



**Western Cape
Government**
Environmental Affairs and
Development Planning

Western Cape
Department of Cultural Affairs and Sport
Office of the Minister

18 MAY 2018

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Kantoor van die Minister
Departement van Kultuursake en Sport
Wes-Kaap

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DEA&DP Reference: 16/3/3/6/7/2/A7/17/3104/16

Heritage Western Cape ("HWC") Case No: 17051090WD0525

HWC Reference: HM/ CAPE TOWN METROPOLITAN/ PHILIPPI/ CAPE FARM 738 AND 767

AND

Heritage Western Cape ("HWC") Case No: 15112504WD1217E

HWC Reference: HM/ CAPE TOWN METROPOLITCAN/ OBSERVATORY/ ERF 151832

Minister Anroux Marais
Minister for Cultural Affairs & Sport
Western Cape Government
8th Floor Protea Assurance Building
Greenmarket Square
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By Hand and via e-mail: Anroux.Marais@westerncape.gov.za
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Dear Minister Marais

RE: APPEAL IN RESPECT OF PROVISIONAL HWC PROTECTION DECLARATIONS

A. Introduction:

1. The Western Cape Department of Environmental Affairs and Development Planning ("DEA&DP") is the legally mandated Competent Authority for the administration of the National Environmental Management Act, 1998 ("NEMA") EIA Regulations (2014, as amended) for the Western Cape Province, for listed activities in terms of the listing notices (Listing Notices 1, 2, and 3) in terms of Chapter 5 of the NEMA, whose competence is determined as per Section 24C of the NEMA.
2. Section 38 (8) of the National Heritage Resources Act 25 of 1999 (the "NHRA") provides that the requirements of Section 38 of the NHRA do not apply to a development where an EIA is to be conducted, provided that the EIA evaluation fulfils the requirements of the relevant heritage resources authority specifically related to the list of requirements listed under Section 38 (3) of the NHRA (in this instance the HWC).
3. The DEA&DP and HWC have engaged and formalised the alignment of our mandates through the DEA&DP/HWC Operational Agreement/Standard Operating Procedure ("OA/SOP") (dated June 2014).
4. Further to Section 38 of the NHRA, Section 29 provides provisions for provisional protection. This provision has not before been exercised for developments where an EIA application to the DEA&DP is already underway (i.e. where a NEMA EIA/NHRA Section 38 process is already underway).

5. This has largely been possible due to the fact that the Section 38 process under an EIA provides for the opportunity for a prospective developer to investigate and report on various aspects (including heritage), which information then informs decisions.
6. The DEA&DP requires that HWC is an automatically registered interested and affected party in all EIA processes where heritage matters may be of concern, and this includes pre-application public participation processes. The formality of this interaction is entrenched in DEA&DP's EIA application forms and templates, and in the DEA&DP/HWC OA/SOP, to further facilitate this process.
7. Heritage requirements in accordance with Section 38 of the NHRA are specified by HWC under an EIA application process.
8. The co-operative working relationship between DEA&DP and HWC has over the past four years been hallmarked by facilitative discussions and regular engagements to further cement your requirements and our working environment under the joint process encapsulated in the DEA&DP/HWC OA/SOP.
9. On 20 April 2018, however, the HWC published Section 29 provisional protection notices in the Provincial Gazette of the Western Cape Government.
10. These protection notices pertained to proposed developments where current EIA processes are underway in the DEA&DP and where NEMA EIA/NHRA Section 38 processes are already underway.
11. The DEA&DP therefore hereby submits an appeal in terms of Section 49 of the NHRA against the HWC decision to issue provisional protections specifically related to developments where EIA applications are currently underway and where DEA&DP/HWC Section 38 processes are currently underway.
12. The statement of grounds of appeal are detailed below and supported by attached appendices. It must be stressed that no decision has been made on the NEMA EIA applications to which this appeal relates and this appeal to HWC should in no way be seen as an indication of the competent authorities' inclination to approve or refuse the listed activities applied for by the respective applicants.

B. Statement of Grounds of Appeal

1. Co-operative Governance

Chapter 3 of the Constitution of South Africa (Act 108 of 1996) requires that ..."(1) All spheres of government and all organs of state within each sphere must: ... (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;...(e) respect the constitutional status, institutions, powers and functions of government in the other spheres; ...(i) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere...(j) co-operate

with one another in mutual trust and good faith by (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating the actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another...". Chapter 2 Section 33(1) of the Constitution further states: "... Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." Section 2(4)(l) of the NEMA specifically states that "There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment." Chapter 1, Part 1 Section (5)(3) of the NHRA states "Laws, procedures, and administrative practices must-...(c)give further content to the fundamental rights set out in the Constitution."

To give effect to the above requirements of the Constitution, the NEMA and the NHRA, both DEA&DP and HWC have worked closely in recent years to achieve these goals. This is further evidenced by DEA&DPs inclusion of specific heritage management questions in DEA&DPs various Application Forms, other templates, and Guidelines, as well as standard heritage management conditions in all EIA environmental authorisations. Furthermore, DEA&DP and HWC have agreed to the DEA&DP/HWC OA/SOP which encapsulates the spirit of co-operative governance in a formal manner.

We submit that the decision to declare provisional protections (Section 29) for land where EIA applications are ongoing (i.e. where a NEMA EIA/NHRA Section 38(3) process is currently underway) and where HWC has already commenced with such engagement is procedurally unfair. These declarations prohibit continued co-operative governance and co-ordination of procedures and actions by contradicting the agreed-to administrative actions captured in the DEA&DP/HWC OA/SOP.

2. Duplication of processes to achieve the same goal

Section 38 (8) of the NHRA specifically states, "*the provisions of this section do not apply to a development.....and any comments and recommendations of the relevant resources authority with regard to such development have been taken into account prior to the granting of the consent.*"

The effect of this provision requires HWC to become an automatically registered interested and affected party in the NEMA EIA process to achieve your desired heritage management outcomes. It must be noted that HWC has already commenced with engagement as part of the NEMA EIA processes for the subject properties (Erf 151832, Observatory and Cape Farm 738 and 767, Philippi) for which it has now, on 20 April 2018, declared Section 29 provisional protections. We were surprised by this unilateral action, completely against the spirit and intent of the DEA&DP/HWC OA/SOP.

The NEMA EIA/NHRA Section 38 processes for both these proposed developments have already commenced, with HWC already participating in the pre-application process for Erf 151832, Observatory and the NEMA EIA formal application process for Cape Farm 738 and 767, Philippi, respectively. In this regard, HWC formally provided an interim comment to the applicant for Erf 151832, Observatory on 16

March 2017, and initial comment to the applicant for Cape Farm 738 and 767, Philippi on 13 June 2017, requiring this applicant to conduct a Heritage Impact Assessment (attached).

In addition, the declaration of provisional protections under Section 29 of the NHRA, involving the same Interested and Affected Parties participating in the NEMA EIA/HWC NHRA Section 38 process, creates confusion and could lead to an allegation of bias or perception of bias on the part of HWC.

3. Current process underway to investigate and determine impacts on heritage resources

Section 29 of the NHRA specifically states: "...*(ii) heritage resource, the conservation of which it considers to be threatened and which threat it believes can be alleviated by negotiation and consultation; or (iii) heritage resource, the protection of which SAHRA or the provincial heritage resources authority wishes to investigate in terms of this Act...*". In furtherance of these requirements, the NEMA EIA/NHRA Section 38 processes that are currently underway for these two cases, endeavour to ascertain whether such threat indeed exists through investigation of potential impacts.

The HWC decision on the Section 29 declaration, viewed against the current NEMA processes already underway, and which processes HWC is part of, could be viewed as procedurally unfair given that HWC is already engaged in these NEMA EIA processes, investigating and determining whether a threat indeed exists to a heritage resource.

C. Proposed way forward

DEA&DP proposes that you immediately withdraw your Section 29 provisional protection, as allowed in terms of Section 29. (1) (b) of the NHRA, which confirms that: "... *or a provincial heritage resources authority, may,by notice in the Provincial Gazette...-(b) withdraw any notice published under paragraph (a).*

This withdrawal will then again allow the NEMA EIA/HWC NHRA Section 38 processes to continue, including the investigation of any potential heritage resources investigations of potential threats, which information may then be considered in accordance with the existing DEA&DP/HWC OA/SOP.

We look forward to your decision in this regard.

Yours sincerely



PIET VAN ZYL
Head of Department
Environmental Affairs and Development Planning
Date: 18 May 2018

Copies:

1. Mr Mxolisi Dlumuka, CEO Heritage Western Cape
(ceoheritage@westerncape.gov.za)
2. Mr Brent Walters, HOD Cultural Affairs and Sport
(Brent.Walters@westerncape.gov.za)
3. Mr Anthony Barnes, Department of Environmental Affairs and Development
Planning (Anthony.Barnes@westerncape.gov.za)
4. Mr Zaahir Toefy, Department of Environmental Affairs and Development
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APP 1



Western Cape Government
Environmental Affairs and
Development Planning



Western Cape Government
Cultural Affairs and Sport



OPERATIONAL AGREEMENT/

STANDARD OPERATING PROCEDURE (SOP):

COORDINATION OF

**HERITAGE IMPACT ASSESSMENTS (HIAs) &
ENVIRONMENTAL IMPACT ASSESSMENTS (EIAs)**

June 2014

Sign Off and Date of Effect of this Operational Agreement /
Standard Operating Procedure (SOP)

This Operational Agreement/Standard Operating Procedure (SOP) is hereby agreed by the Western Cape Provincial Heritage Resources Authority (Heritage Western Cape) (HWC) and the Department of Environmental Affairs and Development Planning (DEA&DP) for implementation

from the following date of effect: 6 month period starting 1st July 2014

All amendments to this Operational Agreement/SOP will be jointly decided by HWC and DEA&DP and will only come into effect once reduced to writing.

A. B. Hall

Andrew Hall

Chief Executive Officer: Heritage Western Cape

24 June 14

Date

G. Gerber

Gerhard Gerber

Director: Development Facilitation (For: Head of Department)

Department of Environmental Affairs & Development Planning

24 June 2014

Date

PREAMBLE

ACKNOWLEDGING that-

everyone has the right to an environment that is not harmful to his or her health or well-being, and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;

environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably;

sustainable development requires the consideration of all relevant factors including that the disturbance of landscapes, sites, buildings and objects that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;

with respect to every application for an environmental authorisation ensure that, amongst other requirements, the actual and potential impacts on cultural heritage and the national estate be identified, predicted, investigated, assessed and evaluated to the extent necessary;

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

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

INTRODUCTION

In terms of Section 24(2) the National Environmental Management Act of 1998 (Act No. 107 of 1998) (NEMA) certain activities have been identified which may not commence without environmental authorisation from the environmental authority and which must be subjected to environmental impact assessment (EIA).

Section 38 of the National Heritage Resources Act of 1999 (Act No. 25 of 1998) (NHRA) lists certain development activities and requires that any person who intends to undertake such development activities must first give notice to the heritage resources authority to determine if a heritage impact assessment (HIA) will be required. If a heritage assessment is required then the person may only proceed once the approval of the heritage authority has been obtained.

In order to avoid duplication and allow for coordination in terms of the requirements in terms of NEMA and the NHRA, Section 38(8) of the NHRA states that if the development activities listed in Section 38(1) must be subjected to EIA in terms of NEMA, then a separate HIA and approval from the heritage resources authority are not required, provided that the environmental authority must:

- ensure that if the relevant heritage resources authority requires an HIA it fulfils the requirements of the heritage resources authority, &
- any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the environmental authority's consent.

As such, if a NEMA EIA is required for the development activities listed in terms of Section 38 of the NHRA, then it is not permissible for a separate HIA and EIA process to be followed and separate decisions to be followed. An EIA process will be followed and if the heritage resources authority requires a HIA, then the HIA will be undertaken as one of the EIA specialist studies, but the environmental authority must ensure that the heritage resources authority's requirements in terms of the assessment are met. In such instances it is also not permissible for a separate heritage approval to be issued, but the environmental authority must take into account the comments and recommendation of the heritage resources authority prior to granting or refusing environmental authorisation.

STANDARD OPERATING PROCEDURE: HIAs AND EIAs

HIAs & EIA Basic Assessment

See attached Excel Sheet (sheet 1).

HIAs & EIA Scoping & Environmental Impact Reporting

See attached Excel Sheet (sheet 2).

Weeks

Integrated Heritage Impact Assessment (HIA) & Environmental Impact Assessment (EIA) Basic Assessment (BA) Process June 2014

Process	Responsibility		Timeframe																																		
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	
1. EAP to submit the EIA Application Form to DEA&DP. It must clearly be indicated if Section 38(1) of the NHRA will be triggered or if the EAP / Heritage Practitioner is of the opinion that the development/activity will not change the character of the site in terms of Section 38(1)(c) of the NHRA.	EAP																																				
2. DEA&DP to respond to the applicant (copied to EAP & HWC) confirming the EIA process requirements & indicating that: a) if Section 38(1) of the NHRA is triggered, a Notice of Intent to Develop (NID) must be submitted to HWC; or b) if the EAP is of the opinion that the development/activity will not change the character of the site (exceeding 5 000m2 in extent, or involving 3 or more existing even or subdivisions thereof, or involving 3 or more even or divisions thereof which have been consolidated within the past 5 years), a request for confirmation of the applicability of Section 38(1)(c) of the NHRA must be submitted to HWC; & c) if a HIA is required by HWC, the HIA must be undertaken as a specialist study as part of the EIA process.	DEA&DP																																				
3. EAP / Heritage Practitioner to submit to HWC (& simultaneously submit a copy to DEA&DP): a) if Section 38(1) of the NHRA is triggered, a NID; or b) if the EAP / Heritage Practitioner is of the opinion that the development/activity will not change the character of the site, a request for confirmation of the applicability of Section 38(1)(c) of the NHRA must be submitted to HWC; which NID/request must: a) clearly indicate that an EIA is required; b) must provide the DEA&DP EIA Reference Number & Case Officer contact details; & c) be accompanied by a copy of the EIA Application Form submitted to DEA&DP & a copy of DEA&DP's letter or response. (Note: the copy to be submitted to DEA&DP does not have to contain a copy of the EIA Application Form or DEA&DP's letter of response.)	EAP/Heritage Practitioner																																				

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<p>4. HWC to respond to the NID/Request to DEA&DP (to the relevant DEA&DP EIA case officer & citing the DEA&DP EIA Reference Number) & copy the applicant & practitioner, indicating:</p> <p>a) that Section 38(1)(C) of the NHRA is not triggered as there will be no change in the character of the site; or</p> <p>b) that Section 38(1) is triggered, but that an HIA will not be required; or</p> <p>c) that Section 38(1) is triggered, that an HIA will be required & must be undertaken as one of the specialist studies of the EIA, & the requirements in terms of the HIA (including which registered heritage conservation bodies to be consulted with).</p> <p>Note.</p> <ul style="list-style-type: none"> - in terms of a) and b) above, HWC should provide their final comments in terms of the development/activity or indicate whether HWC want to be further consulted with during the EIA process. - in terms of c), while an initial indication of the HIA requirements will be provided by HWC in response to the NID/request, the final requirements must be indicated when HWC provides comments to DEA&DP on the draft Basic Assessment Report (BAR). Once the BAR has been accepted by DEA&DP no further opportunity exist to request additional information. If there is a need for the requirements for the HIA to be clarified, DEA&DP will liaise/meet with HWC to clarify the requirements, thereafter the applicant & practitioners will also be informed of the clarification. 	<p>HWC</p> <p>14 days</p>	<p>Applicant, EAP, Heritage Practitioner, DEA&DP & HWC</p> <p>N/A</p>
<p>5. Early-process screening meeting: The applicant/EAP might request or DEA&DP or HWC might require that the applicant & EAP attend an early-process consultation/screening meeting with the DEA&DP and HWC to screen the process requirements.</p>	<p>EAP</p> <p>21 days</p>	<p>EAP</p>
<p>6. EAP to notify I&APs (incl. the State departments) (incl. placing notice(s) in the media) of the EIA applications & HIA & calling for people to register & provide initial comments. The registered heritage conservation bodies for the geographical area in question &/or the category of heritage resources must also simultaneously be notified.</p>	<p>EAP & Heritage Practitioner</p> <p>30 days</p>	<p>EAP & Heritage Practitioner</p>
<p>7. EAP to compile the draft Basic Assessment Report (BAR), including the HIA & EMP, & submit it to DEA&DP, & simultaneously provide a copy to HWC.</p>	<p>DEA&DP & HWC</p> <p>14 days</p>	<p>DEA&DP & HWC</p>
<p>8. DEA&DP & HWC to acknowledge receipt of the draft BAR.</p>	<p>EAP</p> <p>40 days</p>	<p>EAP</p>
<p>9. EAP to notify the registered I&APs (incl. the State departments) & simultaneously notify the registered heritage conservation bodies of the availability of the draft BAR (including the draft HIA) & for a 40-day commenting period.</p>	<p>DEA&DP</p> <p>40 days</p>	<p>DEA&DP</p>
<p>10. DEA&DP to request comments from the relevant State departments on the draft BAR (including the draft HIA)</p> <p>Note: DEA&DP will specifically be requesting HWC to study the draft BAR & draft HIA in order to confirm that the heritage impacts were adequate assessed & addressed. Even if Section 38(1) of the NHRA were not triggered, the DEA&DP will and a Section 240 letter to HWC for inputs in terms of potential heritage impacts in the "national estate" (section 24(4)(b)(ii) of NEMA refers).</p>		

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<p>11. HWC to comment on the draft BAR & draft HIA to DEA&DP & copy the applicant & EAP, indicating that: a) the heritage impacts were not adequately assessed & providing only an interim comment in terms of the shortcomings of the heritage assessment; or b) the heritage impacts were adequately assessed & providing final comments on the heritage assessment & comments & recommendations in terms of the outcome of the application.</p>	HWC	40 days	
<p>12. DEA&DP to scan the draft BAR & provide advice to the EAP in terms of producing the final BAR. Note: if there is a need for comments, to be clarified, DEA&DP will liaise/meet with HWC to clarify the comment.</p>	DEA&DP	40 days	
<p>13. EAP & Heritage Practitioner to consider all the comments received & complete the final BAR & HIA.</p>	EAP & Heritage Practitioner	14 days	
<p>14. EAP to make the final BAR & HIA information available to the registered I&APs & registered heritage conservation bodies for a 21-day commenting period, & provide an electronic copy to DEA&DP. Note: As a registered I&AP, the final BAR will also be made available to HWC.</p>	EAP	21 days	
<p>15. HWC to comment on the final BAR & final HIA to DEA&DP & copy the applicant & EAP indicating: a) the heritage impacts were still not adequately assessed & providing only an interim comment in terms of the remaining shortcomings of the heritage assessment; or b) the heritage impacts were adequately assessed & providing final comments on the heritage assessment & comments & recommendations in terms of the outcome of the application.</p>	HWC	21 days	
<p>16. Following the commenting period the EAP to consider the comments received & submit the final BAR together with & comments received on the final BAR to DEA&DP. Note: Where the heritage impacts were still not adequately assessed (Point 15 (a)), the EAP must ensure that heritage impacts are adequately assessed. If required a meeting between the EAP & HWC may take place to discuss the additional heritage requirements to ensure that these are addressed & included in the final BAR.</p>	EAP	14 days	
<p>17. DEA&DP to acknowledge receipt of the final BAR.</p>	DEA&DP	14 days	
<p>18. DEA&DP to, if in order, accept the final BAR & inform the applicant & EAP, & copy HWC.</p>	DEA&DP	30 days	
<p>19. After having accepted the BAR, DEA&DP to decide whether to grant or refuse Environmental Authorisation. Note: if needed, DEA&DP will liaise/meet with HWC to discuss the possibility that DEA&DP might differ from the comments & recommendations made by HWC.</p>	DEA&DP	30 days	
<p>20. DEA&DP to inform the applicant of its decision, & to copy the EAP & HWC.</p>	DEA&DP	2 days	

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25	HWC to comment on the final EAR & find/HM to DEADDP & copy the applicant & EAP, indicating	HWC	21 days
26	The heritage impact were not adequately assessed & assessed only on interim basis in terms of the shortcomings of the heritage assessment. The heritage impacts were adequately assessed & providing final comments on the heritage assessment & comments & recommendations in terms of the outcome of the application.	HWC	21 days
27	Note: If there is a need for the HWC comment to be clarified, DEADDP will liaise with HWC to copy the comment.	EAP	14 days
28	Following the comment received from EAP to submit the final EAR together with the comment received on the final EAR to DEADDP.	DEADDP	14 days
29	DEADDP, in order, to accept the final EAR & return the applicant a EAP & copy HWC.	DEADDP	60 days
30	After having accepted the EAR, DEADDP to decide whether to grant or refuse Environmental Authorisation.	DEADDP	45 days
31	Note: If needed, DEADDP will liaise with HWC to discuss the possibility that DEADDP might differ from the comments and recommendations made by HWC.	DEADDP	2 days
32	DEADDP to inform the applicant of its decision, & to copy the EAP & HWC.	DEADDP	2 days