



OBSERVATORY
Civic Association

DCAS Award Winner, 2018 : Most Active Conservation Body

**76 Arnold St
Observatory
Cape Town
7925**

**Civic Centre
12 Hertzog Boulevard
Cape Town
8001
4 June 2018**

FOR ATTENTION : THE SPEAKER OF THE CITY OF CAPE TOWN.

CC : THE CITY MANAGER

CC: THE WARD COUNCILLOR, WARD 57, SUBCOUNCIL 16

SUBJECT : OBJECTION TO LEASE OF Erf 26456 AND Erf 27628 AND Erf 26166, FENCING OF MALTA PARK AND LACK OF NOTIFICATION OF THE INTENTION TO DEPRIVE THE PUBLIC OF ACCESS TO THIS PUBLIC OPEN LAND WHICH HAS BEEN USED AS A COMMON GROUND FOR FAMILIES AND AND GENERAL PUBLIC SINCE LIVING MEMORY.

Please find the attached Submission objecting to the lease in relation to Erf 26456 and Erf 27628 Cape Town (Hartleyvale Pitch A) and Erf 26166 Observatory (Malta Park Pitch B) on behalf of the OCA and residents.

We include supporting documentation from residents all noting their objection to the lease, the fencing of Malta Park and lack of notification of the intention to deprive the public of access to this Public Open Land which has been used as a common ground for families and general public for living memory.

Sincerely,

Tauriq Jenkins

Chair : Observatory Civic Association

Date : 4 June 2018

OBSERVATORY CIVIC ASSOCIATION**NOTICE OF OBJECTION****PTMS NO: 130002547 and 130002548****File Reference No: CT 14/ 3 / 6 / 1 / 2 /1600A00 & 1601A00****(Category 1)**

ATTENTION: THE SPEAKER OF THE CITY OF CAPE TOWN.

CC : THE CITY MANAGER

CC: THE WARD COUNCILLOR, WARD 57, SUBCOUNCIL 16

In terms of S90 of the Municipal Planning By-Law of 2015, and the Notification Operational Policy for Land Use Development Applications dated 01 July 2015, application is made to the City Manager:

1. Condoning in so far as may be necessary the late submission of this application.
2. Objecting to the decision of the City to recommend the approval of a lease between The City of Cape Town and Cape Town City Sporting Club (Pty) Ltd, dated 20 November 2017. (Subcouncil 16 Minutes of an ordinary meeting) .

Application for Condonation

3. The Association has never been informed of the proposed lease by the City, as the notice was allegedly sent to The City Bowl Ratepayers Association and not to the Observatory Civic Association. The Association is still not in possession of the notification.

4. The Observatory Civic Association first became aware of the lease when a question was raised in respect of fencing off public land at an ordinary meeting of the association called on 02 March 2018 to discuss developments at the River Club.
5. The Association decided to investigate the fencing off and to report back to its members on 02 May 2018.
4. The Association then established that the fencing off was a condition of a lease entered into between the City and Cape Town City Sporting Club.
5. The Association was given a mandate to object to the lease process.
6. The association has therefore acted timeously, and in good faith when preparing this objection.
7. Insofar as it may be necessary, the Association seeks condonation of the late submission of this objection.

The objection is based on the following:

8. That the City has approved the enclosure of land zoned Public Open Space without notice to the public.
9. That the City contravened the Municipal Asset Transfer Regulations and flouted the Management of Certain of the City Of Cape Town's Immovable

Property Policy: dated 26 August 2010 in that adequate public participation was not sought to enter into the lease which directly and adversely affects the rights of the public.

10. That the City has not notified the registered civic association, namely the Observatory Civic Association.

11. That the City has not notified the Two Rivers Urban Park Association.

Relief Sought

12. On behalf of the residents of Observatory and the greater users of Malta Park, the Observatory Civic Association seeks that:
 - 12.1. That the lease entered into between the City and Cape Town City Sporting Club is set aside, pending due process and proper consultation with the City and relevant stakeholders.
 - 12.2. That the City order the lessee to cease further work on the leased premises.
 - 12.3. That the lessee restores the leased premises to the status quo ante.

Background

13. On 18th August 2017 an advertisement was placed in Die Burger and The Cape Times calling for objections to a proposed lease between the City of Cape Town and Cape Town City Sporting Club (Pty) Ltd, in respect of Portion of remainder Erf 26456 and Erf 27628 Cape Town (Hartleyvale Pitch A) and Erf 26166 Observatory (Malta Park Pitch B), Liesbeek Parkway, Observatory for sporting and training purposes.
 - 13.1. The advertisement stated a lease period of 10 years.
 - 13.2. The advertisement made no reference to fencing of Malta Park which has been used by the residents of Observatory and the greater public for living memory.
14. On 12 November 2017 a report was prepared by the City to consider the proposed lease (**See Annexure A**).
15. The report was compiled in terms of the Management of Certain of The City of Cape Town's Immovable Property Policy dated 26 August 2010 based on an application submitted to it by Cape Town City Sporting Club (Pty) Ltd.
 - 15.1. The application was "to approve the granting of rights to use, manage or control capital assets of a value less than R10 million and for a period of not

longer than 3 years provided that this delegation may only be exercised after considering the comments of the Sub-council in whose area of jurisdiction the capital asset is situated”

- 16 On 20th November 2017 the Report to Subcouncil 16 was submitted and objections were overruled by the council. (The Ward Counsellor for Subcouncil 16 objected to the proposal), (**See Annexure B**)

17. The Civic Association believes that a lease has been entered into between the City and Cape Town City Sporting Club.
 - 17.1. It is believed that one of the terms of the lease was that the lease is subject to an undertaking by the Cape Town City Sporting Club (Pty) Ltd to erect fencing at a cost of no less than R170 000 excluding VAT. The monthly rental was calculated on an amortisation over 35 months of this investment.

- 18 In December a fence was erected around a portion of Erf 26166 Observatory (Malta Park fields A and B)

19. In December the manager of the Cape Town City Sporting Club (Pty) Ltd announced his intention to build a 10 000 seater stadium at Hartleyvale. While no formal application has been submitted, this has been repeated in numerous press engagements. **(see Annexure C)**

20 In May 2018 building work was initiated on Pitch B Malta Park.

OBJECTION 1

The City has approved the enclosure of land zoned Public Open Space without notice to the public.

21. It is submitted that the City failed to consult with members of the public. In consequence of its failure the decision to let erf 26166 Observatory Malta Park is ultra vires and of no force and effect. The subsequent lease and enclosure of the Public Open Space is therefore also ultra vires and of no force and effect.

22. Erf 26166 (Malta Park Pitch A and B) is zoned Public Open Space.

23. In December 2017 a fence was erected around Malta Park Pitches A and B were fenced.

24. Access through the gate is not documented in the lease and is provided on an ad hoc basis.
25. The Association and members of the public attempted to find reasons for the closure.
- 25.1. Reasons for fencing were given to the Observatory Civic Association and members of the public in an ad-hoc manner. These range from vagrancy, irresponsible use by dog walkers, security and emergency use by the City as a proposed water point.
- 25.2. None of the reasons were in line with the city's real reason, which is that it is a term of the lease with Cape Town City Sporting Club. This fact only became available to the Observatory Civic Association in April after securing a copy of the report submitted to Subcouncil 16 dated 12/11/17.
- 26.. In May 2018 earthworks commenced on Pitch B. No explanation for this has been given at all.
27. The result is that the public's rights to open space have been materially and adversely affected in that their rights have been and continue to be severely restricted or stopped altogether.

28. In terms of S4 of the Promotion of Administrative Justice Act,
- a. *Administrative action affecting public.—*
- (1) *In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—*
- (a) *to hold a public inquiry in terms of subsection (2);*
- (b) *to follow a notice and comment procedure in terms of subsection (3);*
- (c) *to follow the procedures in both subsections (2) and (3);*
- (d) *where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or*
- (e) *to follow another appropriate procedure which gives effect to section 3.”*
29. In terms of S35 Municipal Planning By Law of 2015 A use right vests in land and not in a person.
30. In terms of S79 of the Municipal Planning By-Law, of 2015, the City may cause notice of its intention to consider an application.

31. In terms of the minimum prescribed advertising for development of public open space or closure of public open space, the following advertising must take place:

31.1. *.Notice in the media.* This was done.

31.2. *Site notice.* This was not done.

31.3. *Notice to a person affected.* This was not done or inadequately done.

Attached find 106 affidavits (**marked Annexure D**) and 176 petitions (**marked Annexure E**) from residents in the area whose rights are directly affected, who confirm that such notification was not done.

31.3. *Notice to the Ward Councillor.* This was done and his objection was overruled.

31.4. *Notice to a registered Community Organisation.* This was sent to the incorrect community organisation and accordingly the notice was defective. Despite confirming in the media that this had been provided, we have only recently received confirmation from the City of Cape Town that this documentation was sent to incorrectly. (Attached see confirmation by Rachel Schnackenberg, Manager: Property Holding at the City of Cape Town confirming that communication was sent to the City Bowl RPA and not to the Observatory Civic Association (**marked Annexure F**).

32. In the circumstances the notification was inadequate and any decision taken without proper notification is ultra vires. The City must set aside the lease.

OBJECTION 2

The City contravened the Municipal Transfer Regulations and flouted the Management of Certain of the City of Cape Town's Immovable Property Policy dated 26 August 2010 in that adequate public participation was not sought to enter into the lease and to erect a fence.

33. Included in the report of 12th November 2017 was a valuation by the City giving a higher valuation of R1500.00 per square meter and R530 per square meter at a lower valuation.
34. The area in question is 37 568 square meters.
35. Based on the lower value the value of the land is R19 911 040.00
36. The report dated 12th November 2017 was based on the lease of "Non-Significant Property Rights".
37. The advertisement stated a lease period of 10 years and is not in conformity with "Non Significant Property Rights".
38. The advertisement made no reference to fencing of Malta Park which has been used by the residents of Observatory and the greater public for living memory.

39. The City did not instruct the applicant to re-advertise in conformity with Non Significant Property Rights, and accordingly the advertisement is flawed, is ultra vires and of no effect.
40. The City was aware that the lessee intended to spend significant sums during it's lease. It is submitted that the lease should not have been entered into as a "Non Significant Property" but should have had greater public participation as prescribed for significant property rights.
41. **Alternatively**, In terms of S16.6 of the Immovable Property Policy p the City must conduct a public participation in respect of a Non-Significant Property Right and may determine the form that this process should take.
42. As far as public participation was concerned, it is submitted that the City should have followed the process contemplated in terms of S16 of the Municipal Systems Act which prescribes that:
- 16(1) *A municipality must develop a culture of municipal governance that complements formal representative government with a system of participatory governance, and must for this purpose-*
- (a) encourage, and create conditions for, the local community to participate in the affairs of the municipality.....*
- (b) contribute to building the capacity of-*

(i) the local community to enable it to participate in the affairs of the municipality

43. The City failed to conform to the prescriptions of S16 of the Municipal Systems Act and accordingly the decisions made in terms of the recommendations to Council were flawed.

44. Accordingly the decision must be set aside.

OBJECTION 3

The City has not notified the registered civic association, namely the Observatory Civic Association.

45. The Observatory Civic Association was not notified. Notification was allegedly erroneously sent to the City Bowl Rate Payers Association.

46. Despite Councillor Diamond confirming on radio to the Observatory Civic Association that appropriate notification had been provided, it took almost three months for Rachel Schnackenberg, Manager: Property Holding at the City of Cape Town to provide confirmed that communication was sent to the City Bowl RPA and not to the Observatory Civic Association. (**marked Annexure F**)
47. The Civic Association was therefore unable to comment.
48. In the circumstances, the decision to let the fields was ultra vires, and the lease is therefore improperly entered into.
49. The City must therefore set the decision aside.

OBJECTION 4

The City has not notified the Two Rivers Urban Park Association.

50. The Observatory Civic Association was advised that the Two Rivers Urban Park Association, was not notified of the enclosure of the Malta Park Sporting fields. The Malta Park fields form part of the TRUP area. In terms of Section 29(1)(a) of the National Heritage Resources Act, No 25, 1999 HWC have

provisionally protected certain areas of the TRUP, decided on 20th of April, 2018, for a maximum of two years. While the Observatory Civic Association cannot formally comment on this, it is submitted that if this is correct, the lease must be set aside on this basis as well.

GENERAL COMMENT

51. Given the public statement by the lessees representative of its intention to build a 10 000 seater stadium; its actions in restricting use of Malta Park fields; and the sum of money it has spent, it is reasonable to suspect that the lessee intends to utilise the short term lease as a springboard to a longer-term lease.

52. It is unclear whether the Applicant advised the City of its intention to build a stadium, if the lease were extended. If the applicant did not do so, it failed in its duty in terms of S78 of the Municipal Systems Planning By-Law 2015 in that it is a material omission to the granting of this application.

53. It is also reasonable to suspect that the longer the lessee is in possession and the more money it spends in preparation for its intention to build such a stadium, the stronger its perceived rights will become.

54. It is recognised that its perceived rights are not lawful rights, and that the any such application would need public participation.
55. However, given that Applicant's membership is less than 500 members, and that to sustain such a stadium, it would need commercial space, and the additional parking associated therewith;
56. And given that Hartleyvale Stadium abuts both a residential area of historic significance, and an environmentally sensitive area; and that;
57. The Two Rivers Urban Park has in terms of Section 29(1)(a)of the National Heritage Resources Act, No 25, 1999 HWC have provisionally protected certain areas of the TRUP decided on the 20 April, 2018 for a maximum of two years. These considerations must be taken into account by the City when considering the objections above.
58. The Observatory Civic Association, Residents and the Two Rivers Urban Park wish to engage in a precinct planning initiative that engages the entire sporting precinct, from the Swimming Pool, through the Bowling Greens, Western Province Hockey Club and through to the end of Malta Park.

59. It is submitted that to favour one sporting group over all others where the City's own policy is to utilise the present stadia within its precinct for professional bodies, is contradictory and irrational.
60. The Councilor for Ward 16 and Observatory Civic Association engage constructively with **all** sporting interests and the needs of development and amateur sport and balance this against the needs of residents and the environment and historical significance of the Two Rivers Park.
61. This would include not only individual lessee's but joint sporting calendars and initiatives to ensure sensible and sensitive best use of this communal land without depriving public of their long standing rights of access.
62. To favour one professional sporting body and one sport only over the broader needs of the community is unfair, irrational, contrary to city policy and ultra vires.

The Association therefore seeks that the relief set out above.

DATED at OBSERVATORY on 4 JUNE, 2018

Tauriq Jenkins

Chairman Observatory Civic Association.