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Ministerial Appeal Tribunals
Ministry of Cultural Affairs & Sport
Western Cape Government
8th Floor, Protea Assurance Building,
Greenmarket Square, Cape Town, 8001

FOR ATTENTION : Adv. Michael Petersen

SUBJECT : Comments on Appeals regarding HWC declaration of a Protected Area Erf 151832

These comments were prepared by :
Prof Leslie London, Convenor of the OCA's Large Development Group Sub Committee,
Tracy Hyde, Convenor of the OCA's Architecture and Heritage Sub Committee
Marc Turok, OCA TRUP Committee Convenor
Tauriq Jenkins, Chair OCA

Sincerely, on behalf of the OCA

Tauriq Jenkins
Chair : Observatory Civic Association
Email : chair@obs.org.za
Date : Mon Sep 10, 2018

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Comments on Appeals regarding HWC declaration of a Protected Area Erf 151832

The Observatory Civic Association submits the following comments on the appeals lodged by various parties regarding the declaration by Heritage Western Cape of the River Club and related areas (Erf 151832) as a Provisionally Protected Area under section 29 of the National Heritage Resources Act (NHRA).

We provide, firstly, general comments on the HWC action and then deal, in turn, with each appellant's argument thereafter.

1. Observatory support for the Section 29 declaration: The Observatory Civic Association believes that the River Club and surrounding areas is of high heritage value that it warrants specific protection under Section 29 of the NHRA. It is an area of intense historical and cultural value, particularly for indigenous peoples whose histories have been exterminated by colonial and post-colonial development over past centuries.
2. Assessments to date have not given adequate attention to the heritage resources in the application to date. It is irrelevant that claims are made that HWC is pre-judging the matter. It is the mandate of HWC to ensure adequate protections are in place where there is a high value heritage resource involved.
3. Our experience of public participation processes to date as an Observatory community have made us acutely aware that such histories are not given adequate attention by standard participation processes, which are generally geared to facilitate the approval of development as far as is possible within legal constraints. EIA's do not give adequate attention to particular specificities and are treated as cookbook exercises by so-called EIA consultants, intended to tick boxes rather than address substantive contextual matters.
4. By way of example relating to the River Club, we can point to the recent process of public consultation on the River Club development having inadequate consideration of (a) alternatives, despite DEAT EIA guidelines requiring such consideration; and (b) a perfunctory consideration of the first nation histories by the heritage consultants employed by the developers – notably a heritage report favourable to extensive development within the erf, which we believe would permanently destroy the cultural footprint of indigenous peoples in the area, as well as irrevocably change the natural environment.
5. For these reasons, we are generally supportive of the HWC action to ensure extra protections are in place for consideration of development applications in the River Club (and TRUP areas).

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We therefore indicate our strong support as a community organisation in the neighbourhood for the River Club to be placed under provisional heritage protection as it will be to the benefit of local and national heritage.

6. We note that HWC is the competent authority whose mandate is to protect heritage resources. This has recently been reaffirmed in the case of Gees. Neither the DEADP nor the DTPW have such a mandate.
7. The fact that an EIA is being conducted under the auspices of another entity and that HWC is a commenting party in that process (the HIA expert input into the EIA) does nothing to change HWC's mandate.
8. The fact that DEADP and DTPW have now become I&APs in the HWC process because of the HWC Section 29 declaration may be unusual but we believe it is legally and conceptually correct.
9. The remaining consideration & approvals processes under DEADP and the City of Cape Town may continue unhindered while the issue of the s 29 NHRA protection is dealt with (within the NHRA/HWC ambit. The HWC protection is provisional and therefore, by its very nature, not yet final so the process has to be followed to its conclusion.

We now turn to the comments of the various parties in their appeals.

The arguments of the DEADP

10. The first argument advanced is that DEADP and HWC have obligations to ensure co-operative governance in this matter and that HWC's action in declaring the area provisionally protected interfere in this cooperative governance. We fail to understand why the HWC declaration of the River Club as provisionally protected, a step fully in line with their legal mandate, given the high cultural significance of the area, constitute a breach of cooperative governance. If the DEADP interpretation of co-operative governance is that HWC should cede decision-making powers to an EIA process, the same argument could be made that DEADP should cede decision-making powers to a Heritage process. Our understanding is that the declaration of the River Club as a provisionally protected area is for the duration of such time that an EIA might be conducted to ensure no overhasty decision-making excludes important considerations of significant heritage resources. The argument that HWC's declaration violates co-operative governance has no legal basis.
11. The second DEADP argument is that the Heritage Protection duplicates EIA processes. We disagree and do so on the basis of personal experience in that the EIA documentation produced by the applicants on which the EIA decision is to be made is highly flawed and lacks adequate attention to heritage resources. Therefore, additional heritage oversight is welcomed by the local community and is not seen as a duplication at all. To the contrary, it is seen as providing an

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additional check and balance, consistent with the constitutional requirements for fair administrative processes that seek to protect a wide range of rights, particularly those of marginalised first national peoples.

12. As involved IAPs, we can assure the DEADP that, contrary to the assertion that the declaration of provisional protections under Section 29 of the NHRA “involving the same I&Ps participating in the NEMA EIA/HWC NHRA Section 38 process creates confusion,” the OCA understands the distinct processes and their legal mandates very clearly. We are most definitely not confused and IAPs should not be spoken for by the authority meant to receive IAP inputs on the EIA. It is condescending to do so. Further, it is unclear to us why a regulatory body such as HWC exercising its statutory duty under its Act should be regarded as biased for doing so. “Perceptions” should not be the basis for deciding in matters of law. One might argue that DEADP’s action to appeal the HWC declaration is equally “perceived” as bias, an argument I am sure DEADP would reject. We therefore reject any considerations of ‘bias’ on the part of HWC are relevant to this appeal.
13. The assertion that the current EIA process, in which HWC is an IAP, would be adequate to determine whether a threat to a heritage resource exists, is not material to dismissing Section 29 of the NHRA. In fact, we understand that the invoking of provisional protections is precisely to ensure that the EIA, which is likely to take 2 years, is adequately able to address heritage concerns without being railroaded by other stakeholder interests. We refer to examples below in this regard. We are therefore of the opinion that a Section 29 action is complementary to the current EIA process and believe that DEADP is adopting a very narrow and conflictual view of the provisional protection notice issued by HWC. A spirit of co-operative governance should welcome such supportive action.

The City of Cape Town: While the City of Cape Town is not an appellant, we note that various parties have referred to City of Cape Town correspondence in their appeal. We therefore wish to bring to the attention of the Appeal authority the following:

14. On the 26th May 2017, the Mayor and City Manager wrote to the Chief Executive Officer of HWC, arguing that there is no imminent threat to a heritage resource in TRUP and that provisional protection is unnecessary. Although this pre-dates the declaration by HWC of the River Club as provisionally protected, we believe this statement is of high relevance because it is used by appellants to justify their objections. Our subsequent experience shows that the two senior city officials have misplaced confidence in the City’s ability to identify threats to heritage resources and that this claim cannot be accepted at face value.
 - a. With regard to an Observatory development on Erf 172047 (Anson Rd, Observatory, outside the TRUP) on 5 December 2017, the recommendation of the City’s City’s own Environment and Heritage Division was that the development should not be supported

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because of adverse impacts on the adjacent heritage resources. However, the case officer involved completely ignored the recommendation of the City's own Environment and Heritage Division by recommending an application. The community has documented evidence that supports the City's own heritage practitioners' assessments. This was completely ignored by the relevant City official and the MPT approved the development. In our view, this indicates that the City is not able to validly identify when a heritage resource is under threat.

- b. In December 2017, the City awarded a contract to a professional football club for use of the Malta Park fields (which fall within the broader TRUP area). Despite the ongoing public participation processes related to TRUP, this contract was awarded without public scrutiny. Worse, the contractee was permitted to replace the existing surface of a large public space with astroturf. This was done without any reference to any of the oversight being applied with regard to the TRUP. Areas zoned open public spaces within TRUP are heritage resources, but this particular heritage resource has not received any protection.

It is therefore quite clear that the City is unable to predict, let alone control imminent threats to heritage resources in this jurisdiction. This provides strong ground for support for the action of HWC to provide provisional protection for the River Club, at least, and for the broader TRUP heritage resources.

The Department of Transport and Public Works

15. In its appeal of 15th May 2018, the Department of Transport and Public Works argue that HWC should have given reasons for its decision of 20th April "in order to give effect to the right to administrative action that is lawful, reasonable and procedurally fair." While this is no doubt correct, we fail to see why it is grounds for an appeal. Certainly, such information could be sought in order to help frame and appeal and we see no reason why the Department of Transport and Public Works did not take such steps to strengthen its case. It is our experience that no government department provides written reasons to any community representatives for its decisions **at the same time as it issues its decision**. We, as the OCA, are expected to make special request for the reasons, if we want to strengthen our case on appeal. Yet it seems the Department of Transport and Public Works is unhappy with the fact it is being treated in the same way as every other citizen in Cape Town and wants special treatment in this regard. We disagree this could be regarded as grounds for an appeal, otherwise, we could have been lodging multiple appeals with multiple authorities. What is good for the goose, must be good for the gander.
16. The Department repeats three arguments raised by the DEDP and City of Cape Town above in points 6 to 9, viz., that
 - a. There is no evidence of any threat to heritage resources in the erf
 - b. Provisional protection results in duplication

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- c. HWC is biased because it has pre-judged a Section 38 process

These arguments have been responded to above. In short,

- Development has been permitted by an authority in the TRUP area without any due process and this represents prima facie evidence of a threat
- There is no ground to claim a section 29 protection duplicates other processes – it merely puts additional oversight in place which should be welcomed by any authority that is serious about public participation and protection of heritage resources. We see no obstacle to the Section 38 process proceeding and the appellants has not provided any such evidence.
- We do not believe that HWC is biased merely because it has identified heritage rich resources in the area under discussion. This may be unwelcome to parties who have a vested interest in developing the area, but to claim bias on the part of HWC doing their job, is the flip side of the bias coin. It is parties who don't like what they see in a bona fide, rational HWC decision, who are biased.

17. In light of the accusations of bias against HWC, we wish to note that the following. The Department of Transport and Public Works' appeal pays particular attention to the plight of a private landowner seeking to develop their land and associates themselves with the landowner. Jacqui Gooch's letter notes that "the fact that ... HWC ... persisted with following a section 29 process ... presents Liesbeeck Leisure Properties Trust and my department with a serious challenge ..." We are puzzled why is it any business of the Department of Transport and Public Works that Liesbeeck Leisure Properties Trust should be in any way inconvenienced?

18. The Department is there to serve the public not private interests.

We are therefore uncertain as to why the DTPW should accuse the HWC of bias when it is not acting dispassionately in this appeal in terms of the law but speaking for the developers. Public servants need to serve the public, not private interests. We believe that HWC is doing a good job of meeting their mandate to serve the public. It is not at all clear if the same can be said of the Department of Transport and Public Works. We have personal experience of the inappropriate behaviour of one of the department's senior officials in a consultative meeting with community organisations which reinforces this belief that the Department is adamant it should get its own way and will brook no opposition. We would be happy to table such evidence to any authority if requested.

The Liesbeeck Leisure Properties (LLP) are the developers wishing to exploit the River Club site for major development.

19. Firstly, the LLP argue that under PAJA, they were entitled first to a hearing before the HWC came to a decision. We note that HWC issued a notice in December 2017 giving notice of its intent to declare the River Club and TRUP provisionally protected and invited comment, which the OCA duly submitted. We expect that RRL also submitted comments. After this process, HWC issued the declaration of the River Club as a protected area. We struggle to understand what is

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procedurally unfair about such a process. Everybody had a change to have their say and HWC considered the submissions and made a call on them. We therefore do not understand why an opportunity to have a meeting to discuss the decision first constitute anything more administratively just. In any event, the applicants have the right to appeal which they are currently pursuing. As a ground for appeal, we do not understand how this can be entertained. Our Civic is told with every development that we have no rights to meet the private developer or to discuss the development with City officials but can lodge of our objection in writing and can only appeal after the decision. What special treatment is the RRL seeking?

20. The appellants argue that the HWC decision was substantively flawed because it made no reference to the River Club property having particular value as a heritage resource and that it was not under imminent threat. RRL's own heritage consultants have repeatedly demonstrated there are substantial heritage resources on the property and we repeat our assertion above that, from the Community's perspective, there are very real threats to the preservation of these resources. The claims that there is no imminent threat to the heritage resources in the area repeat much of what is advanced by the DTPW and contained in the City of Cape Town correspondence. We have dealt with that above.

The OCA therefore wishes to note its support for the proclamation of the River Club erf as provisionally protected. We disagree with the arguments advanced by the appellants as indicated above.

The Site has rich heritage resources which deserve careful protection and oversight. Our experience of the bullying tactics of government departments other than HWC involved in the TRUP and River Club processes is that they are not interested in protecting these resources but want to press ahead with development without obstacles. Our community will not tolerate such bullying. We do not believe there are any grounds for appealing the HWC declaration.

History, memory, and the revival of silenced historical narratives:

There are highly significant heritage aspects of the site in terms of the importance of the rivers and the integrated landscape that for thousands of years characterised early life in the Cape, as well as being the site of the first major conflicts between Colonial and local First Nations People. The defeat of the Portuguese viceroy D'Almeida in 1510 by the Goringaiqua, to Jan Van Riebeeck's first farms whose demarcation and theft would over time precipitate the ethnocide of the Khoi, genocide of the Cape San and 14 Khoi Wars that waged from this precinct towards the Eastern Cape. Historians and heritage specialists recognise the immense cultural significance of the site. Melanie Attwell's Heritage Baseline Study describes the TRUP as of the most significant sites for the First Nations in South Africa. The route from Duynhoop towards the wood along the Liesbeek River is where large groups of the first indigenous people grazed their cattle every day. The integrated TRUP landscape is where the first indigenous people settled for the dry months (large groups of people and cattle migrated annually to the Swartland and Vredenberg areas during winter and returned every year as part of a well adapted "transhumance lifestyle" until it was blocked and destroyed by the Burgher farmer settlers who started to plough up the

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fertile ancestral grazing land and the hostile 'First Frontier' became a permanent blight on the history of the Cape over the last 340 years until Apartheid was ended. This history is of extraordinary local and international significance, as it locates Observatory and the TRUP as an historical nexus of South Africa and of mankind.

We would like to put on record our request to be present and to the MEC's Tribunal in consideration of the Appeals as an I&AP.

These comments were prepared by :

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Tracy Hyde, Convenor of the OCA's Architecture and Heritage Sub Committee
Marc Turok, OCA TRUP Committee Convenor
Tauriq Jenkins, Chair OCA

Yours sincerely

Tauriq Jenkins

Chair : Observatory Civic Association (chair@obs.org.za)

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