

Ad FA para 21.1

176. No case has been made out for an interdict pending the Part B review proceedings.

Ad FA para 21.2

177. No case has been made out to review or set aside the decision of the MPT or my decision on appeal.

Ad FA para 22

178. For the reasons set out above, this case should not be heard on an urgent basis, as any urgency has been created by the applicants, to the prejudice of the respondents.

179. I deny that any heritage resource, valuable or otherwise, is being defaced. The subject property's intangible heritage, by definition, cannot be defaced. And the tangible heritage resources will only be improved by the development.

180. I deny that the subject property is '*a relatively untransformed open space*'. It is entirely transformed: the golfing greens, conference centre and parking lot are not natural occurrences, but man-made structures that have no heritage value.

Ad FA para 24

181. The attorneys now acting for the applicants are the same attorneys who made



representations before the decision-makers on behalf of the OCA, which representations included detailed written submissions and were based on a thorough consideration of the relevant documentation in this matter. They were accordingly well versed in the issues when I made my appeal decision on 18 April 2021. It is therefore inexcusable that the applicants delayed more than three months before launching this supposedly urgent application.

182. I have no knowledge of the OCA's appeal against the developer's water licence. However, from Mr London's description, it seems that the OCA lodged the appeal without any basis for doing so. The applicants do not claim that they had any good grounds for an appeal. They did not even wait for reasons. In their own words, they did so purely to ensure that '*the proposed development could not proceed*'. That is an abuse. It discloses the applicants' willingness to misuse legal processes to delay the development by any means necessary.
183. Given that the applicants were informed of the developer's intentions in respect of the water licence on 7 July 2021, they fail to explain why they delayed for almost another month before serving this application.

Ad FA para 25

184. The '*freshwater systems*' referred to by Mr London are highly degraded. The western channel no longer bears the Liesbeek's waters; it is choked with alien species and carries stormwater runoff from the surrounding urban areas. The eastern Liesbeek channel is a polluted concrete canal that has limited, if any, ecological functionality.



185. The development will rehabilitate these resources by creating a vegetated swale (i.e. sunken ground that will be covered with plants and absorb and filter stormwater) with wetland ponds along the subject property's western boundary, and a naturalised and revitalised riverine corridor along its eastern boundary, with the concrete stripped out and replaced by natural soils and indigenous flora.

Ad FA para 27

186. It is a misconception that there is one original and definitive river course on the site: with time and various human interventions, the river has manifested in different ways. At present, and for a considerable time, the western channel has not been watered by the Liesbeek River.

Ad FA paras 29 and 30

187. The commercial and residential buildings will be located on the River Club site, which is privately owned. The environmental rehabilitation of the watercourses will take place on City land, to the benefit of the public.

188. The Raapenberg Wetland lies adjacent to the subject property and is an important ecological asset. It featured prominently in the City's assessment of the development.

For example at paragraph 204.2 of my appeal decision:

[The proposed development] will also ensure that the sensitive aspects of its surrounding context – including the Raapenberg Wetland, the confluence point of the Liesbeek and Black Rivers and the SA Astronomical Observatory – are appropriately buffered and less exposed to the development's concrete bulk.



And it will introduce a significantly upgraded indigenous open space that encourages the presence of members of the public. It will therefore play a well-thought-out threshold role between its surrounding uses.

and at paragraph 255.4:

Wetland habitat for bird species was not ignored. The western swale will feature weirs to create small wetland pools. The green open space will have improved linkages to the Raapenberg Wetland, which is a notable habitat for waterfowl and other avifauna. And the rehabilitated riverine corridor will offer highly improved habitat for, among others, numerous bird species.

and at paragraph 318:

The 'small portion of land around the confluence of the Black and Liesbeek Rivers' is how the District Plan describes the Buffer 1 zone in the TRUP area. The land fitting that description which requires particular consideration and biodiversity protection is the Raapenberg Wetlands. As set out above, the Raapenberg Wetlands will not be adversely affected by the proposed development. Care has been taken to ensure that their water flows and salinity levels will not be disrupted. They will benefit from improved connectivity with other green resources, including the naturalised riverine corridor, the east-west open-space corridor and the vegetated swale with wetland habitat features. And they will be better appreciated from the pedestrian paths that will run along the subject property's western boundary.

Ad FA para 35

189. The confluence of the two rivers is not on the River Club site, but adjacent to it. Its historical significance is not in doubt. However, as explained in my appeal decision (paragraph 198), the M5 highway runs immediately adjacent to the confluence point. It is no longer possible to experience pristine or undisturbed enjoyment of the spiritual and ceremonial significance of the confluence.

Ad FA para 37

190. The River Club site is not '*undeveloped*'. It has been the subject of extensive human

intervention. It is no longer used as grazing land.

Ad FA para 38

191. The Nieuwe Molen windmill is not on the site. There are no known remnants of the early settlers on the site.

Ad FA paras 29 – 44 generally

192. Mr London describes various heritage informants of the subject property and the surrounding area. None of this information is new. All of it was analysed by the experts, presented to the City and taken into account by the MPT. Certainly, all the information described in these paragraphs of the applicants (subject to what I say above) was part of what I considered when I determined the appeals.

Ad FA paras 52 and 53

193. I refer to what I have said in paragraph 126 above.

Ad FA para 62

194. The City's Development Management Scheme ('DMS') is schedule 3 (not 1) to the By-Law. A Heritage Protection Overlay Zoning does not prevent development within the overlay zone. Instead, item 162 of the DMS requires that the City approve the development. In accordance with item 164 of the DMS, the City must consider the



proposed development's heritage impact, and is conferred with a discretion to call for additional information and impose additional conditions.

195. In any event, no Heritage Protection Overlay Zoning applies to the River Club site. None applied when the MPT made its decision, and none applied when I decided the appeals.

Ad FA para 84

196. The development's impact on the South African Astronomical Observatory received close consideration in my decision-making process and resulted in the imposition of conditions to ensure that the development's interface with the Observatory precinct is sensitively treated (conditions 17.15 and 17.16).
197. My site inspection, which occurred prior to my decision on the appeals, included a tour of the Observatory and its grounds. I was satisfied that the conditions imposed are sufficient to protect the heritage and utility of the Observatory precinct.
198. Although the South African Astronomical Observatory did not submit an objection to the City in respect of the land use authorisations sought by the developer, the City was provided with the Observatory's submissions in respect of an early version of the HIA. I addressed those submissions at paragraph 108 of my appeal decision:

The MPT Report notes that the surrounding area has varied architectural expression. Buildings range from 3 – 30 metres in height and there is wide variety in scale. The proposed development will introduce significantly higher buildings. The conditions of approval allow for heights up to 44.7 metres.



To minimise the impact on the SA Astronomical Observatory, the developer has proposed lowering building heights along the SA Astronomical Observatory border. Furthermore, the lowest buildings will interface with the SA Astronomical Observatory and take account of its heritage indicators. The forthcoming submission of detailed plans will also ensure appropriate treatment of the development's interface with the SA Astronomical Observatory site.

Importantly, the MPT Report notes that the SA Astronomical Observatory is no longer used for astronomical optical observations due to, among other things, prevailing light pollution from the surrounding suburbs and business uses. Accordingly, the proposed development will not hamper the SA Astronomical Observatory's functioning.

During my site inspection, I was also taken around the SA Astronomical Observatory precinct. It was apparent that most of the buildings are far from the boundary with the River Club, and that the Observatory buildings are screened by a tall ridge of trees, limiting their views.

199. An entire section of my appeal decision (paragraphs 206 – 214) was devoted to dealing with the development's impact on the South African Astronomical Observatory.

I concluded as follows:

Since inception, the developer has evinced an understanding of the importance of the SA Astronomical Observatory as a high-quality heritage site, and the need for the proposed development to avoid unnecessarily infringing on its amenity. One of the non-ecological goals of the riverine rehabilitation was to establish an appropriate boundary between the Observatory precinct and the new development. Following the public-comment process, the developer incorporated further measures in respect of the Observatory, including expanding the green buffers along the rehabilitated Liesbeek River corridor, which serves as a border between the subject property and the Observatory, lowering the proposed heights of the buildings adjacent to the Observatory precinct and moving the taller buildings to other portions of the site.

I am satisfied that the developer has included adequate measures (as set out in the supplementary information, following the revision of the HIA) to address the proposed development's impact on the SA Astronomical Observatory.

200. There can no question that that development's impact on the South African Astronomical Observatory precinct and heritage value was given thorough consideration and that such representations as the Observatory elected to make were taken into account.



Ad FA para 87

201. The provisional protection notice was published in the Provincial Gazette on 20 April 2018, as is evident from annexure LL13 to Mr London's affidavit. That notice expressly stated that the provisional protection of the River Club lasted *'for a maximum period of two years from the publication of this notice.'*

Ad FA para 89

202. Mr London has not annexed a copy of the Appeal Tribunal's decision to his papers. However, I have annexed a copy of excerpts thereof to these papers.

203. As discussed in paragraph 126.5 above, the tribunal was expressly required to determine the duration of the provisional protection notice and concluded that *'the provisional protection order expires on 20 April 2020'* (paragraphs 83, 118, 123.5 of the Tribunal decision).

204. The fact that *'[a]ll parties thereafter proceeded on the understanding that the section 29 provisional protection of the site lapsed on 20 April 2020'* is because that is when it did lapse.

Ad FA paras 91 – 93

205. As set out above, and for the reasons expressed in my appeal decision, I disagree that the heritage impact assessment was materially lacking and that the developer failed



to account for '*the intangible significance of the site flowing from its historical associations*'. Whatever gaps there may have been in the initial assessment were more than filled by the subsequent engagements with the objections, the input from the City's officials, the First Nations Collective and the First Nations Report.

206. My decision manifestly accounted for the intangible heritage significance of the site.
207. Under section 38(8) it is not the function of HWC to decide whether a heritage impact assessment meets the requirements of section 38(3).

Ad FA para 99

208. I note that the Provincial Minister decided that the heritage impact assessment met HWC's requirements.
209. As explained in paragraph 149 above, and quite independently of the Provincial Minister, I concluded that HWC's various comments and concerns had been sufficiently addressed. Accordingly, those concerns were no obstacle to the granting of the land use authorisation in respect of the development.

Ad FA paras 102 – 107

210. The developer's application for land use authorisation was accepted by the City on 27 March 2018. The developer ultimately sought a rezoning of the subject property from Open Space Zoning 3: Special Open Space ('**OS3**') to Subdivisional Area Overlay

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Zoning that would permit general-business and open-space uses; approval for retaining structures to be built more than two metres high; and permission to depart from various City frameworks and policies.

211. The application was duly advertised in September 2018. 166 timeous objections, 18 late objections and one letter of no objection were received. All the late objections barring one were condoned, and in respect of that objection the concerns raised were in any event addressed to the satisfaction of the MPT.
212. The application was also circulated to various City departments, which provided their considered input.
213. All the above inputs and submissions were analysed by the City's planning officials, who recorded their assessments in a detailed, 250-page report that was submitted to the MPT. The MPT report, without its annexures, is attached as 'DP6'.
214. The MPT, after hearing oral representations over and above the various written submissions, authorised the development.
215. Nine parties (including the applicants) appealed against the MPT's decision. As part of the appeal process, the PAAP heard further oral submissions on 23 February 2021 (not 2020). After another thorough and careful evaluation process, on 18 April 2021 (not 2020) I dismissed the appeals and confirmed the MPT's decision to authorise the development (subject to certain variations). I gave my comprehensive reasons in a 146-page decision.



Ad FA paras 108 – 111

216. I deny these paragraphs for the reasons given in paragraph 126 above.

217. As set out above, as a matter of law and fact, the provisional protection was not suspended pending the appeals process. Furthermore, by virtue of the Appeal Tribunal's determination, that protection came to an end on 20 April 2020.

Ad FA paras 112 and 113

218. As explained above, I have no knowledge of the decision of 22 July 2021. However, I deny that it could have any relevance to these proceedings as it was not in existence when the MPT and I made our decisions and is still, on Mr London's explanation, no more than an inchoate recommendation. It therefore has no legal effect.

Ad FA paras 114 – 119

219. The competent environmental authorities will address the allegations concerning their decisions.

220. However, it is important to dispel the legal misunderstanding underlying the applicants' arguments. Under section 38(8), the relevant heritage resources authority (HWC) does not have the function of determining whether a heritage impact assessment is adequate.



221. Under sections 38(8) read with (3), HWC has one mandatory function which is to *'specify the information to be provided in a report'* (i.e. the heritage impact assessment report). In addition, HWC may provide *'comments and recommendations with regard to [the] development'*.

221.1. HWC has no power to determine whether the requirements of section 38(3) have been met. Section 38(8) is clear that it is 'the consenting authority' (in this case, the Provincial Director and the Provincial Minister) which *'must ensure that the evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3)'*. It is the consenting authority's job to decide the adequacy of the heritage impact assessment report.

221.2. The Provincial Minister found that the heritage impact assessment complied with the Heritage Act and that HWC's information requirements are met.

221.3. Section 38(8) requires that, prior to the granting of consent, the consenting authority must 'take into account' '[a]ny comments and recommendations' of HWC with regard to the development. The word *'any'* means that HWC is not required to comment on the development. It may do so. The fact that HWC was set against the development and voiced its *'clear and consistent opposition'*, was not determinative of how the consenting authority had to evaluate the impact of the development on heritage resources.

221.4. If a consenting authority were to treat an adverse comment by HWC

regarding the development as a veto, then it would be unlawfully abdicating its function and fettering its discretion. Section 38(8) provides that that it is the consenting authority which must perform '*the evaluation of the impact of such development on heritage resources ... in terms of the ... other legislation*' (i.e. NEMA).

222. This interpretation is consistent with the principle that each decision-maker must reach an independent decision when exercising its own powers pursuant to its own constitutional and legislative competences.
223. In short, under section 38(8) HWC does not decide the adequacy of the heritage impact assessment. HWC is a commenting authority on the development, and its comments and recommendations are relevant considerations but not determinative.

Ad FA paras 120 – 123

224. These criticisms of the various heritage impact assessments are unfounded and unsubstantiated. Mr London vaguely complains that the heritage impact assessment does not '*undertake any systematic mapping or identification of heritage resources on site*'. However, he fails to identify even one component of the subject property's heritage which was excluded from consideration.
225. In any event, as explained above, the information available to the City allowed it to undertake a comprehensive assessment of all heritage resources – including the resources and informants suggested by the applicants during the City's decision-

making process. As the applicants actively participated in the decision-making process, they were fully able to set out any heritage resources that had supposedly been ignored by the developer and its consultants.

Ad FA para 124

226. There is nothing '*notional*' about the aspects of the development that have been insisted on by the City to protect and enhance the ecological aspects of the subject property's heritage.

227. The eastern arm of the Liesbeek River will be decanalised and rehabilitated into a natural waterway that recalls the river-course as it would have presented centuries ago. The developer will be required to ensure a large proportion of high-quality open space that features indigenous flora, eco-trails and pedestrian-friendly interactions with the surrounding environmental assets such as the river corridor and the Raapenberg Wetland.

228. These aspects of the development will result in substantial and tangible improvements to the ecological aspects of the site's heritage, as well as its ecological functioning.

Ad FA paras 125 – 126

229. The development proposal considered by the City accorded significant '*practical significance*' to the site's history. By partnering with the First Nations Collective, the development will concretise much of the subject property's intangible heritage through,



among other things, the cultural, heritage and media centre (which will allow the much-neglected history to be recorded and shared), the indigenous garden (which will see the practical application of the First Nations' knowledge of plants, food and medicine) and the amphitheatre (which will facilitate various forms of indigenous cultural expression).

230. The applicants also palpably fail to show how preserving a golf course and a parking lot will give effect to the subject property's living heritage.

Ad FA paras 127 – 130

231. The applicants misrepresent the developer's initial motivation, which expressly recognised that the site's heritage extends beyond the river corridor.

232. In any event, the land use authorisation has been conditioned to ensure that the development protects and celebrates far more than just the '*ecological potential of the river corridor*'. One need only give a cursory glance to the First Nations Report or the final supplement to the heritage impact assessment to understand that (a) full and proper regard has been given to the relevant intangible heritage and (b) practical mechanisms have been proposed to reflect that heritage.

Ad FA para 134

233. As set out above, following the publication of the first heritage impact assessment, engagements began with the First Nations Collective, which resulted in the



development proposal being revised to further reflect the site's intangible heritage.

Ad FA para 135.1

234. I deny that the mapping of heritage resources was *'illogical and flawed'*.

235. Both the river corridors and the confluence point were fully recognised as heritage resources.

236. The development proposal is fully cognisant of the subject property's location within the greater Two Rivers area. The City's assessments took into account the surrounding heritage informants, as well as the *'low-lying' 'riverine character of the site'*.

237. I remain of the view that the River Club building itself has little, if any, heritage value. While HWC is of a different opinion, it offers nothing in the way of explanation.

Ad FA para 135.2

238. Following the revision of the development proposal to reflect the First Nations Report, and the imposition of approval conditions mandating the establishment of such heritage institutions as the cultural, heritage and media centre, the indigenous garden and the amphitheatre, it is demonstrably untrue to claim that the proposal fails to consider cultural significance or reduces the site's heritage to *'tangibly based ecological values'*.



Ad FA para 135.3

239. As set out above, the City's assessment of the development proposal fully considered its ecological impacts, which assessment was informed by a number of expert studies.

Ad FA para 135.4

240. The development of the subject property will not merely have '*potential economic benefit*'. As set out above, it will create thousands of employment opportunities, result in billions of Rand in investment in the local economy and make tens of thousands of squares metres of residential accommodation available.

241. I deny that the heritage assessments have failed to place the subject property in its proper context: all of those assessments have located the site within the broader Two Rivers area. Furthermore, none of those assessments has sought to avoid the cultural informants or limited their understanding of significance to the riverine corridor.

Ad FA para 135.5

242. Whatever issues HWC may have had with the developer's consultations initially, it is clear that, in the wake of the First Nations Report and the engagements with the various objections (including those of the applicants), there has been ample and meaningful engagement with affected persons, including indigenous groupings.



Ad FA para 135.6

243. The developer has undertaken an assessment of five alternatives, including one in which the site is not developed at all. Those alternatives were determined to be economically unviable.

244. The '*tread-lightly, green-dominated, recreational or educational alternative*' aligns with the notion of an urban park that was mooted in 2003. However, that has turned out to be impractical and unworkable as a development model.

Ad FA para 135.7

245. This assessment is erroneous and fails to account for the subsequent iterations of the heritage impact assessment and the development proposal.

Ad FA para 137

246. This is a mischaracterisation of the supplementary report. Pages 20 – 26 set out a range of revisions to the development proposal '*in response to commentary made in the NEMA, [Heritage Act] and [By-Law] processes*'.

Ad FA para 143

247. This is a baseless mischaracterisation of the First Nations Report. As I explained in my appeal decision, there is no dispute that the First Nations Collective is an authentic



grouping of indigenous people and leaders. Furthermore, while I acknowledged that the Report contained some irrelevant content, I was nevertheless satisfied that much of the rest of the Report contained valuable heritage information.

Ad FA paras 144 – 145

248. I deny that the GKKITC's '*boycotting of the process*' compromised the First Nations Report.

249. As I explained in paragraph 180.3 of my appeal decision:

Initially, the GTKC was associated with the First Nations Collective. Later it broke away. Both courses of action were open to it, as a free association with its own agency. However, having broken away from the group with which the developer was consulting, the GTKC cannot bemoan its self-exclusion from the consultation process.

250. And at paragraph 181:

To the extent that any indigenous person, group or representative structure felt marginalised by the First Nations Collective, they were free to submit comments and objections directly to the City and to appeal the decision of the MPT. This approach has been adopted by the [the GKKITC], which fully used these participation processes. Any such grouping or person was also free to participate in the public-participation proceedings that took place under the Heritage Act and the NEMA (bearing in mind that the HIA was initially compiled for purposes of those statutes).

Ad FA para 162

251. The heritage assessment must be understood in the context of all iterations of the heritage impact assessment that were submitted to the decision-makers. Thus understood, I deny that the recommendations '*are so permissive and abstract as to be entirely devoid of content*'.



252. For example, the supplementary heritage impact assessment set out the following detailed and substantive amendments to the development proposal (LL15 pp 245-255):

- a. The diagonal road dissecting the central 'ecological corridor' has been replaced by a road that crosses the green open space in a more orthogonal orientation, with the intention to mimic the orientation of the buildings, as well as reduce the impact on the amenity and functioning of the 'ecological corridor' space.
- b. The setback of the buildings from the rehabilitated Liesbeek River is now a minimum of 40 metres (this setback previously ranged between 24 - 40 m).
- c. The buildings closest to the SA Astronomical Observatory have been lowered in height to reduce the impact on this precinct.
- d. Vehicular access in Precinct 1 is no longer on the 'outside' of the precinct adjacent to the rehabilitated Liesbeek Canal and vegetated swale, but is now via a central road servicing the precinct; and the buildings overlook landscaped areas providing a better interface with these areas.
- e. The western half of Precinct 2 has been earmarked for the offices of a global company that has very specific requirements for their buildings (for example, standard floor plates which result in very specific building footprints). This campus is located next to Berkley Road extension where greater heights are appropriate, although the heights are staggered to articulate the massing.
- f. The inclusion of First Nations heritage as a design informant which now includes the following:
 - establishing an indigenous garden for medicinal plants used by the First Nations;
 - establishing a cultural centre;
 - establishing a heritage-eco trail;
 - establishing an amphitheatre for use by both the First Nations and the general public;
 - commemorating the history of the First Nations by: establishing a Gateway Feature inspired by symbols central to the First Nations narrative at the road crossing the eco-corridor; incorporating symbols central to the First Nations narrative in detailed design of buildings; and naming internal roads inspired by people or symbols central to the First Nations narrative;
 - the implementation of these mechanisms is to be assured through an institutional arrangement which establishes within the Property Owners Association (or similar) an autonomous legal entity led by the Gorinhaiqua Cultural Council that will be responsible for the management, operations, maintenance and indigenous place-making mechanisms.

253. The same document set out the following '*refinements and amendments*' (LL15 p 249):

- reducing the height of the buildings in Precinct 1 opposite the SAAO in order that their presence, already minimised by the distance is further reduced and so that Lions Head and Signal Hill can be seen from the roof of the old Royal Observatory building;
- improving the vehicular-bridge-crossing of the eco-corridor; and
- introducing the several strategies discussed for 'indigenizing the site through place-making mechanisms' as outlined on pages 8 and 21 above.

254. These aspects contained precise content that informed both the ultimate design proposal and various conditions of approval. The applicants' criticisms are therefore unsustainable.

Ad FA para 177

255. Mr London has annexed an incomplete version of the MPT Report: it omits the various objections, the developer's response to those objections and the planning officials' assessment of the submissions. The full version of the MPT Report has been annexed to these papers.

256. The MPT's decision is not recorded in the report dated 4 September 2020. The MPT made its decision on 18 (not 4) September 2020.

Ad FA para 178 – 179

257. I deny these paragraphs. The attack on the City's decisions are flimsy and unsubstantiated. The applicants baldly allege that there are '*multiple defects*' in the MPT decision – but fail to identify any.

258. The applicants have not identified a single duty under the Heritage Act that the City failed to discharge. They could not do so, because heritage concerns were given full and proper consideration in the City's decision-making process.

259. The development proposal was thoroughly assessed and each element thereof was subject to reasoned analysis in terms of section 99 of the By-Law.
260. The City's officials and the MPT discharged their functions independently of the provincial environmental authorities.
261. Whatever issues the applicants may have had with the MPT's decision simply do not apply in respect of my decision on appeal, which is the operative decision in respect of the land use authorisation. The applicants have failed to plead, let alone establish a credible basis, for a single review ground in respect of my appeal decision. On the papers, my appeal decision is unimpeached.

Ad FA para 180

262. As explained above, I thoroughly engaged with all the HWC's available assessments of the development.
263. Of course, neither the MPT nor I could take into consideration decisions that had not yet been made or recommendations that had not yet been formulated. The applicants candidly admit that to do so would have been unlawful (FA p 91 paragraph 182).

Ad FA para 181

264. I deny that the imposition of a Heritage Protection Overlay Zone '*would almost certainly preclude the implementation of the proposed development*'. Since no such protection



was in place when the planning approvals were given, they cannot be impeached by a future change in the heritage status of the land.

265. In any event, as set out above, the DMS permits development to occur in such zones, subject to the City giving special consideration to the heritage impact. Even had an overlay zone been in place when I determined the appeals (which was not the case), I could not have undertaken a more thorough assessment of the development's heritage impact.
266. Regardless, the heritage authorities have not decided to grade the subject property's heritage resources and there is no overlay zone in place.

Ad FA para 182

267. I deny that formal protection of the site was '*an imminent possibility*' when the MPT made its decision: it is two years later, no such protection is in place and, according to Mr London, HWC has only just now formulated a recommendation regarding the River Club site.
268. In any event, as explained above, I expressly considered the possibility of the heritage authorities grading the subject property. I addressed the point as follows (at paragraph 190 of my appeal decision):

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



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

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

269. The above notwithstanding, it is clear from my appeal decision that heritage impact was, in fact, a '*particularly weighty factor*' in my decision-making process.

270. The City is advised that section 5(1)(a) of the Heritage Act does not apply to the decisions by the City because the City was not '*performing functions and exercising powers in terms of [the Heritage] Act*'. The City made its decisions in terms of the By-Law. Despite this, my decision clearly gave full and proper consideration to heritage considerations.

271. Preserving the *status quo* – which the applicants desire – will only allow the intangible heritage resources to continue being ignored. Allowing the development to proceed, on the other hand, will protect the intangible heritage and revitalise the tangible heritage. The development, and my decision, are therefore geared at ensuring that the heritage resources in question are '*carefully managed to ensure their survival*', as contemplated by the principle in section 5(1)(a).

Ad FA paras 183 – 187

272. The applicants concede, as they must, that on appeal I was provided with all the information regarding HWC's assessments and processes. I considered that information fully in my decision, as is explained above.



Ad FA para 188

273. I deny that I *'failed to understand or engage with the City's duties in terms of the 'Heritage Act'*. Mr London has not particularised or explained any such failure, which makes it rather difficult to respond to this bald allegation.

274. However, I have set out above the manner in which I discharged the City's duties in respect of the affected heritage resources. Heritage concerns were so extensively treated in my appeal decision that it is ridiculous to contend that they were not properly considered.

Ad FA para 189

275. The development was supported by compelling policy objectives. I have addressed some of those in the section discussing the public interest above.

Ad FA paras 190 – 191

276. I deny that the MPT's decision was *'dominated'* by *'economic / developmental considerations at a very general and abstract level'*.

277. In fact, the developer put forward a comprehensive assessment of the development's economic impact, including various specifics in respect of investment and job creation. As I noted on appeal, neither the applicants nor any of the other appellants *'provided*



any alternative information concerning the project's socio-economic benefits, or any reason for doubting SRK's professional assessment' (paragraph 86).

278. I admit that the subject property's location within the City's urban inner core and the metro-south east integration zone featured in both the MPT's assessment and my appeal decision. That was both lawful and reasonable.

279. As I described in my appeal decision, *'the MSDF has delineated the City's Urban Inner Core as the focal point for public and private urban development. The Urban Inner Core is the priority investment focus at a metropolitan scale'* (paragraph 64). I was satisfied that –

the site's location within the Urban Inner Core makes it ideally located for a significant mixed-use development that will provide densification (through increased use of horizontal and vertical space) and diversification (by introducing residential opportunities alongside commercial and other uses, while retaining and revitalising green open space) on a site that is in close proximity to the railway and good roads, employment opportunities and areas of high amenity. Those opportunities and amenities may be found, among other places, in the nearby Cape Town Central Business District (CBD) and Paarden Eiland. The commercial opportunities in Salt River and Woodstock, and the industrial opportunities in Maitland and Ndabeni, are also nearby.

280. At paragraphs 75 and 76 of my appeal decision I recorded the following:

The MSDF recognises the subject property as a strategic site. It records that the [Two Rivers area] has been identified for affordable housing to support the Urban Inner Core. The [Two Rivers area] 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 [Two Rivers area] being developed through private-sector investment to improve housing opportunities, enhance urban infrastructure and ultimately contribute to a more integrated city.

The [OCA] contends that, because the subject property is zoned OS3, it should not be developed as proposed by means of a 'radical change in the zoning'. However, the [OCA] fails to appreciate the site's strategic location in the Urban Inner Core and the Metro South East Integration Zone. Furthermore, the development will preserve and enhance significant tranches of publicly-accessible open space.

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281. The MSDF is the City's core forward-planning instrument. It would have been a material irregularity had I failed to consider the development guidelines that it prescribes.
282. Of course, consistency with the MSDF and economic impact were but two of the many categories of considerations that I considered when evaluating the development in terms of section 99 of the By-Law.
283. Mr London makes the passing comment that the development's affordable-housing component will be '*negligible*'. I reject that characterisation: 6,400 m² being made available by a private developer on private property using private capital, in circumstances where it had no obligation to make such a provision and where there is a substantial need for such housing, is far from negligible. It is admirable. Furthermore, standing at 20% of the development's total residential offering, it is also substantial.
284. Mr London's preferred development alternative would result in zero affordable housing. That would be a completely undesirable outcome.

Ad FA para 192

285. The development was determined by the City either to be compliant with the applicable policy framework or to constitute a justifiable and desirable departure therefrom.
286. Mr London's description of the development's conflict with the Table Bay District Plan ('**the District Plan**') is misleading, as is his allegation that the City's assessment of the

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deviations from the District Plan '*only briefly touched upon*' the relevant issued.

287. I considered the District Plan extensively in paragraphs 312 – 329 of my appeal decision. Ultimately, I was satisfied that, given '*the extent to which the proposed development complies with various District Plan guidelines, and the limited (although not insignificant) extent of the intended deviation... the deviation from the development guidelines set out by the District Plan in order to permit urban development on the subject property [was] justified.*'

288. For example, for the reasons recorded at paragraphs 317 – 319 of my appeal decision, I was satisfied that development could take place in the areas designated as '*Core 2*' and '*Buffer 1*':

The river corridors of the Black and Liesbeek Rivers fall within '*Core 2*'; although they are not on the subject property, they will be significantly affected as part of the developer's ecological contribution. I am satisfied that the proposed development complies with the prescribed development guidelines or, to the extent that there is a departure from those guidelines, that it will achieve desirable spatial objectives. It will entail conservation management activities such as the clearing of alien vegetation. It will encourage low-impact activities (such as walking and cycling on dedicated paths), subject to management plans. New services infrastructure will largely be located outside of the corridors (although road infrastructure will traverse the rivers). It will significantly enhance the amenity of the Liesbeek River and introduce positive interfaces with the rehabilitated corridor and the vegetated swale. Due regard has been had to flood risks, in respect of which various expert-recommended mitigation measures will be employed. Extensive consideration has been given to conservation and biodiversity issues; as set out above, I am satisfied that the proposed development will yield overall positive biodiversity consequences.

The '*small portion of land around the confluence of the Black and Liesbeek Rivers*' is how the District Plan describes the Buffer 1 zone in the [Two Rivers] area. The land fitting that description which requires particular consideration and biodiversity protection is the Raapenberg Wetlands. As set out above, the Raapenberg Wetlands will not be adversely affected by the proposed development. Care has been taken to ensure that their water flows and salinity levels will not be disrupted. They will benefit from improved connectivity with other green resources, including the naturalised riverine corridor, the east-west open-space corridor and the vegetated swale with wetland habitat features. And they will be better appreciated from the pedestrian paths that will run along the subject property's western boundary.

However, the land designated in the District Plan Map for Sub-District 3 as 'Buffer 1' is the land to the north of the subject property, through which a 'proposed development route' will pass. That 'development route' is the Berkley Road extension, of which the District Plan expressly approves as a means to 'promote integration in the area and to strengthen connectivity and general mobility'. The City's officials have confirmed that the Buffer 1 land has no conservation-worthy resources.

289. The OCA complained that the development failed to align with the objective of establishing a multipurpose metropolitan urban park with high-quality pedestrian and public open space. However, as I explained in paragraph 324 of my appeal decision:

The Table Bay District Plan acknowledges that the 'existing state of the natural environment means that considerable investment is necessary to enable the establishment of a quality park.' That investment will be made available as a result of the proposed development. However, it will require some of the existing open space – the asphalt parking lot and the golf greens with alien vegetation – to be redeveloped into mixed-use precincts.

As set out above, I am satisfied that the proposed development will greatly improve the open space that is made available to the public, which will feature not only sensitive interaction with the riverine corridor, but also pedestrian and non-motorised transport networks while making a significant investment into the TRUP. This open space will improve access to and appreciation of surrounding resources, including the Raapenberg Wetlands.

290. I concluded as follows in paragraphs 326 – 328 of my appeal decision:

The Table Bay District Plan encourages the retention and improvement of public access and recreational opportunities. It goes on to caution against the loss of significant public open space through private development. I am however satisfied that the area allocated to OS3 is significant. The proposed development will make provision for a large area of open space with various amenities, including an eco-trail to the benefit of the general public. I have imposed the necessary condition to ensure access to the proposed development, including the open space area, by the general public by way of a right of way servitude. A further servitude must be registered which protects the floodplain and/or ecological buffer in Portion 3 and in the western portions of Portions 1 and 2 from alteration or obstruction. I am accordingly satisfied that the public access to the subject property will not only be retained but improved as the site, specifically the open space area, will no longer only be accessible to golfers and restaurant goers but to the general public at large.

The spatial planning categories discussed above (including 'other structuring open space') and the associated development guidelines were adopted under the predecessor to the MSDF. The same applies to the 'supporting development guidelines' prescribed for Sub-District 3.

The MSDF has since been updated to reflect the City's current planning vision and developmental realities. As noted in the MPT Report, the District Plan's guidelines for the [Two Rivers area] do 'not accord with the MSDF' and the District Plan – along with

all other district spatial development frameworks – is currently being updated. As addressed in detail above, the proposed development is, in many respects, exactly the sort of environmentally conscious, mixed-use development on strategically located land that is desirable under the MSDF.

291. It was evident to me that, in the instances where the development was not aligned with the District Plan, a departure from the relevant provision was reasonable and desirable. Nothing that the applicant has put forward calls that assessment into doubt.

Ad FA paras 193 – 194

292. As he did during the appeals process, Mr London once again seeks to make much of the fact that the City's Acting Director of the Environmental Management Department submitted an appeal against the provincial authorities' initial decision to issue the environmental authorisation.

293. Ultimately, the City was satisfied that all the concerns raised in the environmental appeal were satisfactorily addressed. I dealt with the Acting Director's appeal comprehensively in paragraphs 249 – 258 of my appeal decision. I ask that those reasons be incorporated in this affidavit.

294. I refer to what I have said above about the MSDF.

Ad FA para 195

295. I deny that the City authorised any '*unjustified and unsubstantiated deviation* from its policies, or that it engaged in '*irrational decision-making*'.

Ad FA para 196

296. I assume that where Mr London refers to '*the Minister's decision*' he intends to refer to my decision on appeal. I deny that my decision suffered from any defect.

297. I note that Mr London has completely failed to deal with paragraphs 312 – 332 and 335 – 411 of my appeal decision. In those paragraphs, I deal with the development in the context of each applicable policy and ultimately conclude that the land use authorisation should be granted subject to a host of conditions.

298. Mr London has not asserted a single basis upon which to doubt that policy analysis. His allegations should therefore be dismissed without more.

Ad FA paras 197 and 200 – 201

299. I deny these paragraphs. Mr London has not established a single review ground in respect of the City's decisions, even on a *prima facie* basis.

Ad FA paras 202 – 203

300. I deny these paragraphs.

301. The applicants have failed to establish a *prima facie* basis for reviewing the impugned decisions.



302. Even if they had, that right would be capable of being fully and effectively vindicated in Part B of these proceedings. An interdict is therefore unnecessary.

303. Mr London has failed to identify even one heritage resource that will be harmed if the development proceeds.

Ad FA para 204

304. I deny that the transformation of the River Club site will cause harm. The site will not be '*destroyed*'. There are no tangible heritage resources that will be adversely affected by the construction. Intangible heritage resources, which are impervious to the effects of construction, will only be improved.

Ad FA paras 205 – 207

305. It is notable that the sole reasons which Mr London posits for the balance of convenience favouring an interdict is a vague allegation that '*heritage rights [will be] destroyed*' and the fact that there are many objections.

306. However, he fails to explain how construction will destroy any heritage rights. It is true that there are objectors. As I have shown, all of their concerns were carefully and fully considered. Some concerns were unjustified and unfounded. Others were accommodated and mitigation measures imposed. The fact that some people remain unhappy with the decision is not a basis to grant an interdict.

307. Mr London. ignores the overwhelming public interest in the development proceeding. He gives no consideration to the billions of Rand in investment, the thousands of employment opportunities, the numerous open-market and affordable housing opportunities, the commemoration of the site's heritage, the public infrastructure and the environmental rehabilitation that will be lost if the interdict is granted.
308. For the reasons in paragraphs 100 - 114 above, the City submits that the balance of convenience does not favour the award of the interdict. Rather, the balance of convenience necessitates the refusal of the interdict, particularly since construction will harm no heritage resources.

Ad FA para 208

309. I deny this paragraph.

AD THE SUPPORTING AFFIDAVIT OF TAURIQ JENKINS

310. I now address some of the allegations in Mr Jenkins' affidavit *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.
311. 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 this affidavit.



312. Mr Jenkins' affidavit does not have a case number. It also omits me and the Chairperson of the MPT as respondents. I nevertheless proceed on the basis that it is intended to be an affidavit under case number 12994/21 and that it has been prepared for purposes of proceedings in which I am a respondent.

Ad Jenkins paras 1 – 3 and 5

313. The City has no knowledge of the allegations in these paragraphs.

Ad Jenkins para 7

314. The GKKITC, HWC and the City's heritage officials raised concerns regarding the adequacy of the heritage impact assessment. However, I was satisfied that those concerns had been sufficiently addressed by the developer's consultants, as I explained at paragraph 183 of my appeal decision:

The development proposal has not focused exclusively on ecological heritage. Since inception, it has shown an understanding that, among other things, the site has a complex history rooted in many of the injustices of the South African past.

Following engagements with the First Nations Collective, this understanding deepened and the developer undertook to include a memory centre and other measures that will assist in preserving and enhancing the site's cultural, heritage and political history. The development proposal also reflects the subject property's intangible heritage, to which it seeks to respond by including places of expression for that heritage (such as the amphitheatre and the indigenous garden).

315. The affidavits of Ms Prins-Solani and Ms O'Donoghue were not submitted to the City for its consideration in deciding the developer's land use application.

316. During the appeal process, the GKKITC alleged that the First Nations Report set out to diminish and smear it. I addressed these concerns at paragraph 186 of my appeal

decision:

According to the RC First Nations Report, its aims are not those alleged by the [GKKITC].

However, I acknowledge that the report contains allegations against certain persons that, for purposes of the By-Law, are unnecessary and irrelevant. I have accordingly disregarded those comments. The remarks about the [GKKITC] do not detract from the other valuable content that the RC First Nations Report presents.

Ad Jenkins paras 10 – 11

317. The City was alive to the various oral and intangible aspects of the site's heritage. Hence its appreciation for the First Nations Report and the heritage submissions from parties such as the GKKITC and the First Nations Collective.

Ad Jenkins paras 12 – 19 and 21 – 42

318. The City does not dispute Mr Jenkins' account of the relevant history and heritage. Much of this information was put forward during the land use application process and taken into account in shaping the development's parameters and the conditions of approval.

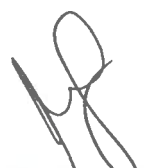
319. The historical use by the First Nations of the site, its importance in indigenous cosmology and its political history of conquest, colonialism and resistance are matters of fundamental importance. They have been completely ignored by the site's conversion into a parking lot, conference centre and golf course. The exclusivity of the golfing greens, the pollution of the Liesbeek River and the degradation of the parking lot all fundamentally contradict the site's history and heritage.



320. In contrast, the rehabilitation of the Liesbeek River will re-establish an indigenously planted watercourse, thus recalling the natural state and significance of the river. The cultural, heritage and media centre will allow members of the First Nations to record and pass on their history on their own terms. The indigenous garden will put the First Nations' historical knowledge of food and medicine into practical use. The heritage eco-trails will echo the First Nations' experience of the natural aspects of the site. And the various commemoration and naming initiatives will allow the heroes of the First Nations to be appropriately memorialised.
321. I reiterate my conclusions regarding the development's heritage impact, set out in paragraph 67 above.

Ad Jenkins para 45

322. The affidavits of Ms Prins-Solani and Ms O'Donoghue were not submitted to the City during the land use application process or during the appeals.
323. However, for the reasons already canvassed, the City was satisfied with the account of heritage ultimately presented from the various sources, which sources included the submissions of the applicants.
324. Whatever misgivings the applicants may have had about the first iteration of the draft heritage impact assessment, ultimately there was substantive and substantial engagement by the developer with the site's intangible heritage. Since Mr Jenkins made oral and written representations, he personally had ample opportunity to address



any perceived shortcomings in the heritage impact assessment. The City imposed the necessary conditions of approval to ensure that that heritage is protected and celebrated.

Ad Jenkins para 47

325. Contrary to Mr Jenkins' allegation, the provisional protection notice (LL13 p 165) did not *'require the site to be graded for heritage importance before any development could be considered.'*

326. Instead, the notice operated to impose heritage protection for a two-year period. In terms of section 29(10) of the Heritage Act, this meant that no one could *'damage, deface, excavate, alter, remove from its original position, 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.'*

Ad Jenkins para 51

327. The City did not appoint Afmas. As discussed above, Afmas was initially appointed by the Western Cape Department of Transport and Public Works, and was later appointed by the developer.

Ad Jenkins para 52

328. The GKKITC raised its concerns regarding the ethics of the First Nations Report during the appeal process. Those concerns were dealt with at paragraph 182 of my appeal decision:

The [GKKITC] points out that the developer's HIA's outcomes have been contested, and (like with the RC First Nations Report), it submits that there are ethical questions about the way the HIA was conducted. The [GKKITC] contends that the HIA is '*an act of ethnocide and epistemicide*'.

However, I am satisfied that the HIA may be accepted for what it purports to be: a professional assessment of the subject property's heritage resources and the proposed development's impact on those resources, performed by appropriately qualified professionals. What ethical questions may have arisen in respect of the Afmas' formulation of the First Nations Report do not appear to apply to the HIA.

The HIA is neither '*ethnocide*' nor '*epistemicide*'. The use of those appellations, rather than engagement with the substance of the HIA, is of limited value.

I note the concerns which have been raised about the RC First Nation Report and how it was produced. Nevertheless, both the Report and the various submissions from objectors contain valuable indicators of the site's heritage resources.

Ad Jenkins para 53

329. The City has no knowledge of the contents of this paragraph.

Ad Jenkins para 55

330. I have no knowledge of the contents of this paragraph.

331. The GKKITC was free to participate in the process that led to the production of the First Nations Report, and free to eschew that process. Either way, the GKKITC was also free to raise all of its heritage (and other concerns) directly with the City, and to submit as much information as it wished regarding the site's heritage. The GKKITC

did precisely that, during the course of the City's decision-making processes.

Ad Jenkins paras 57 – 63

332. As discussed above, I noted and addressed Mr Jenkins' concerns.

333. Even if the GKKITC did not wish to engage with Afmas, it had several opportunities to put forward its own submissions regarding the site's heritage.

334. During the land use application process, the GKKITC made detailed submissions to the City regarding the relevant heritage resources. I included a summary of some of the GKKITC's submissions at paragraph 175 of my appeal decision.

Ad Jenkins para 68

335. I have addressed Mr London's concerns above.

336. It is misleading to contend, as Mr Jenkins does, that *'the HIA consultants have attempted to rebut the claims of First Nation's peoples that the intangible heritage values with which we are concerned related to the whole TRUP area, and particularly the River Club site.'*

337. I summarised portions of the first draft of the heritage impact assessment in paragraphs 146 – 149 of my appeal decision. Those paragraphs make it clear that, from the outset, the developer located the development within the heritage context of



the Two Rivers area generally. Furthermore, when setting out the undisputed aspects of the relevant heritage considerations in paragraph 178 of my appeal decision, I recorded, among other things, that the '*subject property must be understood in the context of the wider area.*' I also referred to the Liesbeek and Black Rivers, the confluence point of those rivers, settlement patterns and historic confrontations in the surrounding area, the extermination of sacred animals from the surrounding area and other heritage resources such as the Astronomical Observatory.

Ad Jenkins paras 72 – 75

338. The City has no reason to doubt that the First Nations Collective is a genuine and legitimate collective of indigenous groups and leaders with an interest in the subject property. The City also has no reason to doubt the First Nations Collective when it expresses its commitment to exercising its own indigenous agency.

339. The City did not allow the differences of opinion between the First Nations Collective and the GKKITC to detract from the City's consideration of the heritage impact of the development. Despite the differences between the representatives, there is no dispute that the River Club site has '*enormous cultural, spiritual and historical significance*'. It is also beyond dispute that concrete canals, an asphalt parking lot and golfing greens do nothing to recognise or protect that significance, and in fact contradict it.

Ad Jenkins para 77

340. I note that Mr Jenkins agrees that the current use of the River Club constitutes damage



to the site. The City denies that the development constitutes '*further damage*'. Instead, it constitutes a radical improvement.

341. Mr Jenkins says that '*every effort must be made to restore the landscape and rivers of the TRUP area, to use it as a living expression of Khoi and San culture [and] to commemorate its historical significance*'. The development is subject to conditions to ensure that it will achieve each of those objectives:

341.1. The Liesbeek Canal will be rehabilitated from a concrete and polluted canal into a naturalised river environment.

341.2. The golfing greens will be replaced by almost 50,000 m² of high-quality public open space that is indigenously planted.

341.3. The cultural, heritage and media centre will allow the First Nations to develop, control, record and disseminate their own narratives.

341.4. The indigenous garden and the amphitheatre will be used for the living expression of First Nations intangible heritage, including medicinal and food knowledge and cultural performances.

341.5. The conditions of approval require both '*symbols central to the First Nations narrative*' and '*naming of internal roads inspired by the First Nations narrative*', which are some of the mechanisms that will be used to commemorate historical significance.



341.6. In respect of each of those initiatives, the conditions of approval expressly require the developer to engage with the First Nations Collective and the GKKITC, to ensure that the ultimate product flows from meaningful engagement.

Ad Jenkins para 82

342. I deny the contents of this paragraph.

343. No assessment under the Heritage Act was required before the City could exercise its municipal-planning powers under the By-Law.

344. In any event, there was adequate heritage information before the City to allow it to discharge its functions.

Ad Jenkins para 83

345. I deny that the natural course of the Liesbeek River remains.

346. It is not apparent which '*initiative*' Mr Jenkins is referring to. If he is referring to the establishment of an urban park across the whole of the River Club site, that is a failed and unworkable option.



Ad Jenkins para 84

347. I deny the contents of this paragraph.

AD THE EXPERT AFFIDAVIT OF BRIDGET ELIZABETH O'DONOGHUE

348. Ms O'Donoghue's affidavit was not placed before any of the decision-makers before they made the impugned decisions. Her affidavit is therefore of limited utility in these proceedings. I deny that it is relevant.

349. Ms O'Donoghue's affidavit does not have a case number. It also omits me and the Chairperson of the MPT as respondents. I nevertheless proceed on the basis that it is intended to be an affidavit under case number 12994/21 and that it has been prepared for purposes of proceedings in which I am a respondent.

350. It is not my intention to deal with each of Ms O'Donoghue's allegations. 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 this affidavit.

Ad O'Donoghue paras 4 – 6

351. Ms O'Donoghue was not briefed with the MPT Report, the MPT's decision or my appeal decision. Her affidavit does not deal with the City's extensive consideration of the development's heritage impact.



Ad O'Donoghue para 16

352. I note the confirmation that no physical or tangible remnants of the pre-colonial past (such as human remains, structures or archaeological material) have been found on the site.

353. Had Ms O'Donoghue been briefed with the City's decisions, she would have been aware of the City's appreciation of, and extensive engagement with, the intangible heritage resources in question.

Ad O'Donoghue paras 22 – 26

354. Ms O'Donoghue says that she was briefed with the December 2019 supplement to the developer's heritage impact assessment. However, it does not feature at all in her analysis.

355. As I recorded in my appeal decision, the supplement followed the various objections regarding heritage impact (and whether it adequately considered intangible heritage), and the engagements with the First Nations Collective. The supplement addresses the intangible First Nations heritage in respect of the wider Two Rivers area, the heritage resources in respect of the River Club site in particular and the aspirations of the First Nations Collective as expressed in the First Nations Report. It also proposes *'indigenizing the site through [various] place-making mechanisms'*. Those mechanisms, developed in collaboration with the First Nations Collective, were the forerunners to the heritage requirements set out in conditions 20 and 21 of my appeal

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decision.

356. Ms O'Donoghue implies that places of cultural significance and places associated with living heritage have been omitted from consideration, but does not provide any examples or explanation. As set out above, it is clear that both cultural significance and living heritage, as well as their associations and implications for the subject property, were thoroughly considered and, in fact, shaped the development.

Ad O'Donoghue paras 27 – 31

357. As set out above, I addressed HWC's comments in my appeal decision.

358. It is not apparent how Ms O'Donoghue concluded that no consideration was given to intangible heritage and that no assessment of significance has been undertaken.

Ad O'Donoghue para 32

359. Had Ms O'Donoghue been briefed with the City's decisions, she would have seen that I engaged with HWC's concerns extensively, and imposed conditions and design parameters to protect and enhance both tangible and intangible heritage.

AD THE EXPERT AFFIDAVIT OF MS DEIRDRE PRINS-SOLANI

360. Ms Prins-Solani's affidavit was not placed before any of the decision-makers before they made the impugned decisions. Her affidavit is therefore of limited utility in these

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proceedings. I likewise deny that it is relevant.

361. Ms Prins-Solani's affidavit does not have a case number. It also omits me and the Chairperson of the MPT as respondents. I nevertheless proceed on the basis that it is intended to be an affidavit under case number 12994/21 and that it has been prepared for purposes of proceedings in which I am a respondent.

362. It is not my intention to deal with each of Ms Prins-Solani's allegations. 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 this affidavit.

Ad Prins-Solani paras 4 – 5

363. Ms Prins-Solani was also incompletely briefed. She has not assessed the supplementary environmental impact assessment, the MPT Report, the MPT's decision, the report to me or my appeal decision. Her affidavit does not deal with the City's extensive consideration of the development's heritage impact.

Ad Prins-Solani para 38

364. As already explained, I deny that there was no identification or documentation of the site's living heritage.



Ad Prins-Solani para 39

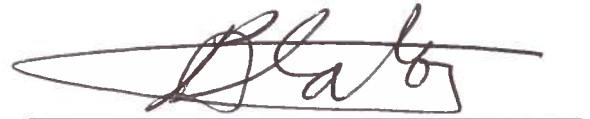
365. As set out above, I addressed HWC's comments in my appeal decision. Had Ms Prins-Solani been briefed with the City's decisions, she would have seen that I engaged with HWC's concerns extensively, and imposed conditions and design parameters to protect and enhance both tangible and intangible heritage.
366. The site was understood in the context of, and the development was informed by, the heritage of the surrounding Two Rivers area.
367. I deny that the boundaries of the rehabilitated river are too narrow. They have been informed by several considerations, including ecological functioning, stormwater management, heritage and aesthetics. Environmental buffers have been imposed to ensure that the riverine habitat is given sufficient space to function.
368. A visual impact assessment was prepared, submitted by the developer and considered by the City. It will form part of the rule 53 record. Furthermore, during my site inspection, I paid particular attention to visual routes and lines of sight.
369. The allegation that the river course way is treated as '*the only site of significance*' indicates that Ms Prins-Solani has not only failed to consider the City's decisions, but has also failed to consider the December 2019 supplement to the heritage impact assessment or the First Nations Report.
370. There was thorough engagement with the site's living heritage.



371. I note that Ms Prins-Solani has not considered conditions 20 and 21 of my decision.

CONCLUSION

372. The City asks the Court to dismiss the interdict sought by the applicants under Part A with costs including those of two counsel.



DANIEL PLATO

I certify that the deponent signed the affidavit in my presence and declared that the deponent knows and understands its contents, has no objection to taking the prescribed oath and considers the oath to be binding. Thus signed and sworn before me on **24 August 2021** at the address set out below.



COMMISSIONER OF OATHS

MANDY JOY MITCHELL
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