Western Cape Government
Environmental Affairs and Development Planning

APPEAL ADMINISTRATOR

APPEAL FORM
In terms of the National Appeal Regulations

April 2019

Form Number: 2019

Note that:

1. This appeal must be submitted within **20 days** of being notified of the decision.
2. This form is current as of **April 2019**. It is the responsibility of the Appellant to ascertain whether subsequent versions of the form have been released by the Appeal Administrator.
3. This form must be used for appeals submitted in terms of National Appeal Regulations, 2014 in so far as it relates to decisions in terms of the:
   a. Environment Conservation Act, 1989 (Act No. 73 of 1989);
   b. National Environmental Management Act, 1998 (Act No. 107 of 1998);
   c. National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004);
   d. National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004);
   e. National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008); and

   subordinate legislation made in terms of these laws.
4. The required information must be inserted within the spaces provided in the form. The sizes of the spaces provided are not necessarily indicative of the amount of information to be provided. The spaces may be expanded where necessary.
5. Unless protected by law, all information contained in, and attached to this application, will become public information on receipt by the Department.
6. A digital copy of this form may be obtained from the Department's website at http://www.capegateway.gov.za/dept/eadp.
7. Please consult the National Appeal Regulations (dated 8 December 2014) and the Department's Circular EADP 0028/2014 on the "One Environmental Management System" and the EIA Regulations (dated 9 December 2014), and any other relevant regulations.

A. DECISION BEING APPEALED

1. Reference Number of the Decision being appealed:

____ *DEA&DP Reference Number: 16/3/3/1/A7/17/3001/20* _____

2. Type of Decision being appealed (please circle the appropriate option):

Environmental Authorisation	24G Administrative Fine	Amendment of Environmental Authorisation	Amendment of Environmental Management Programme	Waste Management Licence	Atmospheric Emission Licence	Exemption Notice
Permit in terms of NEM: BA	Administrative Notice/ Directive	ECA: OSCA Permit	Other			

3. Brief Description of the Decision:

Environmental Authorisation for the re-development of the River Club, Observatory for a Mixed Use development and associated infrastructure on the remainder of Erf 15326 and Erven 26169-26175, 26426-26427, 108936 and 151832, Observatory

4. Date of the decision being appealed (i.e. date on which the decision was made):

Date of the Decision: 20th August 2020
Date on which Interested and Affected Parties were informed: 21st August 2020

B. APPELLANT'S INFORMATION

5. Please circle the appropriate option

Applicant	State Department / Organ of State	Interested and Affected Party

6. Appellant's information:

Name: Leslie London, acting as Chairperson of the Observatory Civic Association

Address: 14 Neath, Road, Observatory

Tel: _____ Cell: 0791896368

Fax: _____ Email: leslie.london@uct.ac.za; chair@obs.org.za

C. APPEAL INFORMATION

7. Did you lodge an Appeal submission within 20 days of the notification of the decision being sent to you?

Yes / **No** (Circle the appropriate response). If "Yes", attach a copy herewith.

8. The following documents must accompany the appeal submission, kindly indicate if they have been attached to the submission:

8.1 a statement setting out the grounds of appeal?;

Yes / **No** (Circle the appropriate response)

8.2 supporting documentation which is referred to in the appeal submission?

Yes / **No** (Circle the appropriate response)

8.3 a statement, including supporting documentation, by the appellant that a copy of the appeal was submitted to the applicant, any registered interested and affected party and any organ of state with interest in the matter within 20 days from:

8.3.1 the date that the notification of the decision was sent to the registered interested and affected parties by the applicant.

Yes / **No** (Circle the appropriate response).

Please indicate the date on which a copy of the Notice of the decision was sent. 21st August 2020

OR

8.3.2 the date that the notification of the decision was sent to the applicant by the competent authority, issuing authority or licensing authority.

Yes / **No** (Circle the appropriate response).

Please indicate the date on which a copy of the Notice of the decision was sent. 20th August 2020

D. GROUNDS OF APPEAL

9. Set out the ground/s of your appeal: Clearly list your appeal issues and provide an explanation of why you list each issue.

1. Who the Appellant represents:

1.1 I write this appeal as the Chairperson of the Observatory Civic Association. Although we are lodging one appeal, I draw your attention to the fact that a petition campaign we ran this year has the support of over 17 000 signatories opposing the BAR of whom more than 10000 are South African residents concerned about the threat to heritage and the environment posed by this development.

1.2 We also draw your attention the fact that, consistent with multiple comments from heritage experts including the committees of Heritage Western Cape, and the findings of the Ministerial Appeal Tribunal on the Provisional Protection Order for the River Club, the River Club site comprises a precinct which is of very high heritage value, probably of provincial if not national heritage status. For that reason, more than 60 First Nation groups, Civic Associations and environmental NGOs have supported an application for the grading of the Two Rives Urban Park, including the River Club, as a Provincial Heritage Resource. This was submitted to HWC in February 2020.

1.3 Many of these individuals and groups are registered as Interested and Affected Parties and will be able to show their endorsement of our appeal through the DEADP appeal process. We therefore wish to indicate how strongly a very large number of people and organisations feel about the wrongfulness of the decision and how broad-based that concern is across the Western Cape, South Africa and the world.

1.4 I now turn to the direct grounds for appeal.

2 Grounds for Appeal – Heritage

2.1 The decision-maker failed to take into account the concerns that the development proposed will irrevocably destroy the rich heritage resources of the River Club site which is an integral part of the Two Rivers Urban Park. This is explicitly articulated in the final comments of Heritage Western Cape (dated 13th February 2020) which make it clear that

a. The Two Rivers Urban Park, of which the River Club is an integral component, is of highly significant cultural value in the interplay between natural and human-made landscape, and that this interplay defines a cultural landscape that is of 'at least provincial significance, if not of national significance.'
b. The cultural value is linked to the site being recognised as 'a sacred space' and its 'open, largely-underdeveloped floodplain' is a 'tangible reminder of intangible heritage,' which has profound historical importance involving the first colonial settlement, the dispossession of the indigenous people and their exclusion from their ancestral land. The site 'is a place which speaks to who we are now, and from where we have come, not just as a City, or a Province, but as a Nation.'
c. The height and bulk of the proposed development is incompatible with the heritage value of the site. HWC commented "The bulk and mass of the development proposal does not respond to the site as a living heritage."
d. Instead of providing "an assessment of significance that would assist in informing an appropriate development", the River Club HIA conducted an assessment 'tailored to arrive at mitigation for the development' which allowed the HIA report to 'contend that there are hardly any heritage indicators for development.' HWC rejected this view and considered it 'short-sighted to relegate the significance of the site' to 'a set of post-rationalised and confined areas of significance, primarily based on ecological rather than cultural values and to isolate the

subject site from the broader cultural landscape.' HWC concluded 'HIA has unfortunately reduced this significance to a set of ecological values. provided for the most part to post-rationalize a wholly intrusive development model.'

e. HWC continued to comment that the HIA was incorrect to 'base significance on ecological rather than cultural values' and errs when it 'reduces the acknowledge and farm wider cultural landscape of the valley to just the river(s). This argument 'negates in its entirety the exceedingly high historical and symbolic significance of the site', a significance 'submitted continuously throughout the process by the relevant I&APs.'
f. The fact that the site has been 'considerably disturbed' cannot be a justification to destroy the open space or to "take away the meaning of the site as a historic frontier or point of containment, conflict and contact, or its significance to the region."
g. These concerns <u>are similar to those raised by the OCA (and many other stakeholders</u>) in our comments on the Heritage Impact Assessment consistently since February 2018 but have been consistently ignored by the HIA consultant and the developer. For example,
    i. On the 2nd May 2019, we noted that "While the new draft purports to have responded to comments made by IA&Ps previously, we do not believe the new draft has sufficiently interrogated not addressed concerns raised for at least some of the points that the OCA raised in March 2018."
    ii. Again on the 11th May, we noted in a follow up to the consultants that "We are therefore still of the opinion that a range of key issues have not been adequately considered in the HIA or have not been adequately characterised in the HIA."
    iii. Again, on the 14th February 2020, we noted 13 points on previous submissions to which the developers had either not responded or not responded adequately. Four of these were key heritage failings of the proposal. We commented that "We support the position of IACOM and have been pointing out many of these arguments for some time already but the heritage practitioner has consistently not responded to these arguments."
h. In sum, this illustrates <u>a pattern</u> that the developers and their consultants <u>were not responsive to key concerns of Interested and Affected Parties related to heritage and other matters in this process</u>. The nett result is a development that is hugely damaging and disrespectful of heritage.
i. Our belief that the HIA failed to address heritage concerns adequately is consistent with the fact that HWC concluded that <u>the Developer's Heritage Impact Assessment failed to comply with provisions of Section 38(3) of the National Heritage Resources Act</u>.

2.2 Despite this overwhelming evidence, the letter of decision fails to deal with this obvious problem – that the impacts on heritage are not acceptable. Purporting to set out reasons for the authorisation in Annexure 3, Section 3.2, the decision-maker appears to have (a) materially misrepresented arguments; (b) accepted without question the views of the Developer's consultant over those of the HWC experts and other I&APs and (c) failed to engage the substance of the concerns in coming to his decision.

a. I tabulate below a set of statement made in section 3.2 which appear to materially misrepresent what is actually the case, along with why these statements are wrong.

Decision-maker's statement	Why this statement is wrong or misrepresented	Evidence
Since then, the preferred alternative of the proposed development has changed in order to address the	This statement implies that the proposed development has been responsive to heritage concerns, which is	Paragraphs 101 to 106 of the HWC final comments: "It is unfortunate that the engagement with First

concerns relating *to inter alia*, the heritage significance of the site …	not the case.	Nations groupings did not materially change the design approach in a manner which is reflective of the intangible heritage significances identified. The HIA fails in this regard as there is no meaningful consideration of alternatives, whatsoever."
HWC confirmed in their final comment dated 13 February 2020 *"What is noted is that a s29 provisional protection does not preclude an applicant from making an application (indeed s29(10) of the NHRA makes provision for this)".*	This statement is quoted out of context. It gives the impression that HWC was not concerned about an imminent threat to heritage from a development application.	The final comments of HWC dated 13 February 2020 also expressly states as follows: "in spite of HWC having previously advised that whilst individual land owners are entitled to proceed with an HIA for their own development, to ignore the existing studies and the bigger TRUP picture could be "at their own peril" and "That the applicant has chosen to proceed with the application. without meaningful reference to any of the previous studies is regarded as unfortunate."
All the concerns raised by I&APs were responded to and adequately addressed during the public participation process	This statement is completely without foundation as the concerns of the I&APs have not been addressed. This is as much the case for the OCA as one of many stakeholders, but the evidence is clearest with regard to the concerns of HWC.	HWC noted the HIA does not comply with the requirements of Section 38 of the NHRA and urged DEADP to engage with HWC before making a decision on the Final BAR. The account of the engagement in Annexure 3 can only be described as feeble on the part of the decision-maker. A meeting between HWC IACOM and DEADP was planned but never took place. Instead, a 'written response to HWC's correspondence was provided by the heritage specialists.' Note that these were the same heritage specialists who were

		criticised for an inadequate HIA that failed to meet the standards of the NHRA and who persisted in a post-rationalised attempt to mitigate a given development. Yet, it appears that the Decision-maker was satisfied that the need to engage with HWC could be substituted by a written response from a heritage specialist with a conflict of interest in the matter. This is completely preposterous as a process said to have 'adequately addressed' heritage concerns.

b. I tabulate below a set of statements made in section 3.2 which simply take at face value the assertions or interpretations of the developer and do not offer any critical engagement with these assertions. It appears that the decision-maker has not read the comments of HWC or the various I&APs, since, if he had done so, the evident fault in these statements would be obvious.

Decision-maker's statement	Why accepting the developer's position is incorrect
The specialist noted that no tangible remnants of the actual events have been found thus far.	HWC noted in Para 24 that the site "… *has associated links with post events, persons,* uses, c*ommunity memory, identity and oral history. It possesses* a *strong sense of Pla*ce." In Para 63, HWC noted "It is not just the riverine corridor, (unrehabilitated or not). but the entire TRUP valley including the riparian corridor which is noted as highly significant and is expressed in both its tangible and intangible qualities. This has been recognized and assessed in previous reports considered by HWC, a significant number of other stakeholders, and indeed the IA Com. and HWC itself in taking the step lo provisionally protect the site in terms of s29 of the NHRA." And in Para 110, HWC noted, "the open, largely undeveloped floodplain is a tangible reminder of intangible heritage."
The specialist indicated that the Liesbeek River corridor and its confluence are powerful historical symbols of the early landscape of pre-colonial transhumance use, colonial settlement and agriculture,	HWC noted (para 47) that 'Arguing that the *"river itself* is *the only tangible visual element which survives as a resource which* warrants *protection",* negates in its entirety the exceedingly high historic, and symbolic significance of the site." In para 61, the HWC notes that "The values attributed to the site by the stakeholders have not been carried through into the

which is claimed as a living heritage site by the First Peoples groups.	report and have therefore not adequately informed the unique significance of the site and appropriate development indicators. This is a methodological problem that the HIA does not address."
The specialist noted that while the landscape remains, it is in a transformed state.	HWC noted (para 79) that "the statement that the sense of place has already been transformed iteratively over the post 80 years, does not make it acceptable to destroy what remains."
According to the BAR, the most significant heritage resource close to the site is the South African Astronomical Observatory ("SAAO"), which has Grade I heritage status due to its scientific history. The core historic structure at the SAAO (built in 1822) is centrally situated,	The BAR HIA has consistently underplayed the significance of the Open Space of the floodplain and has chosen to link tangible heritage to the SAAO located outside the River Club site (see para 63 and 110 of HWC comments) and attempted for confine recognition of intangible heritage to the river.
… two reports (compiled by Afmas Solutions and dated November 2019) … dealt with the views of several First Nations groupings regarding the wider Two Rivers Urban Park area and regarding the proposed site. The views of the First Nations groupings to 'indigenise' the proposed site have been incorporated into the proposed development.	It is preposterous that the decision-maker can consider the two reports compiled by Afmas as evidence of incorporation of the First Nation views into the proposal 1. No mention is made of the many First Nation Groups who disagree with the proposal and have objected. Their views have not been incorporated into the development but have actively suppressed by the developer. Not a mention is made anywhere in the HIA nor in the decision-makers narrative of such strong opposition. It is the simultaneous silencing of indigenous dissenting voices whilst giving attention only to those who agree that is the hallmark of the colonial exercise of oppressive power. It is no different to apartheid planning. The conclusion must be that the decision-maker is biased in siding with only those groups who support the development; 2. The consultant who wrote the Afmas reports had an undeclared conflict of interest in that he was contracted to produce a baseline report for the DPWT regarding the TRUP but did not reveal to participants in his work that he was also contracted by the River Club to prepare a report for the private development. The DPWT representative confirmed in a Heritage Appeal Tribunal meeting DPWT were unaware the consultant was also contracted to the River Club. 3. HWC expressed a number of concerns with this report including the fact that the scope of engagement resulted in a number of groups electing to not participate fully; the research process was contested by participants in the engagements; the impartiality of the research questions is not clear to the committee; the methodology for the engagement does not appear to follow accepted oral history; interviewing protocols (for

	example, no ethical clearance forms were supplied); the confusion between this report and the DT&PW-commissioned report brings the ethics around the engagement into question (paragraph 97). HWC concluded that "the engagement of interested and affected parties, while undertaken in response to the interim comment dated 13 September 2019, still does not comply with Section 38(3) (e) of the NHRA." At the very least, one would expect the decision-maker to have grappled with these very serious concerns before coming to any conclusion that "views of the First Nations groupings to 'indigenise' the proposed site have been incorporated into the proposed development." Such a statement is clearly biased given the facts at hand.
The views of the First Nations groupings to 'indigenise' the proposed site have been incorporated into the proposed development. This includes, *inter alia,* the establishment of an indigenous garden, the establishment of a cultural, heritage and media centre, the establishment of a heritage eco trail, an amphitheatre for cultural performances and the use of symbols and names throughout the proposed development.	HWC (para 114): "The Committee also noted that a 'memorial'/ 'museum' and recreated river courses are inadequate in commemorating the significance of the site and appear to be designed to create meaning rather than attempt to enhance identified heritage significances. It is the opinion of the committee that the site is of sufficient significance within itself and does not need to be imbued with meaning. The bulk and mass of the development proposal does not respond to the site as a living heritage."
the River Club site has high historical significance, but also that this significance is not visible or apparent.	This statement is completely contradictory. Even if the significance is not visible (in buildings or ruins), it still is a site of significance, which HWC identified as located in the Open Space, not just in the river. It exists in the current embodiment and does not need recovery of a riverine corridor to create meaning. Far from preserving any 'sense of openness' crucial to the site, the mega-development will destroy precisely the intangible heritage that 'is not visible or apparent' (to some). So, the logic of this statement is inexplicable. But the decision-maker does not question this statement at all. Note that the TRUP comprises one of three sites nominated by the Department of Culture, Arts and Sport as part of the Resistance and Liberation Heritage Route (RLHR), which is a national project to establish a heritage route commemorating sites associated with the resistance and liberation heritage of South Africa. National Cabinet approved the implementation of the National Khoi and San Heritage Route as a national legacy project on June 10 2020. It

	is therefore inexplicable that the decision-maker could agree with the HIA consultant that 'this significance is not visible or apparent."
Although the visual openness of the proposed site is highly valued, the existing development on the proposed site does not signal any heritage or cultural significance.	Again, this statement, drawn from the heritage specialists (March 31 response) is illogical. If one accepts the HWC explanation that the intangible heritage of the site lies in the Open Space, it is unclear how heritage or cultural significance can only be counted in relation to the 'existing development on site.' The decision-maker appears to accept this at face value as some kind of rationalisation for a decision and does not question this statement at all.

2.3 Given (a) materially misrepresented arguments and (b) arguments from the Developer's consultant accepted without question over those of the HWC experts and other I&APs, as outlined above, I hereby explain how the decision-maker has failed to engage the substance of the heritage concerns in coming to his decision.

2.3.1 Nowhere in the Annexure 3 does it explain or give reasons why the decision was made to ignore the fact that the Heritage Impact Assessment was deemed to have failed to meet the requirements of the National Heritage Resource Act by the competent authority to make such an assessment (Heritage Western Cape). No reasons are given to discount this recommendation from Heritage Western Cape. In other words, the decision does not reflect the required equilibrium necessary, 'between the range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area'. See in this regard the judgement in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)* at para 44[1].

2.3.2 What is presented in the penultimate paragraph of section 3.3 of Annexure 3 is an account of what happened, not a reasoning of why the HWC comments were ignored. A meeting was meant to happen to allow for engagement between DEADP and HWC but this meeting did not happen. We are treated to a sentence by sentence account of what happened and a reprise of what the developers' consultant said in a report dated 31 March 2020 that was not circulated to I&APs for comment.

2.3.3 So, instead of the decision-maker applying their independent assessment to the facts at hand, we are asked to accept at face value what the developer's consultant asserts has been evidence of 'concerns' being 'adequately responded to.'

2.3.4 Notwithstanding the procedural irregularities (see below, section 6), there are two grounds why the fundamental problems articulated by HWC cannot be accounted for by "an opportunity to commemorate and incorporate the views of the First Nations Collective."

a) Firstly, there have been multiple First Nation groups objecting to this development, which neither the HIA acknowledge, nor does the decision-maker. Notably, the decision-maker ignores the fact that the First Nations Collective is one grouping that has been very vocal and divisive in challenging any opposition to the development but only appeared in the I&AP process <u>after the developers were exposed at the Heritage appeal tribunal as having failed to engage with the First Nation groups</u>. By welcoming an "opportunity to commemorate and incorporate the views of the First Nations Collective" but ignoring the fierce opposition of many First Nation groups as well as HWC, the decision-maker appear prima facie to be biased in his decision making.

[1] http://www.saflii.org/za/cases/ZACC/2004/15.html

b) Note as well, that the statement that this opportunity "exists in a space that currently displays no heritage significance" is grossly mistaken given the extensive recognition in the HWC comments that the site is of very high heritage significance.

c) Secondly, HWC further noted that sequestering heritage commemoration within an activity or structure (be it an indigenous garden, a cultural heritage and media centre, an amphitheatre for cultural performances, and use of indigenous symbols and names throughout the site) cannot compensate for loss of heritage should the site as a whole be obliterated, which it will by the immense scale and bulk of the development, should it go ahead.

2.3.5 So, instead of the decision-maker applying their independent assessment to the facts at hand, we are asked to accept at face value what the developer's consultant asserts has been evidence of 'concerns' being 'adequately responded to.'

2.3.6 HWC noted that, to commemorate the significance of the site, one must enhance identified heritage significance, rather than find strategies to create meaning, which is what the HIA tries to do. The problem with the HIA and which the DEADP authorisation fails to recognise is that the HIA refuses to carry through "the values attributed to the site by the stakeholders." It is inauthentic.

2.3.7 It is particularly striking that the decision maker comments that the heritage specialists 'noted' the HWC belief that the TRUP may have national or provincial services and also that they 'recognise that the River Club site has high historical significance' but the only solution to this is the 'recovery of the Liesbeek riverine corridor'; yet HWC specifically rejected this view that the *"river itself* is *the only tangible visual element which survives as a resource which* warrants *protection" because it "*negates in its entirety the exceedingly high historic, and symbolic significance of the site." They refer to "the site's open, green qualities as a remnant of landscape that has considerable intangible historical and cultural heritage significance" as the "most important heritage resource" of the site (para 77). Clearly, the decision-maker could not have read the HWC report with sufficient attention if he felt that the HIA consultants' argument that restoration of the riverine corridor could "restore visible and apparent meaning."

2.3.8 In summary, the 14 paragraphs (1669 words) in section 3.2 of Annexure 3 do not provide clear reasons for why the Decision-maker discounted the findings of the Heritage Western Cape which are consistent with our heritage objections. The description presented to justify the authorisation by the decision-maker is based on either material misrepresentation of fact or acceptance without questioning of the views of the Developer's consultant over the conflicting views of the HWC experts and other I&APs. The decision does not reflect any consideration of the different viewpoints and conflicting evidence, where such evidence is presented. The decision therefore does not reflect the required equilibrium necessary, 'between the range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area'. See in this regard the judgement in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)* at para 44.

3 Grounds for Appeal – Hydrology

3.1 The OCA noted in its objection of 14th February 2020 that the hydrology report does not make explicit its assumptions and parameters. This is a comment that has not been dealt with. We believe that there are material difference in the flooding likelihood and severity should different assumptions and parameters be applied. But in the absence of such information, we cannot come to any conclusion regarding the veracity of the modelling. Moreover, the fact that 'new measurements' were mentioned to two Observatory homeowners whose houses were at risk of flooding, but there was no updating of the 2018 report, leaves us concerned that the lack of transparency in the modelling assumptions may belie very wide variability in the estimates of risk.

3.2 Sea level change data on which the hydrology study is based is derived from a previous study from 2010. Aurecon have not updated their 2018 study since first submission. Given the rapidity with which Climate Change data are evolving, it is in not appropriate that the estimation of flooding severity and likelihood is based upon sea level rise data that are modelled from a 10-year old study. The fact that the City of Cape Town's Catchment Stormwater and River Management Branch may be using outdated climate change rainfall and sea-level rise assumptions should not justify this project using outdated data to model flooding. This objection was noted in an objection in February in my personal capacity and has not been addressed.

3.3 The modelling ignored the joint occurrence of a Spring high tide and heavy downpours which could result in a push back of water. Spring highs occur twice a month for at least 4 days, high tide twice a day. The hydrology report fails to deal with a swollen stormy sea on a spring high in a heavy downpour, pushing back up the Salt River Canal, blocking the restricted outlet of the combined Black and Liesbeek Rivers, which should be adequately modelled with current Climate Change data on sea level, before an authorisation can be given which will alter the current drainage.

3.4 The BAR provides no new studies on the effects of increases in storm intensity /sea rise / storm surges expected to result from climate change in the medium to long-term as part of planning for and designing this development. The hydrology studies should have taken more recent information and studies into account, including the 2018/19 City of Cape Town Climate Change Hazard, Vulnerability and Risk Assessment rather than rely on data from the 2010 study mentioned in the Aurecon report.

3.5 Additionally, the question of the very deep foundations and extensive basements that are integral to the hard surface of the proposed mega-development on the River Club site interfere with the ability of the soil to absorb water during floods. This was an objection I raised in my personal capacity. This has not been addressed. The response listed in the project document Appendix F2c (Draft_BA_Public_Issues_and_Responses_Summary.pdf) answers a different question.

3.6 Currently, every property owner is entitled in their deeds to have rainwater run-off not impeded by a neighbour. Ordinary residents are not allowed to renovate their properties in ways what will cause flooding of neighbours' properties. For the development at the River Club to proceed, a rezoning would have to be secured which will effectively relieve the River Club of its responsibility for flooding of neighbouring houses. Even a rise of 15cm, which is conceded in the report, will constitute a flooding risk. The decision-making authority has failed to apply his mind to this planning issue.

4 Grounds for Appeal – Planning

4.1 The decision-maker states that "More than 60% of the proposed site will be retained as open space." This is incorrect. The Municipal Planning ByLaw defines Open Space as "*'land … used primarily as a site for outdoor sports, play, rest or recreation, or as a park or nature area* …". Of the 14.7 ha site, podiums comprising the buildings and their covered parking cover 8ha of the site, and internal roads and bridges 1.5ha. That leave about 5.2ha, which is about 35% rather than 65% for potential open space. The figure of 60% open space is a claim made by the developers. It would seem the decision-maker ignored objections made about this figure and has simply taken at face value what the applicants have said. In this matter, the decision-maker has failed to apply his mind to the misrepresentation of fact in the proposal.

4.2 The decision-maker states "Approximately 15.6 ha of open space will be provided in a number of open space areas throughout the site." We are puzzled at this statement which must be a typing error since the entire site is only 14.7 ha in size. If a decision-maker does not note an error of this magnitude, we have to ask how seriously the decision-maker considered all aspects of the development in writing up his decision.

4.3 The decision-maker states that "According to the City of Cape Town's Municipal Spatial Development Framework ("MSDF") (2018), the proposed site is designated as 'Urban Inner Core'. The 'Urban Inner Core' represents the priority development and investment focus for the City at a metropolitan scale.

The MSDF (2018) further maps the proposed site as a proposed heritage area. According to the "Consistency principles and post-2012 amendments, as contained in Technical Supplement D" of the MSDF (2018), lower order spatial plans and policies must be consistent with higher order spatial plans and policies. The MSDF identifies the land as 'Urban Inner Core" and therefore the lower order Table Bay District Plan is inconsistent with the higher order MSDF (which needs to be updated by the City of Cape Town)."

This statement is a material misrepresentation of what the relationship is between different planning documents. The MSDF is a high-level plan which does not override specific zonings or provisions at local level. It provides a broad framework to encourage development in an area designated the 'Urban Inner Core'. However, this has been misrepresented by the Developers and some other government departments supporting the development to imply that any considerations which limit development can be discounted. This is far from the truth. As stated by Heritage Western Cape, the designation as an Urban Core provides for support in principle but "does not override heritage considerations, or indeed, mean that a mega project is appropriate on this particular site." It seems again that the decision-maker has simply absorbed the arguments of the developer without any critical review of these arguments and without applying his mind to the fact, nor taking account of objections that were lodged.

4.4 The decision-maker states that "The proposed development is largely consistent with the draft Two Rivers Local Spatial Development Framework ("LSDF") (dated October 2019)."

While this statement may be true, it is unclear why the decision-maker has accorded such importance to a draft LSDF that has not been completed and which has attracted many objections – including objections that the draft LSDF has been retrofitted to provide a post-hoc justification for the River Club development. Seemingly unable to wait for the conclusion of the LSDF process, both the developers and the decision maker appear to think that the draft LSDF warrants consideration as the planning framework for the area. In that, **they are wrong in law**. The current planning document is the Table Bay Spatial District Plan (SDP) and Environmental Management Framework (EMP) both of which confirm that any development in the area should not 'negatively impact on the historical character of the area.' The decision-maker dismisses the legality of the Table Bay District Plan on the basis of the higher level MSDF. As pointed out above, there is no legal ground for such a claim. The updating of the Table Bay District Plan is still in process through the Two Rivers LSDF and until that process is finalised, the Table Bay District Plan remains the most relevant planning and policy framework available. The decision-maker appears to have erred in a matter of fact with regard to the planning framework.

5 Grounds for Appeal – Climate Change

5.1 The decision-maker has commented that the development is consistent with the City's policy on Climate Change. We do not agree that the construction of a mega project, requiring massive earthworks and displacing the flow of water, whilst permanently destroying a green lung for the City that is also a deeply important heritage site, can be interpreted as balancing a "triple bottom-line." There is no reasoning presenting in this decision that justifies this intrusive and destructive development.

5.2 We draw attention to the factors in the City of Cape Town's 2017 Climate Change Policy and which we raised in our previous objections but which have not been considered in granting this authorisation:

5.2.1 Climate change will likely increase mean sea level and "It is likely that the severity and impact of storm surges will be exacerbated by this factor." This is not accounted for in the hydrology report.

5.2.2 Cape Town's natural ecosystems should be "protected, managed and made resilient to enable these to act as effective buffers to climate change impacts and provide benefits of ecological infrastructure in support of current and future built infrastructure."

5.3 The above points are accentuated in the more recent 2020 City of Cape Town Draft Climate Change Strategy[2] released 19th August 2020 as follows:

5.3.1 Note is made that there will be "increasing intensity, severity, and frequency" of adverse impacts including "Flooding and associated impact on people and infrastructure" and "Damage to infrastructure and property due to severe storms and strong winds."

5.3.2 The 2020 report warns that "the legacy of past planning decisions causes vulnerability due to the location of various infrastructure and the built environment in high risk areas that are not suitable for development due to environmental factors that are exacerbated by climate change." (p7). This is a development in a site that is not suitable for development precisely because environmental factors that are exacerbated by climate change will increase risk of flooding.

5.4 Further, the recently released National Climate Change Adaptation Strategy[3] notes that increasing physical infrastructure resilience and adaptive capacity will require encouragement of "the private sector to build in low climate risk areas" (p30). What we are seeing here is encouragement to build in a high climate risk area, contrary to national policy.

5.5 All three policy documents point to the importance of carefully accounting for the likely vulnerability to climate change caused by development decision. None of this careful thinking is present in the decision-maker's reasoning.

5.6 As indicated in our February 2020 objection, the court judgement on the rezoning decision to permit development in the Philippi Horticultural Area by Judge Savage[4] confirmed the principle that the state must consider climate change and the impact of the development on the aquifer in the context of climate change in its decision-making processes. We argued in our February objection that the impacts on the aquifer as contained in this proposal were only superficially considered from the perspective of the impact of pollution but not from the point of view that the Liesbeek River, if managed differently, could contribute to better and more sustainable recharge of the aquifer, thereby rendering Cape Town more resilient to drought. We attached to that objection a report (Aziz and Winter (2019): Discharge and water quality of the Liesbeek River and implications for stormwater harvesting. Environmental & Geographical Science and Future Water, UCT), which has not been responded to.

5.7 We believe that the studies for the BAR are insufficient to address the requirement set out in Judge Savage's finding and the decision-maker's explanation does not provide reasons why the 'triple bottom line' approach leads necessarily to a conclusion to grant the authorisation. It would seem that the decision-maker's triple bottom line is a bottom line unduly influenced by the economic considerations at the expense of the social and environmental impacts. It is a preferencing of economic development at the expense of the other 'legs' of Sustainable Development.

6 Grounds for Appeal – Procedural irregularities

There are a number of procedural irregularities which we believe clearly render this decision invalid and outline these below.

6.1 Irregular process to resolve the Heritage Impasse

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2 http://resource.capetown.gov.za/documentcentre/Documents/City%20strategies%2c%20plans%20and%20frameworks/Draft_Climate_Change_Strategy.pdf

3 https://www.environment.gov.za/sites/default/files/docs/nationalclimatechange_adaptationstrategy_ue10november2019.pdf

4 Philippi Horticultural Area Food & Farming Campaign and Another v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape and Others (16779/17) [2020] ZAWCHC 8; 2020 (3) SA 486 (WCC) (17 February 2020) at http://www.saflii.org/za/cases/ZAWCHC/2020/8.html

6.1.1 The NEMA envisages a set of processes for an Environmental Authorisation which are clearly laid out. The relevant Heritage Authority must submit its comments on the HIA involved to the decision-making authority who must take these into account in coming to a decision.

6.1.2 The final comments of the HWC were to indicate they did not agree that the HIA met the required standards of a Section 38 process under the NHRA and reiterated "the need for DEADP to engage with HWC as the commenting Heritage Authority on this matter before DEADP takes a decision on the Final BAR."

6.1.3 The comments could not be any clearer.

6.1.4 DEADP did not effect any engagement with HWC. DEADP held a meeting with HWC officials where it was agreed that "further engagement with HWC in the form of a meeting with the relevant HWC officials and the HWC IACOM committee …was required." The description of efforts to arrange such a meeting between DEADP and HWC are, at best feeble, and, at worst, tokenist. Despite the absence of engagement, DEADP went ahead and made a decision to issue the authorisation.

6.1.5 Since DEADP had been part of 18 months of discussion and disagreement in the Heritage Appeal Tribunal about what constituted 'meaningful engagement,' it cannot be argued that DEADP were unaware of what was meant by 'engagement', not that they could think a cursory meeting with some HWC officials could substitute for <u>engagement</u> as clearly set out as required in the HWC comments.

6.1.6 Instead of meeting with HWC, DEADP appears to have used a report responding to the HWC comments written by the Developer's HIA consultant as the basis for "the potential heritage impacts have been adequately assessed and concerns raised have been adequately responded to." There appears to be no basis for DEADP to take such an extraordinary step.

6.1.6.1 Firstly, the consultant works for the applicant in a matter and cannot be impartial when it comes to a decision on authorisation. The relevant decision-maker must make an independent decision about the application based on the documents generated by the legally mandate process. It is extraordinarily brazen for the decision-maker to allow the applicant's consultant to resolve this impasse when the consultant was deemed by HWC to have failed to meet the requirements of the NHRA in his HIA.

6.1.6.2 Secondly, the I&APS did not have sight or notice of the Heritage Consultants March 31st report and could not comment on this report. It is thus highly irregular that the developer's consultant (who is paid by the applicant and has a conflict of interest) should receive an extra opportunity to influence a decision in a way insulated from public scrutiny or comment. This must surely fail the test of a fair procedure consistent with Administrative Justice.

6.1.6.3 Thirdly, the decision-maker has no heritage background or qualification to come to a conclusion diametrically opposed to the findings of HWC. He mostly certainly cannot rely on the applicant's advice for such a decision. He must refer to the competent authority in the matter – <u>by law</u>.

6.1.6.4 Fourthly, HWC explicitly indicated they expected a meeting with DEADP. They did not indicate involving the applicant or his consultant, nor did they envisage a meeting with HWC officials. It appears that the DEADP decision-maker simply deviated from what he had to do. We cannot comment on the motivation why the decision-maker allowed such an irregular process but it does, for most I&APs, reinforce the view that the decision-maker was biased in his approach to the matter and wanted to approve the decision at all costs.

6.1.7 It is therefore asserted that the DEADP decision was (a) biased and (b) premature and (c) failed to meet the requirements for a Basic Assessment under NEMA. The decision should be rejected on procedural grounds.

6.2 DEADP intervened in a Section 29 process under NHRA

6.2.1 The River Club developers were well aware, having been told such by HWC, that, should they pursue a development application for the River Club, it would be at their own risk. HWC had

communicated its intent to grade the TRUP for heritage status and the developers were aware of this. Despite this, the developers went ahead with both a development application and, later, a rezoning application. Because of the imminent threat to heritage, HWC issued a provisional protection order over the River Club in April 2018.

6.2.2 While it is to be expected that the developers would appeal this protection order, and it is unfortunate, though not surprising that they were joined by the Department of Public Works and Transport in appealing the order, what is deeply concerning is that the Department of Environmental Affairs and Development Planning also joined the appeal. In fact, the decision-maker in the application, the director for Development Management, Mr Toefy, was present representing DEADP in some of the hearings of the Appeal Tribunal.

6.2.3 What that means is that the decision-maker in a public participation process (for the BA) intervened in another decision-making process as an active agent, rather than remaining impartial. Since the Tribunal rejected the appeal, it essentially said that a Section 29 and a Section 38 process under the NHRA can run simultaneously without interference in each other's process. However, that is exactly what DEADP chose to do.

6.2.4 As an independent arbiter, DEADP should have remained aloof from the protection order appeal.

6.2.5 The actions of DEADP raise questions of partiality.

6.3 The Acting TRUP Manager for the Department of Public Works and Transport is actually an employee of DEADP

6.3.1 Mr Gerhard Gerber, who was the acting TRUP Manager for the Department of Public Works and Transport, actively resisted the Protection Order, ostensibly on behalf of the DPWT. He was noted in the Directive issued by the chair of the Ministerial Appeal Tribunal (Appendix 1) as one of two officials involved in driving "fruitless and wasteful contestations" that "did not serve the interests of their department" and conducting themselves in a way that "warrants review and censure, where appropriate." (para 89)

6.3.2 As a result of his partisan behaviour, and his forwarding of materials that were prima facie defamatory of a number of I&APs in the Tribunal process to the secretariat of the Tribunal, I lodged a complaint about Mr Gerber's actions.

6.3.3 In the response, we discovered that Mr Gerber was not actually an employee of DPWT but an employee of DEADP, the same decision-making authority in the Environmental Authorisation.

6.3.4 Mr Gerber never declared his employment relationship with DEADP in any public meeting.

6.3.5 In declining to take action against Mr Gerber, the Head of DEADP indicated that Mr Gerber's current position at the Department of Environmental Affairs and Development Planning "is entirely removed from any decision-making capacity in respect of EIAs, which is handled by a Directorate in the Department which sits outside and apart from the one where Mr Gerber is employed." (Appendix 2).

6.3.6 We do not believe that this is sufficient of a firewall between the decision-maker and the actors involved. This is borne out by the content of the discussions at the Heritage Appeal Tribunal, as described below in 6.4.

6.4 The contestation over Section 29 versus Section 38 of the NHRA

6.4.1 In the discussions at the Heritage Tribunal, the appellants, including DTPW and DEADP, were at pains to argue that heritage concerns would be adequately addressed under a Section 38 process and that the Protection Order under Section 29 was not required, was a duplication of effort and could not be justified by an imminent threat to heritage at the River Club.

6.4.2 This was articulated in the papers of the DEADP and by all appellants present in the Tribunal. The HoD for DEADP wrote that the evaluation under Section 38 will suffice, "provided that the EIA evaluation fulfils the requirements of the relevant heritage resources authority … in this instance the HWC) …" and urged HWC to withdraw the protection order to allow a Section 38 process to

continue, “including the investigation of any potential heritage resources investigation of potential threats, which information may then be considered in accordance with the existing DEADP/HWC OA/SOP.” (Appendix 3)

6.4.3 An SOP for coordination of HIA and EIAs between DEADP and HWC was attached to the DEADP HOD papers in the Appeal Tribunal in May 2018. The SOP (attached within Appendix 3) states that “the environmental authority must ensure that if the relevant heritage resources authority requires an HIA, it fulfils the requirement of the heritage resources authority” and “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.”

6.4.4 The SOP is dated June 2014. The fact that the head of DEADP submitted the SOP to the Appeal Tribunal in May 2018 indicates that it was current during this BAR process. We have not been advised that the SOP has been changed and we understand it still remains operational.

6.4.5 It is clear that the SOP was not followed in this case as the authority granted the authorisation despite the fact that the HIA failed to fulfil the requirement of the heritage resources authority and, further, without taking into account the HWC’s comments. In fact, they did not even wait to meet with HWC before issuing the authorisation.

6.4.6 The proceedings at the Heritage Appeal Tribunal were laid out by the chair of the Tribunal in the final directive as follows: DEADP and other appellants “spearheaded a process in terms of Section 38 of the NHRA” in which HWC’s role “changed from being a consenting authority to a commenting authority.” I&APs noted in the Tribunal that there were ‘serious doubt on whether the Section 38 process will ensure the conservation protection of the heritage resources under threat.”

6.4.7 Given the rapidity with which DEADP issued the authorisation and its complete failure to respond to HWC’s recommendations, these I&AP concerns appear perfectly warranted.

6.4.8 I further draw the appeal authority’s attention to a response to a request for reasons directed to the decision-maker (Appendix 4) – particularly related to the absence of any reasons for discounting the HWC comments. In the response, Mr Toefy states (Appendix 5) that “my reasons for the decision are the reasons as provided in Annexure 3.” In other words, there are no reasons provided that reflect the required equilibrium necessary, ‘between the range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area.’

6.4.9 Since Annexure 3 appears both to lack any reasons as envisaged in section 5 (3) of PAJA and to describe a decision-making process that appears to have violated DEAP’s own SOP for handling an EIA, it seems a materially irregular decision.

6.5 All the points above (6.1 to 6.4) reinforce the view amongst I&APs that the decision-maker was biased in the decision and that the decision-maker had decided long before the BA was finalised to get the proposal approved. The lack of clear reasons in Annexure 3 of the decision is evidence that there was no reasoning about contested matters.

6.6 Participation

6.6.1 The Annex claims that “all the concerns raised by I&APs were responded to and adequately addressed during the public participation process.”

6.6.2 We completely dispute that this is the case. We have detailed above some key concerns that have not been addressed at all let alone addressed “adequately.”

6.6.3 In particular, we point out the bias of the HIA and now, seemingly, of the decision-maker in elevating the First Nation Collective to the status of speaking as representative of First Nations.

6.6.4 As we pointed out in our objections, the First Nations Collective did not exist when the first HIA was released nor when the Provisional Protection Order was invoked by HWC in April 2018. The Collective only appeared after the involvement of Mr Rudewaan Arendse in supposedly

researching a report on the First Nations perspective on the TRUP and on the River Club well into the Heritage Appeal Tribunal process in 2019. As indicated earlier, Mr Arendse did not declare any conflict of interest nor tell anyone that he was employed both by the River Club and the DPWT. HWC raised many concerns about his report.

6.6.5 Yet the First Nations Collective and the Afmas report is relied upon heavily, if not exclusively, to defuse criticisms of the HIA and the impact of the development on heritage.

6.6.6 The voices of other First Nation groups, critical of the First Nation Collective and critical of the development are completely silenced in the DEADP decision.

6.6.7 It is the simultaneous silencing of indigenous voices who dissent whilst giving voice only to those who agree with powerful authorities that is the hallmark of the colonial exercise of oppressive power. It is no different to apartheid planning.

6.6.8 Given all the above, we believe this confirms a deep – seated bias on the part of the decision-maker.

7 We believe the evidence above indicates that

7.1 the decision-maker failed to apply his mind correctly to the facts at hand; and/or failed to appreciate the facts at hand; and/or was biased in his assessment of the facts at hand.

7.2 The decision-maker erred in process by not following the department's own SOP and also by allowing an applicant's consultant (the applicant's Heritage expert) to respond on behalf of DEADP to the HWC comments – meaning the decision-maker did not himself apply his mind to the HWC comments. This must surely invalidate the decision he reached as the developer should not be in a position to influence a decision by an impartial authority. In this case, however, it appears the decision-maker did not behave as an impartial authority.

8 We therefore believe the environmental authorisation is fatally flawed and should be rejected completely.

9.1 Is your appeal based on factors associated with the process that was followed by the applicant/Environmental Assessment Practitioner/Competent Authority in reaching the decision?

Yes / **No** (Circle the appropriate response). Please provide details.

We detail both issues of concern to do with process and concern with the substance of the decision.

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9.2 Is your appeal based on factors associated with matters of unacceptable environmental impacts/extenuating circumstances not taken into account by the Competent Authority?

Yes / **No** (Circle the appropriate response). Please provide details.

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These are detailed in the grounds for objection (above).

9.3 Have your appeal issues been raised previously in the public participation process?

Yes / **No** (Circle the appropriate response). Please provide details.

_____

Almost all the matters we raise here have been raised before in the participation process (without success). The additional issues include now relate to either new policies (Appendices 2 and 3) or matters related to the process of finalization of the BAR and the process by which the decision-maker reached his decision. These are matters that could only be raised in appeal now.

9.4 Are you fundamentally opposed to the decision (e.g. to any development activity on the site)?

Yes / **No** / **Not applicable** (Circle the appropriate response). Please provide details.

The Site must first be graded for heritage before any new development application can be considered. We do not accept any development now until heritage grading is established and can guide any development application.

9.5 Are you in favour of the decision if your concerns can be remedied by rectifying the process or by mitigating or eliminating an impact/s of the activity/ies?

Yes / **No** / **Not applicable** (Circle the appropriate response). Please provide details.

The only remedial step is for the site to be graded. We do not believe the current application can be mitigated sufficiently to be consistent with the anticipated grading.

9.6 Please indicate what measures you propose to have your concerns remedied.

1. Withdrawn the authorisation
2. DEADP to meet and engage HWC
3. The River Club to be graded for heritage

_____

9.7 Does your appeal contain any new information that was not submitted to the Environmental Assessment Practitioner (EAP) / or registered I&APs/ or the competent authority prior to the decision?

Yes / **No** (Circle the appropriate response). If the answer above is "Yes" please explain what this information is and why it should be considered by the Appeal Authority and why it was not made available to the EAP/ or I&AP/ or the competent authority prior to the decision. (Please ensure that the new information is attached hereto.)

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Almost all the information referred to are included in documents previously part of the BAR process.

The only new information is information acquired subsequent to the last BAR deadline, or information pertaining to the process in which the BAR EA decision was reached subsequent to the last opportunity for comment in the public participation process.

The information included involves the following:

Document	Inclusion	Why included
Bato Star fishing judgement	As URL	Relevant to decision-makers lack of reasons
Draft_Climate_Change_Strategy CoCT	As URL	Released 19th August 2020
Nationalclimatechange_adaptationstrategy_ue10november2019	As URL	Released in August 2020
PHA judgement	As URL	Referred to in previous submission but URL now included
River Club Heritage Appeal Tribunal Ruling	Appendix 1	Released 14 April 2020
HOD DEA&DP Letter_Prof L London_Complaint re Gerhard Gerber_29072020	Appendix 2	Dated 29 July 2020
DEADP submission to Heritage Appeal Tribunal 18 May 2018 and SOP Coordination HIAs and EIAs	Appendix 3	Relevant to decision-makers lack of reasons and failure to follow procedures
OCA letter reasons for decision	Appendix 4	Dated 26 August 2020
Request for reasons_ River Club EA_27-08-2020	Appendix 5	Dated 27 August 2020

E. SUBMISSION ADDRESS

This appeal must be submitted to the Appeal Administrator at the address listed below within 20 days of being notified of the decision:

By post:	Attention: Marius Venter Western Cape Ministry of Local Government, Environmental Affairs & Development Planning Private Bag X9186, Cape Town, 8000; or
By facsimile:	(021) 483 4174; or
By hand:	Attention: Mr Marius Venter (Tel: 021-483 3721) Room 809, 8th floor Utilitas Building 1 Dorp Street, Cape Town, 8000; or
By e-mail:	DEADP.Appeals@westerncape.gov.za

Note: You are also requested to submit an electronic copy (Microsoft Word format) of the appeal and any supporting documents to the Appeal Administrator.

Leslie London

_____ 8th September 2020

Appellant's signature Date