opportunities, infrastructure upgrades and the provision of residential accommodation. The development will achieve all of those objectives, and will do so on a scale that will positively transform the City.

14.6. If the interdict is granted, construction will not be able to proceed until the review is finally determined. That could be a year hence in the High Court (if not longer), and several years hence if the decision is taken on appeal. Given the current economic crisis, Cape Town cannot afford to delay the economic and other benefits of the development.

14.7. The City knows from its experience in considering thousands of development applications each year that timing is critical in large-scale development projects. If construction cannot continue pending the review, certain costs will be irrecoverable, the developer's remaining resources will be diverted into other projects, investor confidence will falter and the momentum necessary

to drive the project forward will stall. Furthermore, the longer the development takes to complete, the more expensive it will become, as costs increase above their initially anticipated levels. A significant delay in construction will, likely, be the death knell for the development.

14.8. If granted, the interdict will postpone, and likely terminate, the substantial benefits of the development. At the best of times, that would be a high and disproportionately prejudicial toll to pay. With the pandemic still raging, and the South African economy in the doldrums, it would be disastrous and unaffordable – not just for the developer, but for the City and its residents.

15. Third, the applicants show no *prima facie* right that is threatened by irreparable harm.

15.1. An interim interdict can be granted only if the applicants demonstrate that the impending construction work will irreparably harm a *prima facie* right. They fail to do so.

15.2. None of the site's intangible heritage value will be compromised if the construction proceeds in accordance with the authorisations that have been granted. This is because the existing uses, structures and features on the subject property – a golf course, conference centre and parking lot – have no heritage value at all. The River Club in its current form is a woefully impoverished tribute to the land's heritage. It does nothing to protect, let alone enhance, the subject property's political, spiritual and cultural value.

15.3. By contrast, if the development proceeds, the subject property's heritage resources will be protected and enhanced; this is assured by various conditions of approval that have been imposed. Those conditions were imposed after the decision makers considered a wealth of heritage information and analysis.

15.4. If the interdict is granted, however, those resources will continue to languish unacknowledged and will risk never being recognised.

16. Fourth, there is no case for review relief.

16.1. The *prima facie* right upon which the applicants rely for an interdict is a '*right to the review of the unlawful decisions at issue*'. Even if it were sufficient for the applicants to rely solely on a right to a review for a *prima facie* right (the City is advised that it is not), the applicants make out no case for review relief.

16.2. In respect of the City's decision (I do not propose to deal with the environmental decision), each of the applicants' grounds of review is without merit. At best, the applicants put forward a (weak) appeal dressed up as a review. They hardly attack my appeal decision at all, which is the operative decision by the City.

16.3. When deciding the land use planning application, the City took into account all relevant considerations, including those concerning heritage impact. Both the City's Municipal Planning Tribunal ('**the MPT**', being the decision-maker

of first instance) and I (as the appeal authority) were satisfied that, with the appropriate conditions in place, the proposed development is highly desirable. The applicants have not put forward any basis for disturbing that conclusion.

16.4. The applicants have failed to establish, even on a *prima facie* basis, that the land use authorisation should be set aside.

17. Fifth, the provisional protection order has expired.

17.1. In prayer 2.2, the applicants seek an interdict based on a two-year provisional protection order which the second respondent, Heritage Western Cape ('**HWC**'), issued on 8 April 2018 under section 29(1) of the Heritage Act. The applicants contend that an appeal against the order suspended it and extended its operation by two years, causing it to expire only on 8 April 2022.

17.2. The applicants' interpretation is obviously wrong. If an appeal were to suspend a provisional protection order, then it would strip the heritage resource of its provisional protection – defeating the very purpose of section 29(1). That would be absurd.

17.3. In any event, a suspension is not an extension. The applicants' contention that the order lasts four years is contrary to section 29(1) which says that a provisional protection may only subsist '*for a maximum period of two years*'. Indeed, the provisional protection order itself is clear that it is '*for a maximum*

period of two years from the publication of this notice'.

17.4. Unsurprisingly, the applicants admit that the provisional protection '*has now lapsed*'. That is also the unchallenged finding of an Appeal Tribunal which considered the provisional protection order.

17.5. Accordingly, the applicants do not establish a clear right required for an interdict in terms of prayer 2.2.

18. Sixth, the applicants have another satisfactory remedy.

18.1. An interim interdict is only available if the applicants do not have an alternative mechanism for protecting their interests. However, in the present case, review proceedings will grant the applicants full and effective relief. Such proceedings will ensure that the various complex issues that arise in this matter are fully ventilated. There is no concern that the applicants have raised that cannot be addressed in due course in review proceedings. Once the merits are properly determined, if a case for review is made out, the court will have a wide discretion to grant whatever relief is just and equitable.

18.2. The necessary review proceedings have already been initiated under Part B. The interdictory relief sought in Part A is unnecessary and unjustified.

19. The remainder of this affidavit is structured under the following headings:

19.1. First, I set out a chronology of relevant facts.

19.2. Second, I explain the public interest in the development.

19.3. Third, I detail why the interdict must be refused.

19.4. Fourth, I respond directly to the paragraphs of the founding affidavit and accompanying affidavits which relate to the City.

CHRONOLOGY

20. I set out below a chronology of the relevant facts. To avoid overburdening these papers, I have not attached the supporting documentation as annexures. However, that documentation will be made available as part of the rule 53 record. Should it be required, the documentation can be made available to this Honourable Court for purposes of deciding Part A of these proceedings.

21. On 18 January 2018 Timothy Hart (an archaeologist) and Stephen Townsend, (an architect, planner and conservationist) submitted a draft heritage impact assessment in respect of the development to HWC and the Western Cape Department of Environmental Affairs and Development Planning (**DEADP**). The draft invited comment from interested and affected parties, noting that there was already a long list of parties who had registered to participate in the consultation process.

22. Mr London, the deponent to the founding affidavit, records that the first applicant ('**the OCA**') received a presentation on the draft heritage impact assessment in February 2018 (FA p 52 paragraph 84).

23. The developer's land use application was accepted by the City on 27 March 2018. It was published for public comment later that year, following which 184 objections were received (18 of which were late). The OCA submitted a written objection to the development, as did the second applicant's ('**the GKKITC**') Mr Jenkins (the deponent to one of the applicants' supporting affidavits). (When making representations to the City, the second applicant used various names and spellings including Gorringaichona Traditional Khoi Council, which I abbreviated as GTKC in my appeal decision.)

24. The application was circulated to various City departments, each of which submitted its input. This included detailed comments and analysis from the City's Environment and Heritage Management Department, set out in a 21-page report.

25. On 20 April 2018 HWC published a provisional protection notice (LL13 p 165) recording that the River Club site was protected for a maximum period of two years as from the date of publication.

26. In July 2019, following input from various interested and affected parties, Messrs Hart and Townsend revised the heritage impact assessment.

27. On 13 September 2019 HWC requested the developer to further engage with the First Nations in respect of the subject property's heritage resources.

28. On 25 September 2019 AFMAS Solutions ('**Afmas**') submitted the '*TRUP First Nations Report*' to the Western Cape Department of Transport and Public Works. The Department appointed Afmas as a social facilitator to engage the First Nations about their oral history of the Two Rivers area (which area includes the River Club site).

29. Following HWC's request, and in the light of Afmas' role in preparing the report referred to in the preceding paragraph, the developer appointed Afmas to facilitate engagements with the First Nations to establish the relevant oral history. In November 2019, following those engagements, Afmas submitted the '*River Club First Nations Report*' ('**the First Nations Report**'). The First Nations Report records Afmas's mandate to '*engage the First Nations (the Khoi and San), interchangeably referred to as Indigenous people, or the Indigene, with regard to their intangible cultural heritage in terms of the River Club project site.*' It also records that it '*constitutes a Supplementary Report to the River Club Heritage Impact Assessment*'.

30. On 4 December 2019 Messrs Hart and Townsend prepared a supplement to the heritage impact assessment to account for, among other things, the First Nations Report.

31. The developer submitted its application for an environmental authorisation to the Western Cape provincial authorities on 19 December 2019.

32. On 13 February 2020 HWC issued its '*Final Comment*' on the development (LL17 p 270), including its assessment of the December 2019 supplement to the heritage

impact assessment. HWC expressed the view that the heritage impact assessment does not comply with section 38(3) of the Heritage Act and said that it is not in a position to endorse the report or the development proposal (p 280 paragraph 115).

33. In April 2020 the developer's consultants completed the Final Basic Assessment Report, setting out its environmental impact assessment in respect of the development. The Report recommended that the environmental authorisation should be issued. Paragraph 67 of Mr London's affidavit indicates that the process culminating in this Basic Assessment Report commenced in April 2016. Paragraph 94 of his affidavit records that the Report went through '*multiple phases of public comment and … attracted 494 comments from the general public*'. Mr Jenkins' affidavit records that the GKKITC submitted '*representations as an interested and affected party during the environmental impact assessment (EIA) process*' (paragraph 80.5).

34. On 14 April 2020 an '*Independent Appeal Tribunal*' issued its decision in respect of the various appeals against HWC's provisional protection order. It dismissed the appeals and confirmed that the provisional protection endured for the '*maximum period of two years*', until it '*expires on 20 April 2020*'. I annex hereto an excerpt from the decision dealing with the provisional protection's duration ('**DP1.**').

35. The fourth respondent ('**the Provincial Director**') issued the environmental authorisation for the development on 20 August 2020.

36. Various parties appealed the environmental authorisation to the fifth respondent ('**the Provincial Minister**').

37. On 18 September 2020 the MPT convened to consider the land use application and hear oral representations. Both Mr London and Mr Jenkins made oral representations to the MPT, over and above their written objections, as did the GKKITC's attorney.

38. Parties were notified of the MPT's decision to authorise the development on 30 September 2020.

39. On 26 October 2020 the OCA submitted a lengthy appeal against the MPT's decision. The grounds of appeal were authored by the OCA's attorneys and came to 40 pages (excluding annexures, which were another 86 pages). The GKKITC, acting through its own attorneys of record, submitted its appeal on the same day.

40. The appeals were circulated to various City departments, each of which again provided input. This input included an extensive 45-page analysis from the City's Environment and Heritage Management Department.

41. On 22 February 2021 the Provincial Minister dismissed the appeals against the environmental authorisation and varied the conditions of approval. His appeal decision is part of the record which I considered.

42. On 23 February 2021 the City's Planning Appeals Advisory Panel ('**PAAP**') convened to consider the appeals in respect of the MPT's decision and to hear oral representations from interested parties. Both applicants made oral representations. The OCA's representations were made by its attorneys (who are the applicants'

attorneys in these proceedings) as well as Mr London. The GKKITC's representations were made by Mr Jenkins and by its attorneys. Both applicants also submitted detailed written motivations.

43. The PAAP recommended that the appeals be dismissed. It drew my attention to further written submissions by Mr Jenkins which were submitted after the oral hearing. I took those into account.

44. I considered all relevant information and made my decision to authorise the development and vary the conditions of approval on 18 April 2021.

45. Mr London's founding affidavit states that, on 22 July 2021, HWC recommended that '*consideration be given to [the River Club site's] declaration as a national heritage site*' (paragraph 15). Mr London has not annexed a copy of the recommendation. I have no knowledge of the recommendation.

46. This application was served on the City on 3 August 2021.

PUBLIC INTEREST: THE DEVELOPMENT IS GOOD FOR HERITAGE, GOOD FOR THE ENVIRONMENT, GOOD FOR HOUSING, GOOD FOR PUBLIC INFRASTRUCTURE AND GOOD FOR THE ECONOMY

47. Often, the socio-economic benefits of a new commercial and residential development entail some costs to the environment and sometimes to heritage resources. In such

cases, where a trade-off is involved, the City would weigh up competing benefits and costs in determining whether to authorise the proposed land use.

48. However, unlike those cases, the development of the River Club site involves no trade-off: not only will the socio-economic benefits be substantial, but the site's heritage resources will go from being ignored and invisible to being celebrated, and its ecological functioning will be rejuvenated. Given its scale, the development will benefit far more than those who live and work in the new precinct. The development will be a catalytic initiative that will yield positive outcomes on several fronts, including heritage, the environment, housing, public infrastructure, the economy, and job-creation. These positive outcomes will be experienced by the City's residents generally.

49. The City has ensured that all of these features are binding components of what the developer is required to deliver. The residents of Cape Town, and the public interest generally, stand to gain substantial benefits from the development.

Heritage

50. Heritage is of critical importance. It is recognised by the Bill of Rights (sections 30 and 31) and protected by, among other instruments, the Heritage Act. The City is required by section 99(3)(g) of the Municipal Planning By-Law ('**the By-Law**') to consider the impact on heritage when determining whether to authorise a development.

51. Heritage considerations were given especially close and careful consideration in this development application. In making its decisions, the City recognised that the River

Club site is steeped in culture, history and heritage that is of immense importance to South Africa. The City also considered multiple sources of heritage information, including the reports procured at the instance of the developer, comments from HWC and inputs from objectors – including the applicants. The extensive consideration of heritage is reflected in the 39 pages of my appeal decision devoted to the issue (LL28 558-597 paras 145 – 227).

52. In my heritage assessment (paragraph 178 of my appeal decision), I recorded that the heritage considerations relevant to the development include at least the following:

52.1. In indigenous cosmology and practice, land and the watercourses have a spiritual element. The subject property itself is regarded as sacred.

52.2. The Liesbeek River and the Black River are fundamental, both as features of the site and as holders of memory. Their confluence point, which is adjacent to the subject property, has historical, cultural and political significance. For example, in years past it has hosted significant ceremonies and gatherings.

52.3. The subject property must be understood in the context of the wider area.

52.4. Various indigenous groups had significant presence in the wider Observatory area before they were driven off by European settlers. Among other things, those groups used the area to graze their cattle.

52.5. The wider area is a focus point for historical acts of dispossession and violence that indigenous people suffered at the hands of European settlers. Significant historical confrontations took place in the area, including the 1510 battle with D'Almeida and the 1659 war with the Dutch.

52.6. Sacred animals were hunted to extinction, or driven from the area, by European settlers.

52.7. The European settlers were later replaced by, or became, colonialists.

52.8. The subject property has no tangible representations of the area's heritage in the form of buildings, graves or artifacts from battles. However, the physical aspects of the subject property – its open space, topography and natural features – are a reminder of the site's heritage. The open space is what is most notable about the subject property today.

52.9. The subject property is surrounded by other heritage resources that could be affected by the development, prominent among which is the South African Astronomical Observatory.

53. Open space and riverine aspects aside, the heritage in question is largely intangible: it is a product of memory and history, but does not have a physical manifestation on the subject property.

54. Having inspected the site, I can confirm that at present, the subject property's open spaces have been either converted into golfing greens or covered in asphalt. The Liesbeek River's waterways are choked, run-down and canalised. With its exclusive golf course, drab parking lot and degraded environment, the River Club at present abjectly fails the site's heritage. There is not a single indicator of the site's importance to the history of South Africa generally or the First Nations specifically. The current land uses – with their exclusivity and pollution – run directly contrary to the site's heritage.

55. The City carefully and fully considered the site's intangible heritage resources. Those informed the development proposal in various ways, and resulted in the City imposing several conditions to secure and commemorate the site's heritage:

55.1. The First Nations Collective (the eighth respondent, an association of indigenous groups and leaders with an interest in the River Club site), in a commendable partnership with the developer, worked to inform how the development can commemorate the site's heritage.

55.2. As a result, the First Nations Collective and the developer proposed several heritage commemoration features including an indigenous garden for use by the First Nations; a cultural, heritage and media centre; an amphitheatre for cultural performances; commemoration initiatives; and a heritage eco-trail. The City made those commemoration features conditions of approval (condition 20). Section 35(3) of the By-Law accordingly legally obliges the developer to implement them. (The City's conditions of approval are

Annexure A to my appeal decision. While the Applicants annex my appeal decision as LL28, parts of Annexure A are in black and white but need to be in colour to be understood. Accordingly, I attach Annexure A as **'DP2.**'.)

55.3. The heritage eco-trail will align with the indigenous respect for the site's ecology and allow pedestrians to experience that ecology on foot. The indigenous garden will allow the First Nations' knowledge of food and medicine to be put into practice. The cultural, heritage and media centre will allow their history to be recorded and taught. The developer has undertaken that the centre will be '*located prominently in the centre of the development, with direct views to Lion's Head, a landmark with great symbolism to and significance for the First Nations*'. And the garden amphitheatre will allow for various modes of expression. These features will materially enhance the subject property's heritage. In my appeal decision, I include the following depictions of the proposed eco-corridor and some of the proposed heritage commemoration features.

Proposed eco-corridor linking the eastern naturalised Liesbeek River with the western vegetated swale

Proposed interpretive information boards and sculptures to be positioned along the Ecological / Heritage Trail

55.4. The Liesbeek River's watercourse will be rehabilitated and protected. The concrete canal will be converted into a naturalised river and an indigenously planted landscape. The following picture from my appeal decision is the proposed rehabilitated Liesbeek.

Proposed rehabilitation of the eastern Liesbeek canal into a naturalised river

55.5. The topography of the site will be much changed. However, a significant portion of the land will be set aside and developed as public open space. Approximately one third of the site will be dedicated to high-quality and pedestrian friendly open space and more than 49,000 m^2 will feature a green corridor with indigenous vegetation, interfaces with the amphitheatre and cultural, heritage and media centre, interactions with the revitalised river corridor, and vantage points from which to enjoy the surrounding views (including mountain vistas).

55.6. As per approval conditions 17.15 and 17.16, the development's building heights will be concentrated at the north of the subject property, along Berkley Road, and will be designed so as to minimise their impact on the Astronomical Observatory (which has its own heritage value, discussed in the context of the development at paragraphs 206 – 214 of my appeal decision).

55.7. A site development plan and a master landscape plan must be approved by the City, both of which must make appropriate accommodation of the various heritage features (approval conditions 15.6, 29.5 and 31.4).

56. Those are all positive aspects that protect and elevate heritage resources that have hitherto been unacknowledged in any public form. They represent a marked improvement on the golfing greens and parking lot that currently dominate the site.

57. The development's heritage impact is not uncontested. For example, the First Nations Collective (which came into being with the express purpose of recording the relevant oral history) and the applicants do not see eye to eye. The First Nations Collective supports the development while the applicants do not.

58. The First Nations Collective is satisfied that the extent to which the proposed development has been shaped by the relevant heritage informants represents a robust example of indigenous agency and an appropriate celebration of previously ignored

heritage. In paragraph 218 of my appeal decision I quoted from Chief !Garu Zenzile Khoisan's submissions regarding the development. I reiterate them here:

> Our support for the project does not come lightly, as the area under consideration for the proposed development is a most sensitive location both in terms of its ecology, as also its deep heritage significance. Our support for this project has been extensively pondered and is primarily a strategic act of indigenous cultural agency where we, as an integral part of the Khoi and San resurgence, act in our own interest to secure a legacy for us and for seven generations into the future for which we are responsible.
> ...
> We have arrived at this position after much consideration and consultation with many of the senior indigenous leaders and their councils in the Peninsula, as also with prominent national leaders of the Khoi and the San.

59. Chief Khoisan recounted frustrating and futile efforts to engage with several state entities to obtain recognition of his peoples' national culture, political, social and economic narrative:

> the Khoi and the San, particularly those in this Peninsula, whose forebears bore the most severe blows of colonial aggression, are refusing to hand over our destiny to others. ... It is with the knowledge of having been trivialised, silenced and bludgeoned into invisibility that we as the Gorinhaqua Cultural Council, have elected to directly engage the entity involved in the proposed River Club Development.

60. Chief Khoisan explained his reasons for supporting the development, following the various engagements with the developer:

> The first is that we believe that the developer has grasped the intense pain that has been associated with the bludgeoning of our narrative. As such, this developer, unlike any other government, corporate, or social entities with which we have engaged, has made a firm commitment to ensure that the footprint of the Khoi and San's history of resistance, and its modern day resurgence is incorporated into the development plan.
> ...
> The second point that ... both at the level of the ecology of the area which the developer had committed to cleaning up and indigenising – and in terms of ensuring that the spiritual and cultural symbols of the Khoi and the San finds resonance within the proposed development plan.

61. Regarding *'detractors ... who believe that indigenous people stand diametrically opposed to development and are best served by being relegated to an anthropoid*

fetishised state where they roam perpetually in antiquity without the tools to navigate the modern world', Chief Khoisan stated:

> it is our view that such paternalistic notions must by themselves be put to the sword, because we, the ones who had been at the frontline of fighting for recognition, restitution and restoration, have elected to exercise agency in our own interest and our progeny.

62. While the applicants disagree with the views of the First Nations Collective and Chief Khoisan, no party contends that golfing greens and an asphalt parking lot are adequate or appropriate ways to protect, enhance and celebrate the subject property's heritage resources. No party could reasonably make such an argument: the River Club in its current form is a woefully impoverished tribute to the land's heritage.

63. The applicants contend that the subject property should be converted into an urban park. However, the applicants offer no feasible route to achieving this. In 2003, the City accepted that an urban park was a development possibility for the River Club site. However, over the past 18 years, such a development has proved to be a pipe dream. It is unfeasible because there are no funders for an urban park. There are no workable development plans.

64. So the outcome of the applicants' opposition to the proposed development would be to retain the River Club in its current form: an exclusive recreational facility slipping into urban decay that completely ignores and contradicts the history and culture of the property on which it is built. That would achieve no legitimate purpose, whether in respect of heritage or otherwise.

65. The applicants claim that the interdict application will protect the subject property's heritage resources. They fail to say how given that the River Club as it currently stands has no tangible heritage value.

66. In truth, the impact of the interdict, if granted, will be harmful to heritage: it will jeopardise the only feasible option for promoting and celebrating the site's heritage that has arisen in two decades, and that is likely to arise for the foreseeable future. If the development fails, there will be no cultural, heritage and media centre, no heritage eco-trails, no amphitheatre, no indigenous garden, no heritage commemoration initiatives and no rehabilitation of the Liesbeek River. Instead, the golf club, the parking lot and the concrete canals will remain. That can only harm the cause of heritage.

67. I reiterate my conclusions regarding the development's impact on heritage resources (paragraph 225 – 227 of the appeal decision):

> The development will allow much positive change from a heritage perspective: the Liesbeek River will be naturalised and rehabilitated, introducing a more authentic environment that supports indigenous fauna and flora; a significant portion of open space will be retained, upgraded and made far more accessible to the general public; various components of the development have been informed by a genuine engagement with custodians of First Nations heritage, which engagements have resulted in a variety of substantive initiatives to indigenise the site. I have imposed conditions which require the developer to incorporate at least the heritage commemoration features listed in Annexure A to these reasons. The conditions also require the developer to invite and consider representations in respect of the details of each of these heritage commemoration features.
>
> Some adverse impacts will be experienced, most prominent of which are a reduction in the extent of zoned open space. However, various reasonable and adequate mitigating measures have been put in place.
>
> In my view, the value of the subject property's heritage is one of the reasons why this development <u>should</u> go ahead. The First Nations narrative is deserving of celebration and recognition. The status quo of an inaccessible, private golf course with its alien vegetation is not a fitting or dignified tribute to the area's political history and the First Nations' experiences on the subject property. By contrast, the proposed heritage commemoration features will meaningfully celebrate the First Nations' narrative and give visible and due recognition to this part of our nation's heritage on a site which

> currently has no tangible signs of its important history. These heritage commemoration features outweigh and mitigate any negative heritage impacts of the development.

68. There should also be no misapprehensions regarding the process to date: interested parties – including the applicants – have had multiple opportunities to make representations in respect of the development and its heritage impact. They have fully utilised those opportunities, both before the MPT and on appeal.

69. As is evident from my appeal decision, heritage concerns were fully ventilated, explored and assessed before I issued my final appeal decision.

70. I summarised my assessment of the heritage assessment process at paragraph 193 of my appeal decision, which I reiterate here:

> [T]he developer has meaningfully and sensitively addressed all significant heritage resources and concerns which have been raised. The fact that some parties disapprove of the heritage proposal does not mean that the heritage resource in question has not been identified or addressed. The developer has committed to significant mitigation measures. For example, while it acknowledges that the development proposal will result in the loss of open space on the site, the developer has committed to retaining a large portion of open space and devoting substantial resources to upgrading it and maintaining its quality. The participation requirements under the By-Law have more than merely been complied with. The consultation process and the revision of the development proposal in response to it displays a laudable commitment to engagement with indigenous groupings and an impressive endeavour to ensure that the site's indigenous heritage is sensitively treated and promoted. This in an approach which is to be welcomed and encouraged.

71. Furthermore, conditions of approval were imposed to ensure that there is additional engagement with interested parties – including the GKKITC – in respect of heritage commemoration in the development (condition 21). There has been, and will continue to be, ample engagement regarding the development's protection and celebration of the subject property's heritage. The applicants can still raise their concerns about the proposed commemoration features in that process.

72. In summary regarding heritage:

72.1. Interested and affected parties have had numerous occasions on which to make submissions regarding heritage. Those opportunities have been used in full by the applicants. Further opportunities will be provided as the development progresses.

72.2. There has been fulsome consideration of all heritage concerns by the City. Those concerns have been set out in, among other things, the developer's motivations, the expert assessments, the objectors' responses, the City's officials' evaluations and various analyses conducted by HWC.

72.3. Contrary to the applicants' contentions, the development will contribute to the subject property's protection and celebration of important history, culture and heritage resources.

72.4. At present, the subject property fails the site's heritage. Nothing positive is gained from preserving the *status quo*.

72.5. The granting of the interdict will only harm heritage resources and will risk jettisoning the only viable development opportunity to protect and celebrate heritage resources that has arisen in 18 years.

Sustainable development: socio-economic and environmental impact

73. In terms of section 24 of the Constitution, everyone has the right to have the environment protected for the benefit of present and future generations, through reasonable measures that, among other things, promote conservation and secure ecologically sustainable development while promoting justifiable economic and social development.

74. The City, as an organ of state, is duty-bound to respect, protect, promote and fulfil the obligation to ensure sustainable development. Furthermore, in terms of sections 152(1) and 153 of the Constitution, the City must endeavour to promote both a safe and healthy environment and social and economic development.

75. The Constitutional Court has recognised that economic and social development are essential to the well-being of human beings. However, the Constitution requires that any development pay due regard to the associated environmental costs. Accordingly, any decision regarding a development must adopt an integrated approach, balancing social, economic and environmental considerations.

76. One of the ways in which the City discharges these obligations is by ensuring that the developments it approves are sustainable as contemplated by section 24 of the Constitution. Importantly, compliance with section 24 is not merely a matter of legal form. Instead, it is critical to ensuring the achievement of a sustainable spatial future for Cape Town, in accordance with the City's forward-planning vision and the Bill of Rights.

77. The River Club development will be an excellent example of sustainable development. As is evident from my appeal decision, sustainability concerns permeated the City's decision-making processes and resulted in several conditions being imposed:

77.1. The development's socio-economic impact was assessed (paras 84 – 95 of my appeal decision). I was satisfied that the overall net socio-economic impact would be substantially positive, bearing in mind that the development will entail approximately R4,5 billion of direct investment and an increase in economic output of approximately R8,55 billion (given that the construction multiplier is 1.9); and will create 5,239 construction jobs and 19,000 employment opportunities.

77.2. A development charge of more than R73 million was imposed to ensure the adequate provision of services. This will be leveraged to finance infrastructure (in the form of the Berkley Road extension) that will substantially improve road transport and connectivity between the eastern and western portions of the metropolitan area.

77.3. As discussed in greater detail below, the development will include a significant residential component, 20% of which will be set aside for integrated and affordable housing. This is an important element of the development's sustainability offering.

77.4. I evaluated the development's ecological costs and environmental impacts, with due regard to several thorough investigations and assessments undertaken by experts, as well as the input from the City's environmental officials and objections from concerned third parties. The core of my environmental analysis is set out at paragraphs 228 – 294 of my appeal decision. Among other things, I considered flood risks, biodiversity impacts, the functionality of the Liesbeek River system, natural habitats, climate change and loss of ecological functionality.

77.5. Ultimately, I was satisfied that the ecological losses flowing from the development will more than be made up for by the ecological benefits. Those benefits include rehabilitating the Liesbeek River watercourse from a degraded concrete canal into a natural waterway that can overcome past human interventions and maximise ecological functionality. They also extended to various initiatives favouring biodiversity, including a range of interventions to support the endangered Western Leopard Toad and other local fauna.

77.6. Various conditions were imposed to ensure appropriate environmental protection, including: obliging the homeowners' association to maintain the rehabilitated waterway (condition 33.2); requiring the formulation of and compliance with an environmental management plan to protect natural habitats during construction (condition 34); implementing flood-attenuation measures as recommended in the expert hydrology report (condition 39); and

formulating and implementing various plans for the naturalisation and management of the Liesbeek River watercourse (conditions 40 – 42).

78. It is rare for a private development to offer such a desirable, large-scale and beneficial combination of social development, economic opportunities and environmental rehabilitation. The development will be privately financed but regulated and subject to conditions to ensure that it operates in the public interest to ensure a sustainable urban environment.

Housing

79. Section 26 of the Constitution provides that everyone has the right of access to adequate housing, and obliges the state to take reasonable measures, within its available resources, to see to the progressive realisation of this right.

80. Housing can be supplied by the private sector, the public sector or a combination of the two. It can be supplied through the open market (where families access homes by paying market-determined prices), on an equitable basis (where families are allocated homes based on need and considerations of fairness) or informally (for example, the creation of backyard structures). The provision of public housing is a national and provincial competence.

81. The City's Municipal Spatial Development Framework ('**MSDF**') – the central instrument setting out Cape Town's spatial vision and development priorities – sets out the following information regarding housing supply:

81.1. By the early 2030s, Cape Town's population is expected to reach 4,5 million.

81.2. Households are becoming smaller and Cape Town is experiencing a rapid increase in the number of households. Up to 48% of households consist of one or two people, which has implications for the type and volume of housing required.

81.3. '*Three features define the housing challenges of Cape Town. Firstly, a significant backlog in the supply of affordable units; secondly, housing projects are often built at densities that are too low to support city functions such as public transport; thirdly, many settlements are poorly located in terms of access to economic opportunities and social facilities.*'

81.4. As at December 2015, Cape Town's backlog for affordable housing opportunities exceeded 300,000. Demand for new housing is on the increase, requiring '*approximately 35,000 housing opportunities ... to be supplied by the overall formal housing market annually to eradicate the official backlog over 20 years whilst meeting new demand.*'

81.5. Between 2005 and 2015, Cape Town generated only 15,000 to 20,000 housing opportunities annually. Credit constraints and a near-recessionary economic climate caused the formal housing sector (i.e. private developers, open-market sales and government housing programmes) to decrease to an annual housing output of only 7,000 to 10,000 units.

81.6. Opportunities exist for the City to encourage the private sector to make affordable housing – i.e. '*housing units within a neighbourhood where those earning less than the median income of the neighbourhood can afford to live in*' – available in well-located areas. This will assist in addressing '*the significant unmet demand for affordable housing*'.

82. The MSDF is a lengthy document, not all of which is relevant to Part A of these proceedings. However, I annex hereto, marked '**DP3.**', an extract from one of the supplements to the MSDF which deals with housing: '*Technical Supplement G: Overview of drivers of urban change*'. Technical Supplement G confirms the above information.

83. In 2015, the formal private and public sectors' ability to supply new residential accommodation was far outstripped by prevailing demand. Even combined, government and market forces were barely able to supply half of each year's requirements, leading to an ever-greater backlog.

84. The numbers referred to above were computed before the pandemic, the associated restrictions and the subsequent economic recession. The housing backlog has only worsened since then. This underscores how important it is for the people of Cape Town that there is more housing.

85. The MSDF defines '*affordable housing*' as '*housing with prices or values below the overall open market value which targets below-average incomes*', specifically housing

that is affordable '*to the household income brackets of R3,501 – R18,000 per month, and is inclusive of social, GAP, and inclusionary housing*'. The public sector cannot meet the existing need for housing on its own. Instead, where possible, collaboration with the private sector is required.

86. The development that the applicants seek to prevent is an excellent example of such collaboration.

87. The development will entail at least 31,900 m^2 of residential accommodation (as per approval condition 45.2), largely made up of apartments. That will result in a significant number of individual residential units. They will mostly be directed towards market-related demand and will cater for the City's growing appetite for smaller residential units due to smaller households.

88. At least 20% of the residential accommodation – i.e. approximately 6,400 m^2 – will be devoted to affordable housing as it is defined in the MSDF. This requirement has been made a condition of approval (condition 22). That is a substantial contribution. In the City's experience many private developers contend that it is unfeasible to include any affordable housing in their private residential developments, let alone an apportionment as substantial as one fifth of the total residential offering.

89. I reiterate the following assessment of the development's affordable-housing contribution, as set out in my appeal decision (at paragraphs 68.3, 75 and 78.5):

> The MSDF notes the previous trend of locating affordable housing on the City's periphery and seeks to counteract the creation of new communities in similarly remote locations. Among other things, such locations significantly increase transport costs and do not facilitate integration. The proposed development – with its range of residential

> opportunities, including affordable housing – is well aligned with these objectives of location optimisation and preventing urban sprawl.
>
> The MSDF recognises the subject property as a strategic site. It records that the TRUP has been identified for affordable housing to support the Urban Inner Core. The TRUP falls within the Metro South East Integration Zone, which is one of three zones that are focused on spatial transformation through transit-oriented development and the implementation of catalytic urban development projects. The proposed development will assist in realising the MSDF's vision of the TRUP being developed through private-sector investment to improve housing opportunities, enhance urban infrastructure and ultimately contribute to a more integrated city.
>
> The proposed development meets the requirements in respect of inclusivity and integration. It will include a combination of mutually supporting land uses and a mix of income groups by offering both market-driven and affordable housing opportunities, as well as introducing a rehabilitated public space that sensitively interacts with the Liesbeek River. The developer has undertaken to ensure that the affordable housing units are physically integrated with the other residential units in the development's apartment complexes. A suitable condition of approval has been imposed in this regard.

90. During the land use appeals process, the OCA argued that the development will not contribute to the objective of spatial justice because it lacks social housing. It must be borne in mind that the OCA's preference is for there to be no residential development, and therefore no affordable or social housing, at all. So, its objection was rather insincere.

91. In any event, I addressed the OCA's ostensible concern as follows in paragraphs 433 – 435 of my appeal decision:

> Spatial justice entails more than building new social housing or providing affordable housing within new developments. Due regard must also be had for the extent to which the proposed development facilitates spatial transformation in accordance with the City's policies and the extent to which it will introduce benefits that will be enjoyed by surrounding communities and contribute to integration. The MSDF provides that spatial justice includes promoting economic opportunities through creating and attracting job-rich investment. As set out above, the proposed development will make significant contributions in this regard.
>
> It is in the public interest to significantly increase the availability of residential dwelling units, high-quality public open space and commercial opportunities as contemplated in the development proposal. Spatial justice and spatial transformation also include appropriate densification, diversification of land use due and the establishment of residential opportunities in close proximity to good transport infrastructure, economic

> opportunities and social facilities. The proposed development will achieve these objectives, thus contributing to an integrated and inclusive urban setting.
>
> At present, while private developers may be encouraged to do so, they are not obliged by law or policy to include any affordable housing when utilising private capital to develop private property. Under the MSDF, it is the public sector that is charged with responsibility for addressing the housing needs of those who are not serviced by the open market. It is therefore commendable that the developer has elected to include an affordable-housing component in the proposed development.

92. Another of the objectors contended that, in the light of the existing backlog, the developer's affordable-housing contribution was negligible. I addressed this concern as follows (at paragraph 441 of my appeal decision):

> When compared to the entirety of the backlog, the offering may appear small. However, considering that the offer comes from one private developer in respect of one privately owned erf, in circumstances where the developer was not obliged to make any affordable provision at all, I consider the proposed development's affordable-housing offering to be significant.

93. There are several ways in which the public interest will be served by the development's housing component:

93.1. The development will provide tens of thousands of square metres of residential accommodation, which will contribute to meeting prevailing demand in the open market. Meeting market-based demand prevents upward pressure being placed on pricing, which is beneficial to the City's residents generally.

93.2. 20% of that square meterage will be dedicated to affordable housing that is integrated, well-located and near numerous economic, educational and social opportunities.

93.3. Both the market housing and the affordable housing will be funded by private capital, at a time when such investments are in critically short supply.

93.4. The development represents precisely the sort of collaboration between the public and private sectors that is necessary to transform Cape Town's spatial reality. Its success will signal to the market that such partnerships are viable and will encourage similar developments. This is particularly important in the depressed economic climate and in the light of recent development failures, such as 'The Vogue', which is discussed below.

Infrastructure

94. The development will fund the erection of a bridge over the confluence of the Black and Liesbeek Rivers and the ultimate connection of Berkley Road in Ndabeni to Malta Road in Salt River. The extension will go a long way to establishing a vital connection to Malta Rd. This specific link will contribute to relief on the City's higher order roads (e.g. the N2 and the M5) by linking lower order roads, leading to more equitable, balanced and logical distribution of road-based trips to move people, goods and services.

95. The benefits of this infrastructure – referred to in my appeal decision as '*the Berkley Road extension*' – are discussed in Mr Greyling's accompanying supporting affidavit.

Economy

96. The development's economic impact is discussed in Mr Greyling's supporting affidavit. That impact will include: the investment of approximately R4,5 billion in private capital in the local economy; an increase in local economic output of more than R8,55 billion; the direct creation of more than 5,200 construction jobs and the creation of approximately 19,000 economic opportunities.

97. These economic benefits are substantial. They also come at a critical juncture. Cape Town is in the midst of an economic crisis that has seen commercial activity plummet and unemployment soar. Time is of the essence to prevent a long-term economic decline from setting in irreversibly. The development will provide an immediate injection of billions of Rand in investment and thousands of jobs. It is therefore an essential component of the City's economic recovery; any postponement of the investment and job-creation will be an immense and irreparable setback to that recovery.

98. The City's own resources to address the current economic crisis are also dwindling. The City sources approximately 70% of its operating revenue from rates and service charges and approximately 20% from national government grants. However, as the pandemic and the economic crisis continue, residents' ability to pay rates and service charges has deteriorated. Furthermore, the City has received more than R487 million less in national transfers for the 2021/2022 financial year than it did for the 2020/2021 financial year.

99. The City's revenue streams are shrinking, even as service-delivery demands increase. Things have gotten so bad that, notwithstanding the City's commitment to prudent financial management, in July 2021 its credit rating was downgraded by Moody's. This downgrade will drive up the City's borrowing costs and therefore limit its capacity to source funds to deliver basic municipal services. Every investment opportunity that will not only boost rates revenue, but increase investment, create jobs and stimulate economic output, is to be welcomed and encouraged.

THE INTERDICT MUST BE REFUSED

Grant of the interdict will cause massive prejudice; its refusal will cause none

100. Delays can be terminal for large-scale developments. It is the City's experience – primarily as the competent authority for land use authorisations and building plan approvals, but also as an organ of state with significant experience in substantial infrastructure projects – that as a project's lifespan increases, so do its costs, and that an excessive delay will render a project economically unfeasible. In respect of private developments, that is enough to halt the project in its tracks, permanently.

101. Furthermore, if a development is halted pending legal proceedings, the cessation of activity introduces a substantial element of uncertainty. That, in turn, adversely affects investors' and anchor tenants' willingness to support the development. Uncertainty, therefore, can be as calamitous as delay.

102. By the time a development gets to planning approval stage, the developer is incurring time-based holding costs. Costs mount daily if an approval is delayed. Some developments are also urgent for business and operational reasons. With lengthy delays, the increased costs can harm or even destroy the financial, business and/or operational viability of the development.

103. 'The Vogue' provides a telling example of the impact of litigation such as the present application on large-scale developments.

104. On 26 February 2019 the City granted land use authorisation in respect of a development within the central business district known as 'the Vogue'. The development would have featured approximately 34,265 m^2 of mixed uses, including commercial and residential uses. The Vogue would have entailed R1,4 billion in local investment and created approximately 4,000 construction and related jobs over a three-year period. It would also have introduced 362 residential units into the housing market.

105. In September 2019 one of the objectors to the Vogue initiated proceedings in the High Court that brought the development to a halt. The development has since failed and the residents of Cape Town have lost out on the employment, commercial and residential opportunities it would have brought.

106. The City recently received correspondence from the developer of the Vogue, explaining the failure of the development ('**DP4.**'). The developer describes:

106.1. The uncertainty created by the litigation caused the development's financiers to withhold funding. It also led to investors demanding the return of their deposits.

106.2. The withdrawal of the funds, in turn, brought about an end to construction, which would otherwise have yielded approximately 4,000 on- and off-site employment opportunities.

106.3. Each month of delayed construction cost the developer approximately R30 million, over and above the lost jobs.

106.4. Ultimately, the development was cancelled following the institution of the High Court proceedings, inflicting an R80-million loss on the developer.

106.5. The failure of large developments does not only impact private developers; it also has adverse impacts on regional economies, as employment opportunities are lost and investor confidence diminishes.

106.6. The objector that initiated the High Court proceedings ultimately withdrew its application. By that stage, however, it was too late and the development had failed: the losses incurred because of the High Court application were too high and the damage to investor confidence too severe for the development to continue.

107. In this case, the prospect of project failure because of the interdict sought by the applicants is therefore not remote. It is, in the City's experience, a likely consequence if the interdict application is successful. This is particularly the case in respect of large developments, which are dependent on the open market and third parties for financing, tenancy and investment.

108. If the interdict is granted, the benefits of the development will certainly be postponed. As explained above, that in itself will inflict unjustifiable and irreparable harm on Cape Town's economy at a time of crisis. A component of the City's economic recovery at a critical moment will be lost for good.

109. However, given that the review proceedings will drag on for many months, and may ultimately take years to resolve, the associated delay and uncertainty will, in all probability, terminate any possibility of the River Club development going ahead. That would be an unmitigated disaster for Cape Town.

110. The interdict sought by the applicants will therefore be final in effect. The failure of the Vogue stands as a stark warning in this regard.

111. I have already addressed the manifold benefits that will flow from the development: the protection and celebration of ignored heritage; a substantial improvement to the biophysical environment; thousands of square metres of new residential accommodation to meet high levels of demand; a significant allocation of well-located and integrated affordable housing; billions of Rand in investment; the creation of thousands of employment opportunities; ecological rehabilitation; millions of Rand in

critical public infrastructure; and a strong signal to the market that meaningful collaboration between the private and public sectors is possible to deliver transformative projects in the modern urban environment.

112. The applicants seek to justify the interdict on the basis that it will preserve heritage resources. However, there are no heritage resources that could be protected by the interdict:

112.1. Most of the site's heritage resources – history, culture and experience – are intangible. They therefore cannot be adversely affected by the development.

112.2. The only tangible heritage resources are the subject property's open space and the Liesbeek River. However, those features will be materially improved by the development: the asphalt parking lot and golfing greens will be replaced with high-quality, fauna-friendly and indigenously planted open spaces, while the Liesbeek River will be rehabilitated from a polluted concrete canal into a natural and ecologically functional watercourse.

112.3. Similarly, if the development goes ahead, the site's intangible heritage will be preserved and celebrated: knowledge and experience will be retained, recorded and put into practice in such institutions as the cultural, heritage and media centre, the indigenous garden and the amphitheatre.

112.4. By contrast, retaining the *status quo* will only result in the River Club's continued failure of the site's heritage.

113. The interdicts sought by the applicants will only harm the public interest (including the heritage resources in question) and will not achieve any demonstrable benefit, whether for the public or for any individual.

114. Accordingly, the balance of convenience requires the interim interdict sought in prayer 1.1 to be dismissed.

115. In any event, this Court should exercise its discretion to refuse any interdict based on the prejudice to the public interest that it would entail.

No *prima facie* right

116. The applicants assert that they are entitled to an interdict because they have shown that the environmental authorisation and the land use authorisation were afflicted by irregularities. I deny the allegation, at least in respect of the land use authorisation.

117. However, the applicants' claim suffers from a deeper flaw. I am advised that the Constitutional Court has determined that, for purposes of obtaining an interdict, it is insufficient for an applicant to show that it has a *prima facie* right to have an administrative decision subjected to judicial review. That is because a sufficient remedy already exists to vindicate that right i.e. judicial review proceedings. An interdict should only be granted to prevent future harm. It is not available to address an administrative decision that has already been made.

118. In the present case, even if the applicants were able to make out a *prima facie* case that the authorisations are liable to be impugned in judicial review proceedings, that would not entitle them to the interdictory relief sought under Part A of these proceedings. Instead, their relief would be to pursue Part B.

119. If, in the Part-B proceedings, it is determined that further consideration needed to be given to heritage issues by the decision-makers, the Court will be empowered not only to set aside the impugned decisions, but also to grant any order necessary to protect such heritage resources as have been identified. Importantly, that determination will be made after the Court has received the benefit of full evidence and argument regarding the complex issues and voluminous record that are at issue.

120. To obtain the relief sought in Part A of these proceedings, the applicants are required to establish a right that will suffer irreparable harm if the interdict is not granted. In this regard, the applicants have sought to rely on the subject property's heritage resources. However, as explained above, no harm will come to the relevant heritage resources if construction proceeds. Indeed, those resources will receive much better protection than they currently have if the development goes ahead.

121. There is, accordingly, no right that will suffer irreparable harm if the interdict sought by the applicants is not granted. The application for interim relief under Part A of the notice of motion must therefore be dismissed.

The review has no prospects of success

122. The applicants seek to justify the interdict on the basis that the land use authorisation should be set aside in judicial review proceedings. However, their grounds of review have no merit.

123. The applicants present three general challenges to the City's decisions.

124. The first alleges that the MPT – the decision-maker of first instance – did not consider the fact that HWC was investigating the possibility of listing the River Club site on the heritage resources register.

124.1. At the time that the MPT decided the land use application, the HWC had not made any recommendation to list the site. As the founding affidavit acknowledged, HWC's process is, at present, '*still underway*'. There was, accordingly, no HWC determination for the MPT to take into account.

124.2. Furthermore, the subject of heritage received extensive treatment in the report that served before the MPT, over and above being dealt with in the numerous submissions that served before the MPT.

124.3. In any event, heritage concerns took centre-stage during the land use appeals. This has been traversed above. Among other things, when deciding the appeals, I considered HWC's comments, which the applicants complain were excluded from consideration. Those comments received extensive

treatment in my appeal decision, even though HWC itself elected not to participate in the land use decision-making process.

124.4. Under section 99 of the By-Law, the City is required to undertake its own independent assessment of the proposed development's impact on heritage resources. That is precisely what the City did. It would have been inappropriate and unlawful for the City to have allowed the applicants or HWC to usurp that function. The applicants admit this.

124.5. Ultimately, heritage received extensive consideration in the decision-making process. It both affected the development's design and resulted in various conditions of approval being imposed. The contention that I '*failed to understand or engage*' with the City's duties is unsubstantiated, unfounded and false. The applicants seem to not have read my appeal decision.

125. The applicants' second challenge to the land use authorisation is the allegation that the City irrationally departed from various applicable policies and planning instruments in approving the development.

125.1. However, it is not for the applicants – or, with respect, this Court – to determine the weight that should be accorded to a particular policy consideration when the City makes a discretionary and polycentric value judgment such as deciding to grant a land use authorisation under section 99 of the By-Law.

125.2. Furthermore, policy instruments are, by definition, not laws or fixed rules. They serve to provide general guidance. Mere departure from their provisions does not constitute an irregularity. Indeed, any decision-maker would vitiate his own decision by adhering too strictly to a policy guideline.

125.3. In any event, both the MPT report and my appeal decision deal extensively with the applicable policy framework. The development was judged either to be in accordance with the relevant policies and planning instruments, or to constitute a justifiable departure.

125.4. Ultimately, and after having weighed both the positive and negative elements of the proposal, and having considered, among other things, the developer's motivations and the various objections, both the MPT and I were satisfied that, with the appropriate conditions in place, the proposed development was highly desirable. The applicants have not put forward any basis for disturbing those conclusions.

126. The applicants' third attack against the City is that HWC's provisional protection order will expire only on 8 April 2022. According to the applicants, this meant that the City was '*precluded by law from altering the planning status of the property.*'

126.1. This part of the applicants' case is based on a misinterpretation of section 29 of the Heritage Act and is factually unsustainable.

126.2. The applicants' case is legally unsustainable. Under the Heritage Act, an

administrative appeal cannot and does not suspend the operation of the decision appealed against as that would subvert the purpose of the statutory provision, which is to provisionally and immediately maintain the *status quo*. If the applicants' construction of section 29(1) is correct, it would mean that any party can unilaterally nullify a provisional protection simply by lodging a notice of appeal, and then do as it wishes with the heritage resource until the appeal was finally determined (which in this case was for two years). That would be absurd. It would not protect the *status quo*. To the contrary, it would strip the heritage resource of its provisional protection, harm heritage resources, and undermine the protective machinery – contrary to the objects of the Heritage Act.

126.3. In any event, a suspension is not an extension. Even if an appeal suspends a provisional protection (which is not the case), that would not extend the provisional protection by the duration of the appeal process. Section 29(1)(a) of the Heritage Act is clear that a provisional protection applies for '*a maximum period of two years*.' On the applicants' version, the provisional protection issued by HWC should last for four years. That is in direct contradiction of the authorising statute and plainly impermissible.

126.4. The applicants' argument also fails on the facts because the provisional protection order was issued on the basis that it would terminate by 20 April 2020. It was published on 20 April 2018 and expressly states that the protection extends '*for a maximum period of two years from the publication of this notice*' (see LL13 p 166). At a factual level, the applicants' argument

therefore cannot be sustained: on its own terms, the order ceased to be operative on 20 April 2020. Indeed, the applicants concede this, as they expressly allege that the provisional protection '*has now lapsed*' (paragraph 15 of the founding affidavit).

126.5. HWC's decision to issue the provisional protection order was taken on appeal. The Appeal Tribunal was required to determine the duration of the provisional protection. A copy of excerpts of its ruling is annexed as DP1. The Appeal Tribunal found that the protection lasted for '*the maximum period (of 2 years)*' (paragraph 121.4). The ruling expressly states that '*the provisional protection order expires on 20 April 2020*' (paragraphs 83, 118, 123.5).

126.6. As far as the City is aware, the applicants have not brought any application for a declarator or review or any other challenge to the expiry date determination. That determination is unchallenged. The applicants' contention that the provisional protection extends until 8 April 2022 is therefore untenable.

126.7. Even if HWC's protection order had still been in place when the MPT made its decision, or when I determined the appeals (which is not the case), the City would not have been prevented from exercising those powers.

126.8. Section 29(10) of the Heritage Act provides, among other things, that no person may '*subdivide or change the planning status of a provisionally*

protected place or object without a permit issued by a heritage resources authority or local authority responsible for the provisional protection.'

126.9. The Heritage Act defines '*planning*' as '*urban and regional planning, as contemplated in the Physical Planning Act, 1991 (Act 125 of 1991), and provincial town planning and land use planning legislation*'.

126.10. However, the City was engaged in '*municipal planning*' rather than '*urban and regional planning*'. '*Urban and regional planning*' excludes '*municipal planning*'. '*Municipal planning*' is an exclusive municipal competence; it includes the set of powers that the City exercised when it issued the land use authorisation under the By-Law in respect of the development.

126.11. Furthermore, the Physical Planning Act was repealed with effect from 1 July 2015. When the MPT and I made our decisions, we were also not acting in terms of '*provincial legislation*' as contemplated by the Heritage Act. Instead, we were acting in terms of local legislation (the By-Law) and pursuant to the original and exclusive competence conferred on municipalities by the Constitution to decide municipal planning matters such as rezoning and departures from development rules.

126.12. For these reasons, too, the City would not have been prevented from considering the developer's application or authorising the development even if the provisional protection order had still been in place.

126.13. The applicants' (incorrect) interpretation would make section 29(10) of the Heritage Act unconstitutional. On the applicant's construction, absent a permit from a heritage resources authority in the national or provincial government, a provisional protection order prevents a municipality from changing the planning status of a place in terms of local legislation governing municipal planning. That renders part of section 29(10) inconsistent with, among other provisions, section 151(4) of the Constitution which states that *'[t]he national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions*'. It is settled law that the national and provincial governments may not bar a local government from exercising its exclusive executive competence regarding municipal planning. A court must prefer the City's interpretation which saves section 29(10) from constitutional invalidity.

126.14. Accordingly, as recorded in paragraph 145 of my appeal decision, the provisional protection granted to the subject property by HWC in terms of section 29 of the Heritage Act commenced on 20 April 2018 and expired on 19 April 2020.

The provisional protection order has expired

127. In prayer 2.2 the applicants ask for an interdict until HWC grants a permit for the development in terms of section 29(1) of the Heritage Act or until 8 April 2022, which is when the applicants say the provisional protection order expires.

128. For the reasons given in paragraph 126 above, the City submits that there is no basis for such an interdict.

Alternative remedy

129. As set out above, the applicants' complaints – the supposed irregularities in the environmental and land use decision-making process – can be fully addressed in Part B of these proceedings. The Court's just and equitable remedial discretion is sufficiently wide to give appropriate relief if any irregularity is ultimately proved.

130. Because the applicants have a full and effective legal remedy to address their complaints other than the interdict sought, the relief sought in Part A of the notice of motion should be refused.

AD SERIATIM RESPONSES

131. I now address some of the allegations in the founding papers *ad seriatim*. Given that many of them do not relate to the City's decisions and processes, I will not respond to all the allegations.

132. Any allegation that is not specifically dealt with should be taken as denied, unless that denial is inconsistent with what is set out elsewhere in the City's answering affidavits.

AD THE FOUNDING AFFIDAVIT OF LESLIE LONDON

Ad FA para 2

133. I deny that the contents of Mr London's affidavit are all true and correct, or within his personal knowledge.

Ad FA para 13

134. I deny the contents of this paragraph. The development will not result in the permanent or irreversible loss of heritage resources. Instead, it will enhance tangible resources (through the rehabilitation of the Liesbeek River and the improvement of the site's public open space) and protect intangible heritage that has hitherto been ignored (through establishing various institutions such as the cultural, heritage and media centre and the indigenous garden).

Ad FA para 14

135. I have described the heritage resources in paragraph 52 above.

136. Throughout the founding affidavit, the applicants state ambiguously that the River Club site is '*located at the confluence of the Black and Liesbeek Rivers*'. To be clear: the confluence of the two rivers is not on the River Club site, but near it.

137. The subject property is not located within a '*park*' in the sense of a statutorily protected

area such as the Table Mountain National Park. Instead, the reference to an '*urban park*' is a reference to an outdated City planning guideline that, in the two decades since it was first adopted, has turned out to be unworkable.

138. In 2003, the City adopted the Two Rivers Urban Park Contextual Framework and Phase 1 Environmental Management Plan ('**the TRUP Report**'), which sets out policy guidelines for the area and recognises that the Two Rivers area generally (within which the subject property falls) is '*an ideal space for the creation of a park*'.

139. The TRUP Report defines the Two Rivers area as extending from the subject property in the north-west to the Valkenberg complex in the south to the Vincent Pallotti Hospital in the south-east to Ndabeni in the north-east. The Two Rivers area is therefore much larger than the subject property, which lies on its periphery.

140. I engaged in a comprehensive assessment of the development in the light of the TRUP Report (paragraphs 339 – 352 of my appeal decision). Ultimately, I concluded that the development aligns with some of the TRUP Report's objectives and that, where it does not align, the departures are not only warranted but desirable.

141. I also noted that the TRUP Report had, in the 18 years since it was first formulated, become outdated. In fact, the City was in the process of preparing a new local spatial development framework that would provide a more appropriate regulatory framework for the Two Rivers area (see paragraph 191.2 of my appeal decision).

142. In its appeal, the OCA complained that the development was inconsistent with the

objective of establishing a multi-purpose urban park. I addressed this concern as follows (at paragraph 325 of my appeal decision):

> Various guidelines [from the applicable District Plan] include conserving and enhancing ecologically sensitive areas and historically significant sites; upgrading and rehabilitating degraded open space and ecological systems; creating a high-quality, multifunctional recreational area that forms part of an ecological system stretching from Table Bay to False Bay; allowing for varied activities including conservation, active and passive recreation as well as more public uses along the edges of the site where appropriate; integrating the park into the fabric of the city by improving edge conditions and facilitating a positive interface with existing adjacent communities and institutions; supporting limited residential and institutional (with some supporting commercial use) development within the edges of the park to provide passive surveillance; formalising a system of pedestrian links across the site: east-west linkages from Alexandra Road as entry points into the park as well as north-south linkages between the Alexandra Institute, Maitland Garden Village and Oude Molen precinct.
>
> I am satisfied that the proposed development will give effect to the above guidelines by improving the open space on the subject property; vastly rehabilitating the ecologically sensitive areas, including the river channels; commemorating the heritage of the site in various ways, including various methods of memorialisation, namely an eco-trail, symbolism and a media centre, as well as by retaining a vast open space on the site and appropriate interfacing with the river which holds heritage value; configuring the site in order to ensure a positive interface with the neighbouring areas while still achieving passive surveillance of the subject property.
>
> Of course, the proposed development will not result in a multi-purpose urban park across the entirety of the site. But that notion has proved unfeasible in the years since the District Plan was adopted and is currently outdated.

143. The subject property's ecological value – i.e. its status as a '*green lung*' within Cape Town – received extensive consideration by the City, as is evident from paragraphs 228 – 294 of my appeal decision. It also resulted in the imposition of numerous conditions of approval, including: requiring the development's site development plans to reflect the recommendations of the environmental impact assessment and the hydrology study (condition 14); requiring landscaping plans that ensure appropriate planting, establish riverine buffer areas and incorporate stormwater and flooding attenuation and mitigation measures (condition 29); requiring further detailed landscaping plans to make appropriate provision for, among other things, the ecological areas and the development's open spaces (condition 31); obliging the

homeowners' association to maintain the various environmental resources as required by the City (condition 33); formulating and adhering to a construction environmental management plan that, among other things, protects natural habitats during the construction process (condition 34); implementing the flood-attenuation measures flowing from the hydrology study (condition 39); formulating and adhering to a detailed river corridor management plan (conditions 40 and 41); upgrading the Liesbeek canal into a naturalised river corridor in accordance with a detailed construction and operational environmental management plan (condition 42); and mandating the establishment of a servitude protecting the floodplain and ecological buffers (condition 43).

144. These planning and environmental considerations will be addressed in full in Part B of these proceedings. However, I have set out the above considerations to clarify that, in the City's decision-making process, these important aspects were thoroughly addressed.

Ad FA para 15

145. I note the admission that the provisional protection granted by HWC in April 2018 '*has now lapsed*'.

146. Mr London refers to a recommendation that HWC issued on 22 July 2021. I have no knowledge of this recommendation. However, I deny that it is relevant to these proceedings: on Mr London's own version, the recommendation post-dates any of the impugned decisions. It therefore is not something that any of the decision-makers

could have considered.

147. Furthermore, it is described as no more than a recommendation. It therefore cannot be determinative for any purpose in these proceedings.

Ad FA paras 17 – 18

148. I have no intention of speaking on behalf of the provincial authorities.

149. However, in respect of the City, two points bear emphasis:

149.1. First: HWC is a provincial entity that discharges its own mandate pursuant to its own competence and obligations. HWC is not, however, the sole arbiter of all heritage concerns. Pursuant to its constitutional and exclusive competence for deciding municipal-planning matters, the City is legally required to evaluate heritage concerns in respect of particular developments.

149.2. While the City must consider all relevant considerations (which may include comments from heritage authorities), it must make its evaluation independently and cannot abdicate its responsibility in favour of HWC. As is borne out by my appeal decision, the City took relevant heritage considerations into account when exercising its municipal-planning competence.

149.3. Second: the City did not ignore the HWC's various assessments. Of course,

I could not engage with the July 2021 recommendation, because it did not yet exist. However, I critically and substantively considered HWC's existing assessments in my appeal decision. I refer in this regard to paragraphs 170, 183, 184, 187, 203, 218, 220 and 222 of my appeal decision. I also specifically considered the submission that HWC was in the process of determining whether it should recommend that the subject property be given a heritage grading (at paragraph 190 of my appeal decision).

149.4. Third: I deny that whether a heritage impact assessment meets the requirements of section 38(3) is a matter for HWC's discretion.

Ad FA para 19

150. I deny that the heritage impact assessment was '*anomalously sympathetic*'. Instead, it was the subject of iterative development that was informed by, among other things, land use objections and engagements with representatives of the First Nations.

151. A copy of the motivation that the developer submitted, without its annexures, is attached as '**DP5.**'.

152. The motivation addressed, among other things, the subject property's heritage. It annexed the heritage impact assessment that had been prepared for consideration by HWC and the DEADP in terms of the national heritage and environmental legislation. The motivation noted that the heritage impact assessment was subject to a public comment process under the National Environmental Management Act 107 of 1998

('**NEMA**') and would be finalised in due course.

153. The motivation described the subject property as having historically been used by indigenous farmers, who were later excluded by European settlers wishing to make use of the best grazing land at the Cape. It identified the Liesbeek River as the sole vestige of physical heritage on the site, but noted the '*intangible and imprecise associations, the sense of deep-time that the history of the area gives.*' The current River Club buildings were described as having '*very low significance*'.

154. Other heritage resources identified by the developer included: the confluence of the Liesbeek and Black Rivers (which is near but not on the subject property); the no-longer-extant river-crossing point; the site's open-space character, shared by the broader Liesbeek and Black River corridor; and features of a cultural / historic landscape. The motivation also stated that the subject property's topography and environment could bear heritage significance, both as the Liesbeek River's floodplain and '*as the site of the early confrontations between indigenous people and settlers.*'

155. Beyond the site but within the area, the motivation also recorded other heritage resources, including the South African Astronomical Observatory, the Valkenberg Hospital complex, the Oude Molen space and the Alexandra Institute and historic mill.

156. The motivation proposed six heritage-related development considerations: (i) rehabilitating the Liesbeek canal; (ii) naturalising the river corridor but not reintroducing the pre-1952 river course; (iii) lowering building heights on the border with the Astronomical Observatory; (iv) introducing a significant setback from the west bank of

the Black River (to recreate the pre-colonial river crossing); (v) allowing the design of the development (heights, scale etc) to be determined by urban design rather than heritage indicators; and (vi) accepting that it is unnecessary to preserve a view cone from the Astronomical Observatory to Signal Hill.

157. The motivation suggested (a) establishing a '*commemorative and celebratory area*' close to the historic crossing point; (b) rehabilitating the Liesbeek River by removing the canal to introduce a sense of genuine '*river-ness*' and support biodiversity and ecological functionality; and (c) introducing appropriate riverine buffers to support fauna and flora and pedestrian and cycling activities.

158. The land use application was published for comment in September 2018. Responses (which will form part of the rule-53 record) were received in respect of the subject property's heritage, including criticisms of the adequacy of the heritage impact assessment and concerns about the proposed development's impact on the cultural landscape.

159. In October 2018, the City's heritage officials submitted their first set of comments in respect of the proposed development. They:

159.1. emphasised the importance of the topographical, ecological and historical cultural landscape, both in respect of the Liesbeek's floodplain and as the site of conflict between indigenous inhabitants and settlers. The officials underscored the importance of the western Liesbeek channel and opposed its infilling, although they noted that this could be mitigated by including a

watercourse within a transformed riverine corridor;

159.2. highlighted the need to ensure an appropriate interface with the Astronomical Observatory;

159.3. described the subject property as having an urban threshold role, with its openness and watercourses contrasting with the surrounding urban fabric;

159.4. noted that the development would result in significant visual change, given the site's '*long-term status as a green open space*';

159.5. supported landscaping green open areas, but suggested reductions in bulk and height of the intended buildings; and

159.6. did not oppose the development of the subject property per se, provided due cognisance was given to the relevant heritage resources. However, they opposed the developer's proposal, given the mooted bulk and heights and lack of alignment with the Tall Building Policy, Environmental Strategy and Cultural Heritage Strategy.

160. In July 2019 the developer revised the heritage impact assessment (LL14 p 167).

161. The July 2019 revision stated that the proposed development's most fundamental heritage impact would be the change in appearance and character of the site, and that it would also affect the experience of and from the Astronomical Observatory. In

addition, the heritage impact assessment recommended implementing archaeological monitoring procedures on-site and limiting the height of the Observatory-facing buildings to four storeys.

162. In September 2019, HWC (acting under the Heritage Act) requested the developer to further engage with First Nations groups.

163. Outside the parameters of the By-Law, the Western Cape Department of Transport and Public Works appointed Afmas to facilitate engagements with the indigenous people with an interest in the Two Rivers area, to establish the oral history of the Two Rivers Local Area. As a result of those engagements, the First Nations Collective came into being.

164. According to the First Nations Collective, it comprises the majority of senior indigenous Khoi and San leaders and their councils in the Peninsula. The GKKITC initially participated in the First Nations Collective.

165. Following HWC's request, the developer appointed Afmas to engage with the First Nations Collective to ascertain the intangible heritage of the subject property. The result was the production of the First Nations Report.

166. The First Nations Report explains the heritage of the Two Rivers area as a whole, not just the subject property. It records the following '*aspirations*' for the Two Rivers area:

166.1. developing authentic indigenous commemorative landscapes, including

spaces for engagement, place-making, healing and memorialisation;

166.2. acknowledgements of the indigenous people's history on the land, including: the defeat of D'Almeida in 1510; the Two Rivers area's central role both in the dispossession by settlers and as a site of resistance to colonialism; and remembering the narratives of heroes and heroines such as Doman, Autshmao and Krotoa;

166.3. providing a gathering place for cultural performances (such as an open-air amphitheatre with traditional configuration) and a ceremonial site / circuit;

166.4. incorporating indigenous plants to be managed by members of the Khoi and San communities. The '*intangible heritage of landscape use [will be] embodied in vernacular practice [Khoi and San use of indigenous plants]*'. An important part of the process going forward was recorded as '*understanding Indigeneity and Indigenous knowledge systems interwoven with Indigenous fauna and flora*';

166.5. reconnection of indigenous people with the site through the cultivation of indigenous plants and associated practices, which is a manifestation of the necessary '*Indigenous usufruct*';

166.6. establishing an indigenous heritage and art training centre and gallery. Among other things, the centre will serve as a cultural hub where '*local indigenous groups can describe and celebrate their history, display*

Indigenous art and teach Indigenous languages' in order to revitalise First Nations living heritage. The centre will also include heritage and media components;

166.7. using land and accessible internal space to tell the history of the site; and

166.8. a renaming process.

167. The First Nations Report states that it seeks to assert indigenous control over indigenous narratives. It rejects the role of, among others, the OCA in seeking to assert First Nations heritage, as well as the idea that indigenous people are opposed to development. The Report states the First Nations Collective's intention of placing indigenous narratives at the centre of the proposed development instead of protesting from the margins and includes letters of support from various leaders. The report includes the following quote:

> We can't return to Eden, because Eden happened a long time ago, but we can give vision. This site must be the optic realization of a vision of realization, restitution, reconciliation and recognition. We bless this development by ensuring that the wells that were poisoned, the waters that were poisoned, once again regenerate life and reflect as close as possible as we can come to what gave life to that sweet water.

168. The First Nations Report expresses the First Nations Collective's assertion of its agency. It also explains that assertion of the indigenous narrative, and the incorporation of the abovementioned interventions, are important elements of spatial justice in the contemporary urban context. It records a social compact with the developer to include indigenous place-making mechanisms at the site, comprising:

168.1. an indigenous garden for use by the First Nations;

168.2. a cultural, heritage and media centre;

168.3. a heritage-eco trail;

168.4. an amphitheatre to be used for cultural performances; and

168.5. commemoration initiatives such as the use of First Nation symbols and naming internal roads after indigenous leaders.

169. Following the compilation of the First Nations Report, a supplement to the heritage impact assessment was prepared.

170. The supplement addressed the contents and aspirations as formulated in the First Nations Report. It also noted that '*there are some First Nations groupings who do not share [the First Nations Collective's support for the development]*'.

171. The supplement recorded various proposed revisions to the development concept, including increased building setbacks along the Liesbeek River, reduced building heights along the South African Astronomical Observatory border and incorporating the First Nations Collective's aspirations into the development. The supplement also addressed the feasibility of different iterations of the proposed development and explained the minimum floorspace necessary to make the project financially viable.

172. The City's decisions were made taking into account all of the above information – not merely the first draft version of the heritage impact assessment.

173. As is evident from the process and substantive development process described above, the heritage impact assessment should not be characterised as anomalously sympathetic. As was evident to me in deciding the appeals, the ultimate set of heritage proposals was the product of a lengthy process of study and engagement, which was informed not only by heritage studies and land use objections, but also by a meaningful collaboration with the First Nations Collective.

Ad FA para 20

174. I deny that the land use authorisation issued by the City was defective in any way. As explained above, the applicants have completely mischaracterised both the decision-making process and the substantive heritage concerns in issue.

175. The applicants participated fully in the City's decision-making process. They were at liberty to put forward any information regarding relevant heritage resources. Both applicants, before the MPT and during the appeals process, made extensive submissions, which were thoroughly engaged with in the process of determining the land used application and the appeals. There is therefore no scope for the applicants now to bemoan a supposed failure to consider the proposed development's heritage impacts.