



**APPEAL: CASE ID: 70396369**

**Appellant: Observatory Civic Association.**

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**APPEAL AGAINST DECISION OF MUNICIPAL PLANNING TRIBUNAL IN  
TERMS OF CITY OF CAPE TOWN MUNICIPAL PLANNING BYLAW TO  
APPROVE APPLICATION FOR REZONING, APPROVAL OF COUNCIL AND  
DEVIATIONS FROM CITY POLICIES IN RESPECT OF ERF 151832,  
6 LIESBEECK PARKWAY (BOUNDED BY LIESBEECK PARKWAY AND  
OBSERVATORY ROADS), OBSERVATORY, CAPE TOWN**

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## 1. INTRODUCTION

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### 1.1 Observatory Civic Association

1. We act on behalf of the Observatory Civic Association, a voluntary association that is registered as a non-profit organization under the Nonprofit Organizations Act, 1997 (“the OCA”). The OCA has instructed us to submit this appeal against the approvals granted by the Municipal Planning Tribunal (“MPT”) of the City of Cape Town which are described in section 1.2 below, all of which related to the proposed development of the River Club precinct into a very large office park (“the Proposed Development”). The applications for the authorisations necessary to undertake the Proposed Development have been made by Liesbeeck Leisure Property Trust (“the Developer”).
2. The objects of the OCA include representing the interests of the Observatory community in civic matters and to promote an active interest in, and to consider the policies and affairs of the City of Cape Town. The OCA and its members would be adversely affected by the Proposed Development which the Approvals authorise (in part) which is not consistent with the environmental right enshrined in section 24 of the Constitution. For example, the Proposed Development would have adverse environmental, aesthetic, and cultural effects for members of the Observatory community, increase the risk of flooding in some areas, reduce capacity to deal with the inevitable impacts of climate change, and is not in the interests of future generations.
3. In this document we explain why the decision of the Municipal Planning Tribunal (“MPT”) to grant the Approvals was misguided, unwise and legally flawed. The OCA’s detailed responses to each of the reasons given by the MPT for its decision, are included in **Annex 3** and **Annex 3a**, which are supplemented by **Annex 2** and **Annex 4** which deal with visual impacts.

### 1.2 Decisions being appealed

4. On 18 September 2020, the MPT resolved that:

*“a. The application for the rezoning of the property from an Open Space Zoning 3: OS3 to a Subdivisional Area Overlay Zone in respect of Erf 151832, 6 Liesbeeck Parkway Observatory **BE APPROVED** in terms of Section 98(b) of the Municipal Planning By-Law subject to conditions contained in Annexure A attached.*

*b. The application for the approval of Council to permit retaining structures to be 5.7m high in Precinct 1 and 5.9m high in Precinct 2 in lieu of 2.0m high above ground level in respect of Erf 151832, 6 Liesbeeck Parkway Observatory **BE APPROVED** in terms of Section 98(b) of the Municipal Planning By-Law subject to conditions contained in Annexure A1 attached.*

*c. The application for:*



- the deviation from the Table Bay District Plan

- Deviation from the Floodplain and River Corridor Management Policy (2009) seeking permission to:

i. develop/obstruct the free flow of water within the 20-year and 50-year floodplain and to seek the in-filling below the 1:50 year floodplain.

ii. Deviation from the Management of Urban Stormwater Impacts Policy (2009) seeking permission to:

- Deviate from the annexure table requiring 24-hour extended detention of the 1-year Recurrence Interval, 24-hour storm event in a greenfield development greater than 50 000m<sup>2</sup>; to deviate from the annexure table requiring up to 10 year recurrence interval peak flow to be reduced to pre-development level in a greenfield development greater than 50 000m<sup>2</sup> and to deviate from the annexure table requiring up to 50 year recurrence interval peak flow to be reduced to existing development levels in a greenfield development greater than 50 000m<sup>2</sup>.

in respect of Erf 151832, 6 Liesbeek Parkway Observatory **BE APPROVED** in terms of Section 98(b) of the Municipal Planning By-Law subject to conditions contained in Annexure A attached.”

5. In this appeal we refer to the above approvals collectively as “the Approvals”.
6. The OCA submits (for the reasons set out in this appeal) that the Appeal Authority should uphold this appeal and in so doing, set aside the Approvals and refuse the Developer’s applications for those Approvals.

## 2. SYNOPSIS OF APPEAL

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7. Building a very large office park, on flood plain in an ecologically important, visually sensitive and culturally valuable area in the City instead of continuing to pursue more appropriate options that are consistent with the nature of the Site, and its zoning as Open Space 3 (Special Open Space) is wholly inappropriate from an urban planning and land use management perspective, incompatible with applicable City plans and policies and wholly at odds with the nature of the Site itself. The ecological, heritage and aesthetic features of the Site make it wholly unsuitable for this type of development,
8. The Proposed Development is highly inappropriate and the Approvals should never have been granted, and would not have been granted had the MPT applied its mind properly to all the material facts, and the relevant environmental and land use principles prescribed by law.
9. The Proposed Development is a classic example of the kind of inappropriate development that spatial planning, land development and land use management, environmental, and heritage, principles, policies, and plans have been enacted or established to prevent. It is directly contrary to,



or inconsistent with: the Local Development Plan, the Municipal Spatial Development Framework (“MSDF”) and is contrary to, or inconsistent with, at least four important policies of the City of Cape Town<sup>1</sup> as well as with other City policy instruments such as the Transport Oriented Development (“TOD”) manual. In this case the approval of “deviations” from the applicable plans and policies is a euphemism for approving the very type of development that these plans and policies exist to prevent.

10. The River Club area on which the Proposed Development would take place if authorised (“the Site”) is zoned as Open Space 3 (Special Open Space) and serves important ecological and social functions within the City as well as having high heritage and aesthetic values. The net effect of the Proposed Development would be to permanently and significantly degrade an area that provides important ecological services and other amenities to the public, in order to further private sector financial interests. Although the Site is privately owned, the effects of the Proposed Development would be analogous to an enclosure of the commons in the sense that the public goods (the use of the open space, ecologic services such as flood attenuation, and heritage values) would be lost by authorising this private project to proceed..
11. The Site is a wholly inappropriate site for the development of a large office park.
  - 11.1. From an environmental perspective the Site:
    - 11.1.1. is within a floodplain at the confluence of two rivers and massive alteration of watercourses, wetlands and the floodplain (i.e. raising the site by approximately 3 metres by trucking in thousands of cubic metres of infill material in order to lift it out of the floodplain) would be necessary to enable the buildings to be constructed;
    - 11.1.2. is ecologically valuable and plays an important role in flood attenuation, providing resilience to the impacts of climate change, and as a habitat for indigenous species.
  - 11.2. From a heritage perspective, Heritage Western Cape (“HWC”) is of the view that the Site should be protected as Grade 1 or Grade 2 heritage resource to protect the very significant heritage values associated with it, and not subjected to a highly intrusive, large-scale development that is largely commercial in nature and would result in the complete transformation of a highly culturally significant landscape. (In this regard see section 8.2 below.)

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<sup>1</sup> These are: (1) the Floodplain and River Corridor Management Policy (2009); (2) the Management of Urban Stormwater Impacts Policy (2009) (3) the Climate Change Policy (policy no: 46824, adopt on 27 July 2017), and (4) The Two Rivers Urban Park Contextual Framework and Phase 1 Environmental Management Plan, 2003. We are instructed that it is also inconsistent with the City’s Environmental Management Framework, 2012.



11.3. From an urban planning perspective, the Site is inappropriate because:

- 11.3.1. It is zoned as Open Space 3 (Special Open Space) which means that the primary uses should be Environmental conservation uses, and that the following uses may be permitted with the consent of the City: environmental facilities, tourist facilities, place of instruction, place of assembly , place of entertainment, plant nursery , utility service, cemetery, rooftop base telecommunication station, freestanding base telecommunication station, wind turbine infrastructure, cultural and social ceremonies, urban agriculture, informal trading, harvesting of natural resource. The Proposed Project is wholly incompatible with this zoning and with the historic uses of the Site, which is why the Developer had to apply for such a radical change in the zoning.
- 11.3.2. The Proposed Development itself has too large a footprint, is too tall, has too much bulk and mass, and will require to be desirable or appropriate in the place proposed;<sup>2</sup>
- 11.3.3. is not within the development nodes identified by the City's policies and plans (including the Municipal Spatial Development Framework ("MSDF") and the Table Bay District Plan);
- 11.3.4. is not well situated for public transport and is not sited in accordance with the City's Transport Oriented Development ("TOD") Policies; and
- 11.3.5. does not make any significant contribution to increasing spatial justice by means of the provision of social housing or redressing the problems caused by apartheid-era planning and development.

12. The City's own Environmental Management Department ("EMD") has drawn attention to the inappropriate nature of the Proposed Development, stating that:

- 12.1. what should be envisaged for the area is "the creation of a park-like environment with buildings in it, rather than the creation of building complexes with park / open spaces around it (i.e. the creation of an urban village and not an office park)"; and
- 12.2. "the concern remains that the scale, bulk and footprints proposed for the building component are excessive within the receiving environmental context when considering that the site is zoned OS3 and is entirely within a floodplain."<sup>3</sup>

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<sup>2</sup> As the applicant admits, is necessitated by the requirement for "a very large capital investment in bulk infrastructure before any commercial structures can be constructed. This includes raising the site above the 1:100 year floodline, installing wastewater, transport and electrical infrastructure" (D. 9 on p116).



13. If the Proposed Development were to proceed it would create some jobs and enhance the City's rate base. However, the economic benefits are dwarfed by what the people of Cape Town, including the OCA and its members, and indigenous Khoi peoples, would lose. These include the loss of: heritage resources and a sense of place, scenic beauty, loss of visual connections between Observatory and the 200 year old South African Astronomical Observatory ("SAAO"), and between the SAAO and the rest of Cape Town, including the mountains; flood attenuation, riverine habits for birds and other species, a degree of climate change resilience, public open spaces and the potential to establish the multi-purpose Two Rivers Urban Park.
14. The Proposed Development is contrary to the City's Climate Change Policies and the Approvals were granted without the MPT having considered a proper assessment of its climate change implications as required by law (see section 8.1 below).
15. In short, the Proposed Development is unnecessary, undesirable, and not in the public interest or the interest of future generations. One of the indications of this is the fact that the Proposed Project has faced, and continues to face, very strong opposition from people in the area (including the OCA and its members), the wider public, significant numbers of First Nation Groups, Heritage Western Cape, and the City's own Environmental Management Department.
16. The decision to grant the Approvals was not only unwise and short-sighted, it was also legally flawed. The Approvals are the outcome of an unfair administrative process which:
  - 16.1. did not enable interested and affected parties such as the OCA to comment on important documents considered by the MPT;
  - 16.2. failed to take account of important considerations (either adequately or at all); and
  - 16.3. in several respects was irrational in that the conclusions reached are not supported by the facts before the MPT.

### **3. FACTUAL BACKGROUND**

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#### **3.1 Context**

17. The Approvals have been granted at a time when humanity is trying to address the rapidly increasing impacts of climate change, catastrophic declines in biological diversity, and a pandemic that is

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<sup>3</sup> Comments submitted by EMD, comments 21 and 22 on page 160).





dramatically reducing the demand for office space. It is also a time when increasing recognition is being given to the rights of First Nations in South Africa after years of marginalisation.<sup>4</sup>

18. As the City's Climate Change Policy and draft Climate Change Strategy make clear, the City needs to enhance the health and functioning of ecosystems that can provide a degree of buffering against the impacts of climate changes such as sea-level rise and storms surges, and flooding caused by extreme weather events. The primary value of the River Club site and its surrounds is ecological, and to some extent, as public open space. The fact that it is located within the Urban Inner Core does not detract from these roles, it makes it more valuable given the limited green areas of any size within the Urban Inner Core.

18.1. As the City's EMD pointed out in its appeal against the granting of the environmental authorisation for the Proposed Development (at page 17):

*"The Western Cape Biodiversity Spatial Plan incorporates the BioNet (Cape Town's fine-scale systematic biodiversity plan). The BioNet is adopted as City of Cape Town Policy in the Bioregional Plan 2015. The BioNet is also aligned with and adopted in other City Policy, most notably the Integrated Development Plan (IDP 2017-2022) and the Municipal Spatial Development Framework (MSDF 2017-2022). The IDP and MSDF recognise Cape Town's critical environmental assets and its globally important biodiversity. The MSDF's often misquoted "Consolidated Spatial Plan Concept" (also known as "The Blue Turtle" owing to the shape of the "Urban Inner Core") does not override the MSDF's Biodiversity Network as if development were more important than conserving biodiversity. The MSDF comprises 4 main maps, and notes that this is "A series of maps that collectively indicate a metropolitan-scale interpretation of the City's spatial vision, development directives, land use informants and investment priority areas." This clearly shows that the MSDF is to be read as a collection of maps of equal standing, rather than the 'consolidated spatial plan concept' overriding all other layers of spatial informants"*

19. The starting point for the consideration of any potential development of Site should be how to enhance the ecological and public use functions of the Site, and how any proposed uses might complement these primary functions. This is consistent with the City's long-term objectives of ensuring that Cape Town's natural ecosystems are protected, managed and made resilient so that

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<sup>4</sup> See for example the enactment of the Traditional and Khoi-San Leadership Act 3 of 2019, and the cabinet announcement of approval for the implementation of the National Khoi and San Heritage Route, which is a national legacy project.



they can act as effective buffers to climate change impacts and provide benefits of ecological infrastructure in support of current and future physical infrastructure.<sup>5</sup>

## 3.2 The Site

### 3.2.1 Flood plain at confluence of two rivers

20. The site of the Proposed Development (“the Site”) is located at the confluence of the Liesbeek and Black rivers in a floodplain, is prone to regular flooding, and most of the property is situated below the 1:50 year, 1:20 year and 1:10 year flood-lines.<sup>6</sup> Prior to the Approvals, the Site was zoned Open Space 3 (Special Open Space).

### 3.2.2 Heritage significance

21. The Site also includes the confluence of the Liesbeek and Black rivers, making it of special significance for the Khoi. . For example, the [AFMAS report states that:

*“The Khoi and the San have the most exquisite symbiotic relationship with the soil, with the river, with the stars, with [Kaggen], who’s the mantis. And, when you look at the Liesbeeck River, the flow of that river and the land next to it ... when I talk about a symbiotic relationship, I’m saying that the river is flowing within; it’s embodied within the consciousness of the Khoi, and so is the land. ... By dislocating the Khoi permanently from the land and from its proximity to the river, you’re completely ... ripping the soul out of them. It was physical, visceral dislocation, because of the understanding, the integral understanding of connectivity.”*

*“Places where rivers are coming together, are special places. Those rivers are connected with people and memory. Water holds memory. So, wherever rivers are coming together, at that point is a ceremonial place. So, the Two Rivers, at that point, is one of them, because of the rivers coming together there. So that space holds a huge memory.” (p19)*

*“The confluence of the Black River and the Liesbeeck River, that embankment area is the place where the Khoi would engage in marriage ceremonies and burial rites, cremation and these kinds of things. It’s also a political hotspot, because that’s where the tribes would gather and meet... So symbolically, confluences for the Khoi, had a tremendous resonance.” (p19)*

<sup>5</sup> Climate Change Strategy para. 5.2.8.

<sup>6</sup> Report to the MPT dated September 2020, p184.



### 3.2.3 *Outside identified development nodes and poorly located for public transport*

22. The Site is not appropriately located in terms of current and future public transport infrastructure, is not an established economic node, and is not located along a route that would support the level of intensification proposed. (Unlike the nearby Voortrekker Road Corridor, which is highly suitable in these respects.)
- 22.1. While the Site is located close to the city centre, it is not located on the main existing corridors namely Voortrekker and Main Road, nor within a node identified in the MSDP or the Table Bay District Plan. It therefore does not support the City's current focus on utilisation of existing services within strategically planned zones. Furthermore, the development demands the construction of additional new services and infrastructure such as Berkley Road extension.
- 22.2. The Site is spatially isolated, and removed from any existing and/or planned public transport routes, and therefore, a reduced parking ratio is not rational for the proposed development. The current PT1 and PT2 zones, which don't include the site, highlight its isolation in terms of public transport accessibility. The City's Transport Oriented Development ("TOD") policy, as referred to in the report to the MPT (p188), requires that "development must be sufficiently dense to promote the use of public transport in conjunction with reduced parking ratios". As the proposed residential density is only 40du/ha (assumed gross), and the site is isolated from existing and/or planned public transport routes, the proposal does not in fact meet the requirements of the TOD policy. In this regard it is relevant to note that the Developer's Supplementary Planning Report<sup>7</sup> detailed how the Amazon campus which would form part of the Proposed Development will provide in the range of 1 500 – 1 900 parking bays.<sup>8</sup>
23. The Site is currently not widely accessible to the public as an open space amenity but could easily be developed as a public access park. However, if the Proposed Development takes place, only one-third of the Site will be retained as open space and this area will be privately owned and controlled.<sup>9</sup> Despite the proposal to register a public access servitude over the open space along the formerly canalised river channel, it will not be truly public open space.

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<sup>7</sup> This report was attached as Annexure K1b to the draft Basic Assessment Report ("BAR") but omitted from the final BAR.

<sup>8</sup> That report also stated that "a large portion of staff working at the Amazon campus" (not specified) would rely on public transport and be provided with an Amazon bus service to transport people to the nearest public transport station (draft BAR Annexure K1b).

<sup>9</sup> The Developer's Supplementary Planning Report stated that "Amazon is a very security conscious organisation" and the Amazon campus will be completely controlled to "maximise security." (draft BAR Annexure K1b).



#### 4. LEGAL REQUIREMENTS APPLICABLE TO DECISION

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24. The MPT's decision to grant the Approvals was made under the City of Cape Town Municipal Planning By-Law, 2015 (as amended) and must be consistent with the requirements of the Municipal Planning By-Law. However the Municipal Planning By-Law must be read in conjunction with the national Spatial Planning and Land Use Management Act, 2013<sup>10</sup> ("SPLUMA") and the Western Cape Land Use Planning Act<sup>11</sup> ("LUPA"), which among other matters, prescribe development principles which apply to all organs of state responsible for the implementation of legislation regulating the use and development of land;
25. The National Environmental Management Act 107 of 1998 ("NEMA") set out a list of national environmental management principles in section 2 ("the NEMA principles"). These principles apply to the actions of all organs of state that may significantly affect the environment. This means, for example, that these principles must be taken into account by the MPT when deciding whether or not to grant land use approvals that may significantly affect the environment.
26. This means that when deciding whether or not to grant the Approvals, the MPT was required to be guided by:
- 26.1. those NEMA principles that are relevant to the Proposed Development;<sup>12</sup>
  - 26.2. the development norms and standards specified in section 7, and the specific requirements applicable to municipal appeal tribunals set out in section 42, of SPLUMA; and
  - 26.3. the spatial sustainability principles set out in section 59(2) of the Western Cape Land Use Planning Act 3 of 2014 ("LUPA").

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<sup>10</sup> Act 16 of 2013.

<sup>11</sup> Act 3 of 2014.

<sup>12</sup> For example, the principles that:

- a risk averse and cautious approach should be applied which takes into account the limits of current knowledge about the consequences of decisions and actions, and whereby negative impacts upon the environment and on people's environmental rights are anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied (precautionary principle);
- Environmental management must be integrated, acknowledging that all elements of the environment are linked or interrelated, and it must take into account the effect of decisions on all aspects of the environment and all people in the environment by pursuing the selection in the best practicable environmental option (the Best Practicable Environmental Option or "BPEO" principle);
- decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognizing all forms of knowledge, including traditional and ordinary knowledge'
- social, economic and environmental impacts of activities, including the disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in light of such consideration and assessment; and
- decisions must be taken in an open and transparent manner and access to information must be provided in accordance with the law (principle of transparency).



#### 4.1 Municipal Planning By-Law, 2015

27. The MPT's decision to grant the Approvals was made under the City of Cape Town Municipal Planning By-Law, 2015 (as amended). The Municipal Planning By-law provides that an application must be refused if the decision-maker is satisfied that it fails to comply with specified minimum threshold requirements. These include the requirement that the proposed development of land must comply with or be consistent with the municipal spatial development framework, or if not, a deviation from the municipal spatial development framework must be permissible.<sup>13</sup>
28. When considering any application that has not been excluded by virtue of the threshold criteria in section 99(1), the decision maker must consider all relevant considerations including, where relevant: any applicable spatial development framework; any applicable policy or strategy approved by the City to guide decision making, the desirability of the proposed use or development of land, and other considerations prescribed in relevant national or provincial legislation, which includes the development principles as contained in section 7 of the Spatial Planning and Land Use Management Act, 2013 (Act no. 16 of 2013).<sup>14</sup>
29. Specific factors must be considered when considering need and desirability.<sup>15</sup>

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<sup>13</sup> **99 Criteria for deciding application** (1) An application must be refused if the decision-maker is satisfied that it fails to comply with the following minimum threshold requirements –

(a) ...

(b) the proposed use or development of land must comply with or be consistent with the municipal spatial development framework, or if not, a deviation from the municipal spatial development framework must be permissible; ...”

<sup>14</sup> Section 9 (2) If an application is not refused under subsection (1), when deciding whether or not to approve the application, the decision maker must consider all relevant considerations including, where relevant, the following –

(a) any applicable spatial development framework;

(b) relevant criteria contemplated in the development management scheme;

(c) any applicable policy or strategy approved by the City to guide decision making, which includes the Social Development Strategy and the Economic Growth Strategy;

(d) the desirability of the proposed use or development of land as contemplated in subsection (3);

(e) impact on existing rights (other than the right to be protected against trade competition);

(f) in an application for the consolidation of land unit –

(i) the scale and design of the development;

(ii) the impact of the building massing;

(iii) the impact on surrounding properties; and

(g) other considerations prescribed in relevant national or provincial legislation, which includes the development principles as contained in section 7 of the Spatial Planning and Land Use Management Act, 2013 (Act no. 16 of 2013).

(h) whether the application complies with the requirements of this By-law.

<sup>15</sup> S.99(3) The following considerations are relevant to the assessment under subsection (2)(d) of the desirability of the proposed use or development of land –

(a) socio-economic impact;

(b) ...

(c) ...

(d) compatibility with surrounding uses;

(e) impact on the external engineering services;

(f) impact on safety, health and wellbeing of the surrounding community;

(g) impact on heritage;

(h) impact on the biophysical environment;



30. Specific additional requirements apply where an overlay zone is required.<sup>16</sup>

#### 4.2 SPLUMA

31. The Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”) was enacted as a framework for spatial planning and land use management and to provide a uniform and comprehensive system of spatial planning and land use management. It seeks to provide for the sustainable and efficient use of land, co-operative governance, and to redress the imbalances of the past by ensuring that there is equity in the application of spatial development planning and land use management systems.

32. SPLUMA prescribes in section 7 several “Development principles and norms and standards” that apply to all organs of state and authorities responsible for the laws relating to the development of land and guide the preparation, adoption and implementation of any Spatial Development Framework (“SDF”) or the performance of any function regulating spatial planning and land use management. These development principles are to operate in much the same way as the section 2 National Environmental Management Act 107 of 1998 (NEMA) principles.

33. These development principles include:

33.1. the principle of spatial justice whereby past spatial development imbalances must be redressed;

33.2. the principle of spatial sustainability which requires land use measures to be consistent with environmental management instruments and to promote land development in locations that are sustainable, limits urban sprawl and results in communities that are viable;<sup>17</sup>

33.3. the principle of efficiency which is the optimisation of the use of existing resources and infrastructure and the designing of decision-making procedures that minimise negative financial, social, economic or environmental impacts;<sup>18</sup>

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(i) traffic impacts, parking, access and other transport related considerations; and

(j) whether the imposition of conditions can mitigate an adverse impact of the proposed use or development of land.

<sup>16</sup> **148 Requirements for preparing an overlay zoning**

(1) Preparation of an overlay zoning shall take into consideration the following requirements where applicable:

(a) the development principles contained in the SPLUMA, the LUPA and this By-Law;

(b) the City’s planning vision and principles as set out in its Integrated Development Plan;

(c) desired spatial form, including but not limited to the development of public and private land, infrastructure investment, utilisation of space, spatial reconstruction, location and nature of development, urban edge, scenic routes, areas of strategic intervention, mitigation of development impacts;

(d) the principles as set out in an approved spatial development framework or a policy plan;

(e) environmental and heritage protection and conservation; and

(f) the principles of co-operative governance and the duties and objectives of local government as set out in the Municipal Systems Act and the Constitution of the Republic of South Africa, 1996.

<sup>17</sup> 7(b)(vi) promote land development in locations that are sustainable and limit urban sprawl;



- 33.4. the principle of spatial resilience which accommodates flexibility in spatial planning and land use management systems so as to ensure sustainable livelihoods in communities most likely to suffer the impacts of economic and environmental shocks; and
- 33.5. the principle of good administration whereby all spheres of government ensures an integrated approach to land use and land development which is guided by the spatial planning and land use management systems as provided in SPLUMA (see s.7)
34. SPLUMA prescribes that when considering and deciding an application, a Municipal Planning Tribunal must, among other matters:
- 34.1. be guided by the development principles (discussed above);
- 34.2. make a decision which is consistent with norms and standards, national and provincial government policies and the municipal spatial development framework; and
- 34.3. take into account the public interest; and
- 34.4. when considering an application affecting the environment, must ensure compliance with environmental legislation.<sup>19</sup>
42. (1) In considering and deciding an application a Municipal Planning Tribunal must—

#### 4.3 Western Cape Land Use Planning Act 3 of 2014 (“LUPA”)

35. The Western Cape Land Use Planning Act 3 of 2014 (‘LUPA’) prescribes in section 49 that when a municipality considers and decides on a land use application, it must take into account, at least: (a) the applicable spatial development frameworks; (b) the applicable structure plans; (c) the principles referred to in Chapter VI [ sections 58 and 59]; (d) the desirability of the proposed land use; and (e)

<sup>18</sup> 7(c)(ii) the principle of efficiency, whereby decision-making procedures are designed to minimise negative financial, social, economic or **environmental impacts**.

<sup>19</sup> 42. (1) In considering and deciding an application a Municipal Planning Tribunal must—

(a) be guided by the development principles set out in Chapter 2;

(b) make a decision which is consistent with norms and standards, measures designed to protect and promote the sustainable use of agricultural land, national and provincial government policies and the municipal spatial development framework; and

(c) take into account—

(i) the public interest;

(ii) the constitutional transformation imperatives and the related duties of the State;

(iii) the facts and circumstances relevant to the application;

(iv) the respective rights and obligations of all those affected;

(v) the state and impact of engineering services, social infrastructure and open space requirements; and

(vi) any factors that may be prescribed, including timeframes for making decisions.

(2) When considering an application affecting the environment, a Municipal Planning Tribunal must ensure compliance with environmental legislation.



guidelines that may be issued by the Provincial Minister regarding the desirability of proposed land use.

36. We submit that when deciding whether or not to grant the Approvals the MTP should have been guided by:

36.1. The principle of **spatial justice**, which requires among other things, that land use planning should redress past spatial and other development imbalances through improved access to, and utilisation of, land<sup>20</sup> and that spatial development frameworks and policy at all spheres of government should address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements and areas characterised by widespread poverty and deprivation;<sup>21</sup>

36.2. the principles of **spatial sustainability**,<sup>22</sup> which require, among other matters, that land use planning should consider all current and future costs to all parties for the provision of infrastructure and social services in land developments (s.59(2)(a)(v)) and promote land development in locations that are sustainable (59(2)(a)(vi));

36.3. ensuring sustained **protection of the environment** by having regard to, among other matters: <sup>23</sup>

36.3.1. natural habitat, ecological corridors and areas with high biodiversity importance,

<sup>20</sup> LUPA s. 59(1)(a).

<sup>21</sup> LUPA s. 59(1)(b).

<sup>22</sup> LUPA s.59(2) "Land use planning is guided by the following principles of spatial sustainability:

(a) land use planning should—

- (i) promote land development that is spatially compact, resource-frugal and within the fiscal, institutional and administrative means of the relevant competent authority in terms of this Act or other relevant authority;
- (ii) ensure that special consideration is given to the protection of prime, unique and high potential agricultural land;
- (iii) uphold consistency of land use measures in accordance with environmental management instruments;
- (iv) promote and stimulate the effective and equitable functioning of land markets;
- (v) consider all current and future costs to all parties for the provision of infrastructure and social services in land developments;
- (vi) promote land development in locations that are sustainable and limit urban sprawl;
- (vii) result in communities that are viable; and
- (viii) strive to ensure that the basic needs of all citizens are met in an affordable way;

<sup>23</sup> LUPA s.59(2)(b) states that "the sustained protection of the environment should be ensured by having regard to the following:

- (i) natural habitat, ecological corridors and areas with high biodiversity importance;
- (ii) the provincial heritage and tourism resources;
- (iii) areas unsuitable for development, including flood plains, steep slopes, wetlands and areas with a high water table and landscapes and natural features of cultural significance; and
- (iv) the economic potential of the relevant area or region;

(c) climate change adaptation and climate change mitigation strategies should be developed and considered in land use planning;

(d) the provision and conservation of, and the management of the demand for, energy should be considered in land use planning;

(e) the safe utilisation of land should be ensured by taking into consideration factors such as sea-level rise, storm surges, flooding, fire hazards and geological formations;"





- 36.3.2. the unsuitability of some areas for development, including flood plains, steep slopes, wetlands and areas with a high water table and landscapes and natural features of cultural significance;
- 36.4. considering climate change adaptation and climate change mitigation strategies in land use planning (s. 59(2)(c));
- 36.5. ensuring and the safe utilisation of land should be ensured by taking into consideration factors such as sea-level rise, storm surges, flooding, fire hazards and geological formations (s.59(2)(e)).
- 36.6. ensuring that development is principle-driven and prioritises long-term social, economic and environmental benefits over short-term benefits (s.59(2)(g)); and
- 36.7. designing land use planning requires that decision-making procedures to minimise negative financial, social, economic or environmental impacts (s.59(4)(g)).

## 5. SUMMARY: GROUNDS OF APPEAL

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37. This appeal is for the setting aside of the Approvals is based on the grounds set out below, each of which are dealt with more fully in the subsequent sections.
- 37.1. First, the administrative process that culminated in the MPT's decisions was procedurally unfair. This is because the OCA and the public more generally, were not afforded an opportunity to comment on a significant amount of new and material information that was placed before the MPT in the period between the public participation process conducted in August and September 2018 and the MPT's meeting in September 2020 (see paragraphs 38 to 46 below). Secondly, the MPT failed to take relevant considerations into account in granting the Approvals. Specifically, the MPT:
- 37.1.1. failed to have regard to, and apply the national environmental management principles in section 2 of NEMA that are relevant to deciding whether or not to grant the Approvals;<sup>24</sup> the

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<sup>24</sup> For example, the principles that:

- a risk averse and cautious approach should be applied which takes into account the limits of current knowledge about the consequences of decisions and actions, and whereby negative impacts upon the environment and on people's environmental rights are anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied (precautionary principle);
- Environmental management must be integrated, acknowledging that all elements of the environment are linked or interrelated, and it must take into account the effect of decisions on all aspects of the environment and all people in the environment by pursuing the selection in the best practicable environmental option (the Best Practicable Environmental Option or "BPEO" principle);



development norms and standards specified in section 7, and the specific requirements applicable to municipal appeal tribunals set out in section 42, of SPLUMA; and the spatial sustainability principles set out in section 59(2) of the Western Cape Land Use Planning Act 3 of 2014 (“LUPA”).

- 37.1.2. failed to properly consider the climate change implications of the Proposed Development, including the risks associated with significantly higher storm surges (exacerbated by sea-level rise and more frequent extreme weather events), the loss of flood attenuation capacity and the potential of the developed area to function as a “heat island”;
- 37.1.3. failed to consider the final comments of Heritage Western Cape in terms of section 38(8) of the National Heritage Resources Act 25 of 1999 (“NHRA”) dated 13 February 2020; and
- 37.1.4. failed to consider a range of other issues identified by the City’s Environmental Management Department in their comments (see Annex 5).

## **6. PROCESS WHICH CULMINATED IN GRANTING OF APPROVALS WAS ADMINISTRATIVELY UNFAIR**

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- 38. The MPT’s decision to grant the Approvals constitutes administrative action for the purposes of the Promotion of Administrative Justice Act (“PAJA”).<sup>25</sup> In order for administrative action to be procedurally fair, persons who stand to be materially and adversely affected by a decision must be given an opportunity to participate effectively in that decision-making process (e.g. by making representations).
- 39. This requirement is reflected in section 3(1) of PAJA which provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Section 3(2) of PAJA gives content to this requirement, and provides that in order to give effect to the right to procedurally fair administrative action, a person must be afforded (i) adequate notice of the nature and the purpose of the proposed administrative action, and (ii) a reasonable opportunity to make representations. These requirements are peremptory. As far as information about the proposed administrative action is concerned, its nature and purpose must be

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- decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognizing all forms of knowledge, including traditional and ordinary knowledge’
  - social, economic and environmental impacts of activities, including the disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in light of such consideration and assessment; and
  - decisions must be taken in an open and transparent manner and access to information must be provided in accordance with the law (principle of transparency).

<sup>25</sup> Act 3 of 2000. PAJA was enacted to implement the right to just administrative action enshrined in section 33 of the Constitution.



described with sufficient particularity, or the right to make representations will be illusory rather than real.<sup>26</sup>

40. In this case, the Developer applied for the authorisations in March 2018, the applications were advertised for public comment in August 2018 and the OCA and other parties submitted their objections. We are instructed that the degree of public opposition to the Proposed Development appears to have made the Developer pend its application, whilst a new Local Spatial Development Framework (“LSDF”) was developed. This proposed LSDF for the Two River would have changed the development framework for the River Club precinct so that the Proposed Development would be consistent with the District Plan. However, this draft LSDF was met with strong opposition and has not been adopted. In the meantime, the Developer had initiated an environmental impact assessment process in order to obtain an environmental authorisation under NEMA for the Proposed Development. In response to comments received during the EIA process, the Developer made material changes to the Proposed Development. At some point the application process began to proceed once more, and on 9 September 2020 (approximately two and half years after the application had first been made) the MPT met to hear representation on the application.
41. The Municipal Planning By-law permits an applicant to amend an application before a decision is taken on that application (section 93).<sup>27</sup> If an amendment is material, the City may require additional notification and may require the recirculation of the application (section 93(2)). Section 94 also empowers the City to require the applicant to a new notice of application if the application has still not been decided after a period of more than 24 months has elapsed since the first notice of the application. It also empowers the City to require a notice of an application to be republished or served again and recirculated to departments at any stage during the processing of the application if new information comes to its attention which is material to the consideration of the application and which adversely affects any person.
42. Furthermore, the Local Government: Municipal Systems Act 32 of 2000 (“MSA”) requires municipality to “to establish appropriate mechanisms, processes and procedures to enable the local

<sup>26</sup> *Heatherdale Farms v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) at 486D – E.

<sup>27</sup> 93 Amendment of application before decision

(1) The applicant may amend their application at any time after notice has been given in terms of this By-Law and prior to the date a decision is taken –

(a) at the applicant’s own initiative;

(b) as a result of objections and comments made during the public notification process; or

(c) at the request of the City.

(2) If an amendment is material, the City may require additional notification in terms of this By-Law and may require the recirculation of the application.



community to participate in the affairs of the municipality, and must for this purpose provide for—  
.... (b) notification and public comment procedures, when appropriate;”<sup>28</sup>

43. In this case more than 24 months had elapsed since the application had been made and the Developer has made substantial changes to the design of the proposed office park and had supplemented the application by including a range of new documents (particularly in relation to the heritage impacts). HWC and various departments within the City had also submitted comments on aspects of the application, a new Stormwater Management Strategy Report dated December 19th 2019 was prepared, and a final basis assessment report an environmental impact assessment report on the Proposed Development was submitted in June 2020. In these circumstances the City should clearly have required the application to be readvertised and allowed objectors and other interested and affected parties to submit comments on the additional documents which were clearly material. It did not do so.
44. Consequently, the OCA and other interested and affected parties were not given an opportunity of considering and commenting on a wide range of documents that were material to the MPT’s decision. These documents are listed in **Annex 1**.
45. This meant that the report which the case officer prepared for consideration by the MPT contained many documents that our client had not been given an opportunity to comment on, including a new heritage impact assessment (“HIA”) report<sup>29</sup>, a Stormwater Management Study Report (which the OCA had not seen previously), and comments for various City Departments and comments from the City’s Environmental Management Department on the Proposed Development. Consequently, the MPT made its decision without considering a range of material information that should have been before it.
46. In reaching its decision the MPT may relied on the misleading claims made by the Developer’s planner during the hearing before it. The planner stated that the application involved “one of the most extensive public participation programmes through the different applications ... and the nature of the applications ...”. This is not correct. Interested and Affected Parties had only one opportunity to comment on the Land Use application – in October 2018. The fact that the environmental impact assessment process under NEMA required a parallel public participation

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<sup>28</sup> MSA section 17(2)(b).

<sup>29</sup> The OCA had had sight of this HIA as it was disclosed during the EIA process and had criticized it heavily but were not given an opportunity to submit these criticisms in relation to the land use application process and consequently they were not before the MPT.



process is irrelevant to the land use application process. In both processes, the applicants have only executed the minimum public participation required under the respective law.

## **7. FAILURE TO CONSIDER NEMA, SPLUMA AND LUPA PRINCIPLES**

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47. We submit that in reaching its decisions to grant the Approvals the MPT failed to give any, or adequate, consideration to the relevant NEMA, SPLUMA and LUPA principles. Had the MPT done so it would have realised that it was required to make a decision which is consistent with the municipal spatial development framework (some of the inconsistencies with the MSDF are listed in paragraphs 71 and 72), and it should refuse the applications because there were no compelling reasons to depart from:

- 47.1. the principles that it should ensure the sustained protection of the environment but not authorising developments in areas unsuitable for development, including flood plains, wetlands, areas with a high water table and landscapes of cultural significance;
- 47.2. the City's climate change adaptation and climate change mitigation strategies; or
- 47.3. the principle of ensuring the safe utilisation of land by taking into consideration factors such as sea-level rise, storm surges, and flooding.

## **8. FAILURE TO TAKE RELEVANT CONSIDERATIONS INTO ACCOUNT**

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48. We also submit that in reaching its decision to grant the Approvals the MTP failed to take important relevant considerations into account, either at all, or adequately. These include:

- 48.1. the climate change implications of the Proposed Development; and
- 48.2. the heritage impacts of the Proposed Development; and
- 48.3. the numerous other issues referred to in **Annex 3** and **Annex 3a**.

### **8.1 Failure to consider climate change implications**

49. We submit that in reaching its decisions to grant the Approvals the MPT failed to give any, or adequate, consideration to the climate change implications of the Proposed Development, failed to consider a climate impact assessment report and failed to consider or apply the City's Climate Change Policy.



49.1. The Case Officer's submission to the MPT does not refer at all to climate change.<sup>30</sup>

49.1.1. The only comments on climate change appear in the section dealing with Summary of applicant's response to public participation. In these responses, there is a bland assertion that climate change was taken into account in the Hydrology report (overlay page 77 and 101).

49.1.2. The case officer makes a comment (overlay page 77) that the proposal represents an example of "thinking globally and acting locally". It is unclear how she arrived at that conclusion given the fact that the global phenomenon of climate change is occurring in large part because of failures to take appropriate local action to prevent harmful activities such as the Proposed Development.

49.2. The comments made by the City's Environmental Management Department in November 2018 posed the question "How does the proposal contribute towards the development of a resilient city capable of withstanding climate change?" The Developer's gave a lengthy response to this question (overlay pages 3166 and 3177 in Annexure G2) but did not answer the question.<sup>31</sup>

49.3. In January 2020 the EMD submitted comments which included the following in relation to climate change (our underlining):

*3.1.4.13 Filling in the river also compromises its potential for groundwater recharge, and recharge of the Cape Flats aquifer, which is not in line with the climate resilience principles for water security. (overlay page 2918)*

*3.1.4.26. Identification of other City policies from which the proposed development deviates: Specific sections of these policies need to be referenced. This will take further work.*

*Climate Change Policy: the City's Climate Change Policy promotes the protection, maintenance, rehabilitation and restoration of natural systems and resources. Infilling a river and developing*

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<sup>30</sup> In the Issues raised section there is a comment about 'heat islands' to which the developer says that they will have trees which will offset the heat island effect so that the effect will be 'negligible.' (Overlay page 77).

<sup>31</sup> The response read as follows: "This development will contribute to the development of a resilient city through addressing, inter alia, the following:

- a. Provision of economic opportunities for a spectrum of society;
- b. Provision of affordable housing;
- c. Provision of accessible, attractive and safe recreational spaces; and
- d. Provision and promotion of public transport facilities;
- e. Rehabilitation of existing river courses and wetlands and associated improvement in ecological functioning;
- f. Education of society about the environmental benefits of natural systems including wetlands on mitigating the impact of climate change.
- g. With regards to flooding, all development will be raised above the 1:100-year floodline. Further, the surface water hydrology study (refer to Annexure H of the motivation report) confirms that the proposed development would have an insignificant effect on flooding in the vicinity of the existing River Club site."



within the floodplain is not consistent with the stated objectives of the Climate Change Policy. (overlay page 2919)

*3.2.11.10. The proposed infilling of the Liesbeek River as indicated in the Motivation Report, is not supported by the Environmental Management Department, because it is not consistent with Water Sensitive Spatial planning and urban design principles; Further filling in a natural river course is not consistent with Climate change resilience principles, nor the biodiversity strategy - to destroy a high faunal sensitivity conservation area by infilling a WLT<sup>32</sup> breeding area (Overlay page 2926)*

*3.2.11.39. Sustainable provision of services and buildings and ensuring a resilient development in light of climate change implications: The applicant should outline how the services that are to be provided are sustainable. This should include Construction materials, Energy – solar power, Water - grey water re use, SUDS (sustainable urban drainage systems and how Waste is dealt with (reduction, recycling and re-use of waste). A water and energy saving plan will be required to be submitted for approval at a later stage. The City’s Management of Urban Stormwater Impacts Policy requires new developments above a certain size to use SUDS principles in their design to manage their stormwater run-off on-site. (overlay page 2931).*

*Filling in the river also compromises its potential for groundwater recharge, and recharge of the Cape Flats aquifer, which is not in line with the climate resilience principles for water security. (overlay page 2966)*

50. On 11 September 2020 the City’s EMD appealed against the granting of an Environmental Authorisation for the Proposed Development. A copy of that appeal is submitted with this Appeal as **Annex 5**. That appeal drew attention to several important climate change concerns (quoted below).
51. The OCA wished to make submissions to the MPT in relation to the various documents that it had not had an opportunity to comment on, but was informed by the case officer that they could not submit written submissions and should take this up with the MTP itself. The OCA did so and on 11 September 2020 the Secretary of the MPT sent an email to the chairperson of the OCA in which she stated:

*“You are not permitted to raise new information at the Municipal Planning Tribunal (MPT), as the applicant would not have had the opportunity to respond to same, nor would the panel of the MPT been given an opportunity to examine said information ahead of the scheduled meeting.*

*Secondly, an interview request has already [sic] been granted to the applicant and objectors who made contact and were informed accordingly. Please consult with the objectors (copied herein) to*

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<sup>32</sup> “WLT” refers to “Western Leopard Toad”.



*enquire from them whether they would be willing to either share their time with you, OR whether they would include your concerns into their presentation.”*

52. The relevant portions of the EMD’s appeal that pertain to climate change are quoted below (our underlining).

**6. THE DECISION DOES NOT GIVE DUE CONSIDERATION TO CLIMATE CHANGE IMPACTS AND RESILIENCE AND FAILS TO APPLY THE PRECAUTIONARY PRINCIPLE**

*6.1 Substantial comments were provided by the City on a range of issues relating to climate change. Responses to these comments were not provided by either the Environmental Assessment Practitioner or the decision-maker in the EA.*

*6.2 The only reference to climate change in the EA is an unsupported statement that the City of Cape Town’s Climate Change Policy has been considered in the need and desirability of the proposed development and the BAR states that the proposed development is “largely consistent” with the said policy. The comments provided by the City on the BAR indicate that the City has significant concerns regarding climate change impacts both in terms of potential climate impacts on the proposed development as well as the potential impact of the proposed development on climate risks in the area.*

*6.3 The omission of reference to the City’s comments regarding climate change in the EA indicates that the decision-maker did not give due consideration to the comments provided regarding climate change. The EA, under Annexure 3 summarises the reasons for the decision and states that “It is imperative that the ‘triple bottom-line’ argument is considered in a balanced manner and within its regional context. If not considered in a balanced manner and if not evaluated within its regional or strategic context, it will result in significant cumulative negative environmental impacts and in unsustainable development”.*

*6.4 In the recent judgement by the Western Cape High Court in the matter of Philippi Horticultural Area Food & Farming Campaign and Another v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape and Others (16779/17), it was found that the issue of climate change had not been adequately addressed in the Environmental Impact Assessment process. The court referred to the judgment in Earthlife Africa Johannesburg v MEC of Environmental Affairs & others which found that, **“There was found to have been non-compliance with s 24 (1) of NEMA in that the Chief Director had relied on the statement in the EIR that the climate change impacts of the project were relatively small and low without a climate change impact assessment. As a result, the Chief Director overlooked relevant considerations in terms of s.6(2)(e)(iii) of PAJA, with the decisions found not rationally connected to the information before him and without him having applied his mind making the decision reviewable under s.6(2)(f)(ii) of PAJA as well”.***

*(emphasis supplied)*

*6.5 The City believes that without a Climate Change Impact Assessment having been conducted, the EAP’s assertion that the City’s Climate Change Policy has been addressed, is unsubstantiated and actively countered in the design proposal. The design concept shows disregard for addressing climate change impacts such as retaining waterways and wetlands as green lungs which reduce the*





heat island effect of global warming by cooling the atmosphere through evaporation, keeping waterways and floodplains open and unobstructed to provide resilience to flood risk in heavy rainfall events, and recharging ground water and the aquifer through natural percolation. Infilling a river course and developing within the floodplain are not consistent with the stated objectives of the City's Climate Change Policy. Furthermore, no consideration appears to have been given to the concerns expressed in the City's Climate Change comment for the loss of climate resilience caused by infilling the floodplain, the heat island effect that is already evident in this area, the uncertainty of the assumed 15% increase in rainfall intensity and the more recent projections of significant sea level rise.

6.6 Section 2 (4) (a) (vii) of NEMA states that sustainable development requires "that a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions". This is commonly known as "the precautionary principle".

6.7 The comments submitted by the City on the BAR noted that "climate models inherently incorporate a certain amount of uncertainty due to the nature of model design and this uncertainty is magnified the further forward the model looks" and that as such there should be additional caution applied to this proposed development, due to the likelihood of the proposed infilling of the Liesbeek River and its floodplain exacerbating these flooding impacts on surrounding properties and City infrastructure.

6.8 The comments noted that the projected 15% increase in rainfall intensity in the Surface Water Impact Assessment was based on a single study and should not be assumed to account for all likely climate futures, particularly in the far future.

6.9 The comments also noted that key studies, namely the "Stormwater Infrastructure Asset Management Plan (Phase 2A) Rainfall Analysis and High: Level Master planning" (SRK, 2012) and "Marine Inputs to Salt River Flood Model.:94" (PRDW, 2010) were 8 and 10 years old respectively. The comments noted that clarity on the risks of using data that is a decade old and what this means for confidence levels in modelled outputs, and hence flood risk determinations, was required.

6.10 The comments also noted that, due to recent updates to IPCC projections regarding sea level rise in the context of continued global failure to meet climate change mitigation targets, the eustatic sea level rise upper limit of 0.55cm which was used in the report, and from which additional modelling was based in terms of hydrology and storm surge, was a significant underestimate in respect of applying the precautionary principle approach. Newer IPCC modelling shows a potential upper limit of 0.84cm by 2100.

6.11 No reference to risk, the precautionary principle, or a "risk-averse and cautious approach" was made in the EA. This indicates that the decision-maker had not adequately applied the precautionary principle, as it relates to climate change, in this decision.

## 8.2 Heritage impacts

53. The MTP's conclusion that "Heritage impacts have been carefully considered and heritage components will be incorporated into the development" (reason 13) is misleading (see the detailed rebuttal of this reason in **Annex 3a** as read with **Annex 2**) . This statement is also contrary to the



conclusions reached by HWC (the competent authority for heritage matters) and the City's own heritage experts, that the Proposed Development is "highly intrusive" and unacceptable from a heritage perspective.<sup>33</sup> The MPT's conclusion appears to be based solely on reports authored by consultants hired by the LLPT rather than taking counsel from any independent experts.

#### 8.2.1 Heritage information considered by MPT

54. HWC's Final Comments dated 13 February 2020<sup>34</sup> were not placed before the MPT or considered by it.

54.1. The MPT were provided with the *Draft Heritage Impact Assessment regarding the Development of the River Club (Erf 151832), Observatory, Cape Town*, dated January 2018 (Annexure 8a); a revised HIA, titled *HIA final July 2019* (Annexure 8b); and a document prepared on behalf of the Developer titled "*HIA Final Comment March 2020*" (Annexure C8d).

54.2. Only Annexure 8a was available for comment during the land use management/ rezoning process.

54.3. Annexures 8a and 8b were both subject to extensive critique during the environmental impact assessment process conducted under section 28 of NEMA. However, the comments by interested and affected parties on Annexure 8b (the final HIA) were not included in the information put before the MPT. In particular, HWC's conclusion that the HIA failed to meet the requirements of section 38 of the National Heritage Resources Act was neither disclosed nor considered by the MPT.

54.4. The MPT did consider the *HIA Final Comment March 2020* (Annexure C8d), a document prepared on behalf of the Developer which purported to provide a Specialist Response to HWC's Final Comment on the HIA for the River Club.<sup>35</sup> However, since the HWC Final Comment was not available to the MPT, it could not have assessed the veracity of the claims made in the Specialist Response. For example, the claim that there were "omissions, errors, vagueness and incompleteness of HWC's Final Comment" or that there was "iterative refusal of the authors of the HWC Final Comment to discuss and clarify its views that the HIA and its supplementary

<sup>33</sup> HWC reached the conclusion that the Heritage Impact Assessment submitted by the Developer/ applicant was inadequate in various respects, including because it did not identify heritage indicators for the site and therefore failed to meet the requirements of Section 38 of the National Heritage Resources Act.

<sup>34</sup> Heritage Western Cape, Final Comments in terms of Section 38(8) of the National Heritage Resources Act (Act 25 of 1999) and the Western Cape Provincial Gazette 6061, Notice 298 of 2003.

<sup>35</sup> The title of this Report is confusingly similar to the HWC document that was not placed before the MPT. It is titled "Final Comment. In terms of Section 38(8) of the National Heritage Resources Act (Act 25 of 1999) and the Western Cape Provincial Gazette 6061, Notice 298 of 2003.



documentation ... did not adequately comply with the requirements of subsection (a) to (g) of section 38(3)".

55. This is a serious lacuna in the ability of the MPT to come to an informed decision about the adequacy of heritage protection proposed by the applicants. This is particularly important because HWC set out clearly in their conclusions as to why Heritage impacts have not been carefully considered and identifies clearly that the HIA has failed to incorporate key heritage indicators into the design of the development.

#### 8.2.2 MPT failed to have proper regard to exceptionally high heritage value of the Site

56. In the conclusions section of HWC's Final Comments dated 13 February 2020, HWC stated as follows:

*“109. HWC regards the wider TRUP, of which the River Club site is an integral component, as a highly significant cultural landscape in the City with significant interplay between natural and man-made landscapes. It is this interplay that defines cultural landscapes. HWC is of the opinion that this area is of at least provincial significance, if not of national significance.*

*110. It is a site which is recognized as a sacred place. The open, largely undeveloped floodplain is a tangible reminder of intangible heritage.*

*111. It is recognized through historic record as well as Cultural Memory, as being a place of conflict for over 150 years. It is recognized as the place where, in 1657, Colonial Settlement of South Africa truly took root with the establishment of the first settler farms along the Liesbeek Valley, and the place where the Cope Indigene were first truly dispossessed of, and excluded from, access to their ancestral land.*

*112. It is a place where almost all of the stages of South Africa's developmental history and policies are either embedded deep within this cultural landscape, or is viewed from it. It is a place where Cetshwayo and Langalibalele were exiled to. It 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.*

*113. The 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, rather than inform appropriate development.*



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.*
115. *The discussion above illustrates that the HIA still does not comply with the provisions of Section 38(3) of the NHR Act, and it is noted that until the issues as identified above are addressed, the committee is not in a position to endorse the reports or the development proposal."*
57. The City's Environmental Management Department concurs with this view in its comments of 23<sup>rd</sup> January 2020 as follows:

*"The impact on the level of significance of the cultural landscape will be highly negative in terms of the level of physical and visual change on the environmental/ topographical/ecological and historical significance of the area and by the proposed heights, scale, and density of the current proposal. This negative impact on the significance of the heritage resources will also carry over to the SAAO site for the same reasons of the suggested heights, scale and density. (paragraph 2.216)*

*this Department believes that the levels of significance of, in particular, the cultural landscape and the SAAO site will still be compromised or reduced by the current proposal and that, although mitigation measures have been applied in the form of the First Nations narrative, setting back proposed buildings further from the SAAO and promoting a 'park like' eco corridor, the overall impact on the heritage resources identified, sense of place and cultural landscape is still perceived to be negative (2.3.1)*

*The proposed development does not acknowledge the unique and symbolic "threshold role" that the site plays, both in its formal layout, scale, and in the uses that are being proposed. Having to raise the site by 3m or more to achieve an acceptable height above the flood water level further exacerbates the concern that the development would be an invasion of this significance." Cape Institute of Architects, 8 Feb 2018. (2.3.3).*

*The current proposed development does not conserve sufficiently the historical and cultural value and significance of the cultural landscape of the area. The importance of historic and existing spatial*



*context is not adequately recognised in the proposed development in its current form which could be mitigated by a further reduction in bulk and heights (2.3.8)*

58. This means that two heritage authorities, HWC who are the competent heritage authority under the HIA/BAR process, and the City's EMD, who are the line authority expert in heritage matters for City planning, have indicated that the Proposed Project fails to address heritage concerns adequately.
59. Further, multiple Interest and Affected Parties have expressed views on the adjustments made by the developers to the heritage components of the application, as contained in the final HIA. The majority of these comments are highly critical, including comments from First Nation representatives. However, since these comments were made during the public participation process for the NEMA EIA process, none of these comments are available to the MPT when making its decision.

#### *8.2.3 Failure to have regard to process to protect Site as provincial or national heritage resource*

60. Because of the imminent threat that the Proposed Development posed to heritage in the TRUP, more than 60 First Nation groups, Civic Associations and Environmental NGOs applied to HWC to grade the Two Rivers Urban Park as a Provincial Heritage Resource in February 2019. This application is still in process.
61. The site is also of national heritage importance as confirmed by HWC in its final comments (para 84). HWC also noted in paragraph 13 that this site may form on important aspect of National Khoisan Legacy Project, and "has been identified as part of the National Liberation and Resistance Project of Government. These are aspects that cannot be ignored and must be taken into account when framing heritage related informants for the site."
62. Accordingly, the Goringhaicona Council, a Khoi entity with direct interest in the future of the site, applied to the South African Heritage Resources Agency (SAHRA) to have the Two Rivers Urban Park site graded as a National Heritage Site in December 2019. SAHRA confirmed this application in writing on 24<sup>th</sup> August 2020.

#### *8.2.4 First Nations Heritage*

63. As noted in the HWC Final Comments, the Site may form on important aspect of National Khoisan Legacy Project, and "has been identified as part of the National Liberation and Resistance Project of Government. These are aspects that cannot be ignored and must be taken into account when framing heritage related informants for the site."



64. In matters affecting First Nation heritage, including that of the Khoi and San, national authorities making decisions affecting these groups, must take account of South Africa's international law commitments, such as contained in the *United Nations Guidelines on Indigenous Peoples* (principle 5), the *United Nations Declaration on the Rights of Indigenous Peoples*,<sup>36</sup> and article 8 of the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples states that any decision-making process by a State body must provide "just and fair procedures for the resolution of conflicts and disputes with States or other parties" which "give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights".<sup>37</sup>
65. We submit that in granting the Approvals, the MPT (which did not include heritage expert and relied solely on the recommendations of the Developer's heritage expert in coming to its decision), failed to consider the need to deal with these issues in a manner that is consistent with South Africa's international obligations, either adequately, or at all.

#### 8.2.5 Visual and other heritage impacts

66. Further evidence of the visual intrusiveness of the Proposed Development and its impact on the sense of place and intangible heritage values associated with the Site are set out in **Annex 2** and **Annex 4** (as read with **Annex 3a**).

## 9. INCONSISTENCY WITH MSDF AND DISTRICT PLAN

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### 9.1 Inconsistency with District Plan

67. District Plans such as the Table Bay District Plan, 2012 which applies to the Proposed Development are important because they reflect a finer planning scale and reflect more accurately what land uses and urban development is appropriate within the district. The Table Bay District Plan emphasises the establishment of a multipurpose metropolitan urban park, and in the interest of maintaining the highest quality pedestrian and public open space, to support the very essence of "park". There is no conflict between the MSDF 2018 and the Table Bay District Plan (2012) for this site as has been claimed in the applicant's motivation report.
68. The Table Bay District Plan (2012) endorses the *Two Rivers Urban Park Contextual Framework and Phase 1 Environmental Management Plan* (2003) as the local policy plan for the TRUP of which the River Club precinct forms part. The Proposed Development is inconsistent with the *Two Rivers*

<sup>36</sup> See Articles 2, 8, 9, 12, 13, 18, 19, 23, 25, 29, 31, 32 and 40.

<sup>37</sup> South Africa was one of 144 countries that signed the Declaration on 13 September 2007.



*Urban Park Contextual Framework and Phase 1 Environmental Management Plan (2003)* (“the TRUP CF”) in many respects, some examples of which are set out below.

- 68.1. The vision of the TRUP CF is “to rehabilitate, protect, secure and enhance the intrinsic ecological qualities of this area, to conserve the unique cultural and landscape, to encourage environmental education, to maximise opportunities for all people and to promote sustainable development”. The Proposed Development is inconsistent with this vision.
- 68.2. The TRUP CF states that development within this area should be kept outside the one in 50-year flood line whereas the Proposed Development will involve construction within the one in 20 year flood line.
- 68.3. Infilling of the floodplain that is not justifiable on the basis of more detailed hydrological data is inconsistent with the TRUP CF.
69. While the applicant attempts to dispute the relevance of the TRUP CF as a planning policy, the Department of Environmental Management for the City of Cape Town confirm that ...
- “Although not a spatial planning instrument, it is nevertheless an approved policy and has status, such as the Floodplain and River Corridor Management Policy, for which application is being made to deviate. As approved policy, the principles must be used to guide decision-makers regarding any future development within the area. Recently (January 2020) a Memorandum of Advice on the Two Rivers Urban Park Contextual Framework and Phase 1 Environmental Management Plan, 2003 and intended Local Spatial Development Framework for the Two Rivers Urban Park Area”, the City’s legal advisor to the Water Department advised as per section 12 of her MoA, “in the absence of formal structure plan status, the CF must be regarded as a policy or a guideline. The City is obliged to apply policy and if there an application entails a substantive departure from policy we would have to seek a council decision (there is no delegation for this).” Furthermore, “There isn’t a formal process for a developer to apply for a policy deviation. It’s up to City decision-makers to apply policy. If asked for a substantive policy deviation they would have to approach council for approval, citing all relevant considerations.”*
70. The MPT also erred in concluding that the fact that the site is located within the Urban Inner Core and the Integration Zone, justified a deviation from the District Plan. On the contrary, the relative few areas of significant size within the Urban Inner Core that can perform such ecological functions, make them even more important.



## 9.2 Inconsistency with Municipal Spatial Development Framework (“MSDF”)

71. The Report submitted by the Case Officer to the MPT indicated (incorrectly) that “the proposal is policy compliant” and the MTP concluded that: “The applications are consistent with the requirements of the MSDF as the property is located within the Urban Inner Core and integration zone where development of this nature is encouraged. To this extent, the deviation from the District Plan is warranted.”
72. However, the Proposed Development is not consistent with the requirements of the MSDF in the following respects.

- 72.1. The TRUP Area is identified in MAP A2 of the MSDF as a Proposed Heritage Area and various guidelines are provided. The following policy statement applies:

*Policy 12: Identify, conserve and manage heritage resources, including cultural landscapes*

- 72.2. The land use intensity of the Proposed Development is in appropriately high when assessed in accordance with the MSDF’s policy guidelines. The following policy statements are relevant in this regard.

Policy 19: Promote appropriate land use intensity and the subsequent Policy Guideline 19.2 (MSDF, 2018: 121):

*“The determination of the appropriate location, height, scale, form and orientation of a higher density development in a particular location should be guided by the following:*

*P8.7 generic considerations related to the suitability of the area for land use intensification, such as surrounding land use character, access to public transport, proximity to places of employment, services and community/social facilities, proximity to public open space, and infrastructure availability (existing and planned);*

*P8.8 the applicable policy frameworks, namely the CTSDf, District SDPs and local spatial plans, density plans, urban design and architectural guidelines; the spatial locations targeted for different types of densification; contextual informants related to the development application and its immediate surroundings, such as the natural environment, land use, built and heritage character, sense of place, infrastructure availability and capacity, and socio-economic considerations, should determine the densities appropriate to a specific location; and*





*P8.9 the spatial outcome of a proposal.”*

- 72.3. The Site is within the 1:100-year flood line and the MSDF discourages development within these areas as indicated in the following policy statement:

*Policy 22: Discourage urban growth in areas at risk from natural hazards/coastal processes which are expected to be amplified by climate change impacts.*

- 72.4. The Site falls within and borders a Critical Natural Assets STA and the MSDF calls for the enhancement and connection of critical natural assets that support the City and regional environment and ecology. The Site is bordered on the east and west by Core 1 Protected and Conserved Areas along the river corridors and to the north by a Buffer 1 zone according to the Biodiversity Network. There are also pockets of wetland and Critical Biodiversity areas surrounding the site. The following policy statement applies:

*Policy 24: Reduce the impact of urban development on river systems, wetlands, aquifers, aquifer recharge areas and discharge areas.*

- 72.5. The Proposed Development is neither focused on social housing, nor is it supportive of the public transport network. In fact, it requires an entire new road i.e. the Berkley Road extension (potentially a Class 2 arterial) to provide it with access from the northern side of the property.

- 72.6. The MSDF does not promote a new node at the River Club.

72.6.1. The MSDF promotes the Voortekker Road Corridor (“VRC”) Integration Zone (IZ), where the primary spatial restructuring objective is linking the Bellville CBD with the Metro South-East Corridor boundary and the Cape Town CBD.

72.6.2. In addition to the higher order nodes of Bellville and the Cape Town CBD other strategic nodal points and precincts include Maitland, Parow, Goodwood and Salt River; not a new node at the River Club.

72.6.3. The availability and increase in the supply of affordable rental stock is recognised as one of the key levers towards integration and renewal of the VRC and the VRC social housing project was submitted by the national Department of Human Settlements as one of the City’s candidate catalytic human settlements projects but within the VRC, not at a new node at the River Club.



72.6.4. Important VRCIZ projects include potential urban development opportunities linked to strategic state land, including Wingfield, and old provincial hospital sites, not the River Club. The human settlements emphasis in the VRCIZ is focused on social housing to provide affordable rental opportunities at densities supportive of the public transport network and TOD principles. The River Club is neither focused on social housing, nor is it supportive of the public transport network. In fact, it requires an entire new road i.e. the Berkley Road extension (potentially a Class 2 arterial) to provide it with access from the northern side of the property.

### 9.3 Inconsistency with City's intensification and densification policies

73. We submit that the MPT erred in concluding, on the basis of the facts before it, that the Proposed Development will result in intensification and densification of the land in accordance with City policy.

73.1. The City's densification policy that was approved by Council on 29th February 2012 had as objectives (and include policy initiatives): to support the development of a viable public transport system and to improve levels of access, along existing nodes and corridors as in the case of the VCR.

73.2. The Proposed Development is inconsistent with the City's Densification Policies in the following respects.

73.2.1. First, the location of the RC is inappropriate to support a viable public transport system as it is neither an existing node, nor located along an existing corridor.<sup>38</sup>

73.2.1.1. While the site is located on the Berkley Road (inter district development route) and Liesbeeck Parkway (District structuring route), neither these routes are planned to accommodate IRT routes in the future. The City goes on to confirm that there are in fact no GABs services running close to the site either. (See page 30)

73.2.1.2. Furthermore, the site is approximately 0.9 to 1km away from the closest train stations with these routes being particularly inappropriate in scale and form to accommodate safe pedestrian movement.

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<sup>38</sup> Liesbeeck Parkway is a Class 3, Secondary Arterial Road and the existing Berkley Road is a Class 2 Primary Arterial Road. An urban corridor such as the VCR is classified as a Class 3 Arterial (an activity route). The reason Liesbeeck Parkway in the vicinity of the RC can never take the form of an activity route is that it is abutted by recreational land / sites such as Hartleyvale on its east and the banks of the Liesbeeck River on its west, that fall directly in the floodplain, and must remain that way to support the site's role as an ecological / conservation role.



- 73.2.2. Secondly, according to the City's densification policy (DP1) and according to the Planning Partners Motivation report, the City aims to achieve a minimum, average gross base density of 25 dwelling units per hectare ("du/ha") in 30 years and will target higher gross base density thereafter. The density of the Proposed Development is 40 du's/ha (presumably presented as gross density, not nett density)<sup>39</sup>. The proponents are of the view that the 40 du's/ha support the gross base density of 25 du's/ha but fail to show how their calculation was arrived at.
- 73.2.3. Thirdly, the development proposal for the River Club is motivated in terms of the potential for Transport Oriented Development, but in fact is far too distant from transportation corridors and stations to be consistent with TOD policies. For example, although the application refers to the Proposed Development being 500m from the Koeberg Station in reality the distance from the main entry and exit points from the site is 900m. Only the furthest tip of the site (for example, at the confluence of the Black and Liesbeek Rivers, lies within a 500m radius of Koeberg Station and there will be no egress from the site to reach Koeberg Station directly. Rather, pedestrians will have to walk back to the main exit point and then along a busy Berkeley Rd extension, taking a route that is not a direct route and so must walk a longer distance than 500m.
- 73.2.4. Fourthly, in terms of policy statement DP2, although density should be promoted in all areas, higher levels of densification should be encouraged only at specific locations and the Site does not meet the criteria for such a location.
- 73.2.4.1. Higher levels of densification should be promoted at locations with good public transport accessibility, at concentrations of employment, commercial development and/or social amenities and in areas of high amenity. Policy DP7 adds that the City will encourage densification in priority zones, whereby in the short term (5 years) such zones include areas adjacent to development and activity routes; activity streets; around rail and IRT stations.
- 73.2.4.2. The City's Densification Policy and District Plan also promotes densification and intensification around nodes and corridors which do not include the site. According to the Table Bay District Plan (2012) "appropriate medium density development

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<sup>39</sup> Gross base density refers to the "the average number of dwelling units per hectare across large city district areas or the city as a whole, excluding land-extensive uses such as agricultural and rural land and large nature areas/reserves/parks" which the Site itself qualifies as. Gross du/ha refers to the "number of dwelling units per hectare of land calculated in a designated area on the basis of land used for residential purposes and other land uses such as industry, commerce, education, transport and parks. Excluded are land-extensive land uses such as agricultural land and nature areas/reserves/parks", such as the Site.



(e.g. 2/3 storey development) along the interfaces of open spaces such as the Two Rivers Urban Park could be considered to improve passive surveillance. (p47) but it is clearly stated that it is subject to contextual informants.

- 73.2.4.3. While the proposal meets the thresholds required to support public transport (acknowledged on p191) the sites locational attributes are being overstated and the motivation for the site to accommodate the scale and bulk of development proposed, based on principles of TOD and Densification Policy (2012), are misleading.

#### **9.4 Inconsistency with City's Stormwater management policies**

74. The MPT concluded that: *"There will be no adverse impact on the service infrastructure as either sufficient capacity exists or improvements to the services infrastructure will be implemented to accommodate the proposal. In some instances, on-site provision will be made to accommodate services."*
75. We submit that the MPT erred in reaching this conclusion for the following reasons.
- 75.1. The approval was granted without considering the greater context of the development and the interconnected nature of service infrastructure. The proposed development will have significant negative knock-on effects on the services provided to the broader TRUP and Metro South East.
- 75.2. This development and the deviations from the City's policies on Stormwater are not supported by the City's Catchment, Stormwater and River Management Department, neither is the proposed construction of a swale by filling in part of the old Liesbeck river, in order to accommodate flooding stemming from the development.
- 75.3. The future impact of climate change and the effects of upstream development are not easily assessed, and consequentially stormwater management on the site and in the TRUP area are not fully understood and are difficult to quantify.
- 75.4. Any measures proposed off-site to respond to stormwater retention as suggested will require the permission of CSRM who have indicated their opposition to this proposal (p219).

#### **9.5 Flood risk and stormwater management**

76. The MPT concluded that:



- 76.1. *“Specialist studies sufficiently demonstrate that measures proposed will mitigate against impact of development within the floodplain. This is agreed to by the competent Department.”<sup>40</sup>*
- 76.2. *“In order to develop a viable solution for potential flooding and storm water management, deviation from Council policy in this regard is required and merited in order to facilitate a sustainable flood/stormwater management system for the development.”*
77. These conclusions are incorrect. The available facts show that the Proposed Development will exacerbate the risk of flooding, there is no viable plan for stormwater management and the limited understanding about the implications for the river catchment mean that a risk averse and cautious approach should be applied.
- 77.1. The area on which the development is proposed currently experiences stormwater and flood mitigation management challenges, exacerbated by local conditions, which impact significantly on existing waste water treatment plants and stormwater overflow management.
- 77.2. It is clear that the development will materially increase flood hazards for other property owners in the surrounding areas, and adversely affect flood behaviour and the stability of river channels. The Proposed Development is heavily bulked and massed and covers two-thirds of the Site which is situated in a floodplain, and prone to flooding very regularly, the frequency of which will increase given the inevitable effects of climate change.
- 77.3. At present, the stormwater management strategy in the area incorporates an already stressed and partly effective piped network that is only sufficient to manage the stormwater from minor storms. Major storms rely on the overland runoff of ground water into the river system, and any development will require extensive changes to accommodate major stormwater movement.
78. The following comments made by the City’s EMD in this regard are instructive.<sup>41</sup>
- “3.1.4.18. Deviation from the Urban Stormwater Impacts Policy is not advisable.*
- 3.1.4.19. Page 5 of the Urban Stormwater Impacts Policy notes the deleterious impacts of urbanisation on receiving waters, that is rivers, streams, wetlands, groundwater and coastal waters, are a worldwide phenomenon. ...*
- 3.1.4.20. One of the functions of this policy, in addition to safeguarding human health, is to protect natural aquatic environments, and improve and maintain recreational water quality. The proposed River Club development is also deviating from this objective.*

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<sup>40</sup> MPT Decision, reason 15, page 4,

<sup>41</sup> Overlay pages 2918 to 2919



*3.1.4.21. A fundamental principle of this policy is that the person or body, whether private enterprise or an organ of state, who creates a development should do so responsibly and should ensure that such development does not adversely impact on present and future communities and on natural ecosystems. In the case of the River Club development, it is acknowledged that there will be some likely increase in flooding and potentially some homes will be flooded slightly more than before. This is a deviation from the policy.*

*3.1.4.22. In order to reduce impacts of urban stormwater systems on receiving waters, all stormwater management systems shall be planned and designed in accordance with best practice criteria and guidelines laid down by Council, to support Water Sensitive Urban Design principles ...*

*3.1.4.23. The proposed River Club development is not designed so as to support Water Sensitive Urban Design principles, and does not achieve the sustainable urban drainage system objectives listed above. Filling in a river corridor is the most inappropriate course of action in this regard. This also constitutes a deviation from the policy.*

*3.1.4.25. The proposed River Club development is not an example of best management practices promoting urban biodiversity, and enhancing the amenity and aesthetics of the River Club site and its surrounds. “*

#### *9.5.1 Application of precautionary approach*

79. The Western Cape Climate Change Response Strategy document (Feb. 2014) warns that degradation of ecological infrastructure, which would ordinarily buffer against climate-related hazards, has been compromised, with the result that the natural environment no longer has the same capacity to buffer humans and human settlements against the impacts of climate hazards.
80. The vital role of the River Club site in terms of flood mitigation cannot be viewed in isolation from the broader catchment system, and the focus on maintenance and filling of the respective Liesbeek River channels on just the site's small section of the river system are misguided as they ignore the fact these channels are part of this broader catchment area. Additional catchment-scale studies, at a minimum including the two golf courses and the River Club, are required to fully understand and model the impacts at the catchment scale, while also emphasising that future flooding risks associated with Climate Change are not fully understood



81. The surface water hydrology report is founded numerous contingencies and assumptions, which pose a number of serious risks.<sup>42</sup> Not all applicable circumstances have been considered (viz. The Two Rivers Urban Park Specialist Study: Modelling of Flood Mitigation Options on The Salt River Task 2 Final Report - 22 March 2017), such as the blockage of downstream bridges or the failure of upstream dams, and as such a decision cannot have been made on all the applicable facts. It is clear that additional scientific studies are required to fully understand the impacts of the catchment scale and climate change.
82. Given the insufficient scientific information about the river systems, the precautionary principle must be applied to guide current and future planning for the site, the broader floodplain and the Liesbeek and Black River catchment area as a whole.
83. The reasons provided for the decision are based on contingencies, assumptions and uncertainties which do not justify the financial, legal, ecological and flood risks.
  - 83.1. The argument that flood mitigation measures can be offset against additional jobs, economic development and contribution to further spatial development is logically fallacious. This is not a dichotomous choice. Protecting the ecological corridors is necessary to enhance the City's capacity to mitigate some of the impacts of climate change, such as flooding and storm surges.
  - 83.2. Mitigation upstream is not a suitable reason to approve development given the widely acknowledged past and present stormwater and flood mitigation management issues (and indeed failures) in the area.
84. To proceed with the current development is irrational and irresponsible, given the flooding, health and safety, infrastructural, financial, economic and social risks that could eventuate, and given the uncertainties around climate change impacts on flooding and the numerous contingencies and assumptions on which this development would be based.

## 9.6 Spatial Justice

85. The Proposed Development would allocate at least 20% (about 30 000 m<sup>2</sup>) of the floor space for housing, while 20% of that (about 6000 m<sup>2</sup>) will be inclusionary housing. This means that approximately 4% of the floor space of the Proposed Development will be allocated to inclusionary housing.

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<sup>42</sup> These assumptions are made clear in the Aurecon opinion, which show that there is uncertainty around the accuracy of hydrological modelling as a result of the broad scientific consensus on the difficulty of predicting the effects of climate change on flooding and therefore the effectiveness of current and future flood mitigation measures.



86. On Page 247 of the case officers report, the question of increasing the proportion of affordable housing is dismissed as being not viable economically:

*“The inclusion of affordable or inclusionary housing units within the development was discussed with the applicant in early application interactions with City officials. In response, the developer proposed a limited amount of affordable housing units (4% being approximately 6000m<sup>2</sup> of the total floor space) based on economic viability of the current proposal. In spite of this department’s desire to propose a condition requiring a larger percentage of affordable housing, the rationale or reasonableness cannot be clearly ascertained. Further, the imposition of such a condition could negatively impact on the financial viability of the project. As a result, the proposal is considered to be adequate and contributes to the broader spatial justice objective within this highly favourable location for reasons explained above.”*

87. However, the Salary Band proposed for the Affordable Housing range is R ,6000 to R 15,000 per month. People in this range are likely employed civil servants (teachers, policemen).<sup>43</sup> The SEIS shows that more than 60% of people in the W Cape and in Cape Town earn less than R 76, 000 per annum and so will not qualify. Moreover, only 25% of Cape Town residents fall in the bracket of R76,001 to R 307,600 per annum which suggest a minority in the range of R 72,000 to R 180 000 as suggested – maybe 10%. This means that the contribution that the Proposed Project will make to inclusionary housing will be negligible.

## **10. BUILDING HEIGHT AND MASS AND VISUAL IMPACTS ON SENSE OF PLACE AND HERITAGE VALUES**

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88. The MPT concluded that “The elevated height in Precinct 2 enables a sensitive bulk distribution where it is deemed most appropriate” (reason 18). In fact, the height and mass of the Proposed Development are completely inappropriate for the Site, are highly visually intrusive, and would cause irreparable damage to the intangible cultural values associated with the Site.
89. In the Developer’s 2018 application, it was stated that indicative building heights in Precinct 1 ranged from 15m to 44m above base level (average height 27m) while in precinct 2, heights ranged from 27m to 44m with average height of 40m. In the 2020 application, Precinct 1 heights are said to be lower at 11m to 33m (though they may in fact be between 19m and 44m), while precinct 2 has received additional bulk with building 32m to 46m high. It has also changed from a precinct of 10 buildings to

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<sup>43</sup> See response to query on page 3123, Annexure G2, applicants response to branch comments.





larger and fewer (8) buildings. It is stated on page 218 by the case officer that “the applicant has indicated that their desired anchor tenant has largely influenced the change in building massing.”

90. The Case Officer’s report describes the massing as follows:<sup>44</sup>

*“Buildings located along Berkley Road extension are proposed to be the highest on the site. Buildings along Berkley Road extension are proposed to be about 46m high in certain instances and will define the public realm/edges of the site and overlook the public domain. This may be commensurate with the future prominence of Berkley Road as a main thoroughfare.”*

91. Of the 8 buildings, four are between 31.9 and 36.4m high, while the rest are all over 42m high, ranging from 42.6m to 46.6m high
92. Much of the intangible heritage value associate with the site is associated with the confluence of the two rivers within the context of the wider landscape including the views to Lions Head and other mountains.<sup>45</sup> However, if the Proposed Development were to take place, the confluence of the two rivers would be dominated by a set of large buildings in close proximity. As illustrated in **Annex 3**, there would be a very large building (building 18) within 50m of the confluence. The front of the building would be 36.6m tall and the back of the building 46m tall. Behind this building there would be another 46m tall building (building 17m), and behind that, another 42.6m high building perpendicular to the lie of the first two buildings.
93. It is difficult to imagine how ceremonies, which have significant spiritual resonance, are going to take place in the shadow of buildings 36 to 46m tall. Furthermore, the culturally significant views of Lion’s Head will be severely constrained (**see Annex 3**).
94. The confluence of the Rivers will now have a major road passing some 10 to 20 metres away (see **Annex 3, Diagram 3**). Thus, any rituals or ceremonies performed at this juncture will be very public and exposed not only to people watching from the 36 m building but potentially from vehicles crossing the Berkeley Road bridge to be built. Besides loss of any privacy, there will likely be considerable noise, fume and dust pollution, along with risk of discarded garbage and cigarettes in proximity to this site.

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<sup>44</sup> Para 16 (pages 218 and 219)

<sup>45</sup> The AFMA report states: "Places where rivers are coming together, are special places. Those rivers are connected with people and memory. Water holds memory. So, wherever rivers are coming together, at that point is a ceremonial place. So, the Two Rivers, at that point, is one of them, because of the rivers coming together there. So that space holds a huge memory." (p19)  
 "The confluence of the Black River and the Liesbeeck River, that embankment area is the place where the Khoi would engage in marriage ceremonies and burial rites, cremation and these kinds of things. It’s also a political hotspot, because that’s where the tribes would gather and meet... So symbolically, confluences for the Khoi, had a tremendous resonance." (p19)



95. The South African Astronomical Observatory (SAAO) have also indicated that the reduction of bulk in Precinct 1 does not afford them relief. The SAAO contend, in their September 2019 comments that, despite mitigation measures introduced to reduce heights in Precinct 1 and to set back buildings, the vertical angle of closer obscuring buildings will limit the visual-spatial field currently experienced from the Observatory. This effect is compounded by the 'urban wall' created by the proposed densely packed individual buildings in the development which will block any horizontal viewing angle between adjacent buildings from any single proximity vantage point at the Observatory. *"Hence, the scale and form of proposed development in Precinct 1 still presents an 'urban wall' interface with the Liesbeek Riverine Corridor and the Observatory and results in the hemming in of the landscape setting of the Observatory. It stands in dramatic contrast to the loose arrangement of Observatory buildings set within a green matrix and tree canopy well suited to the concept of a parkland setting associated with the adjacent riverine corridors."*
96. **Annex 4** illustrates the visual impact of tall buildings on site. The illustration of a 10m high building being replaced by 20 to 40m high buildings will clearly have a major adverse impact of the visual connection of the SAAO with the suburb of Observatory and with views of the mountain.
97. The Visual Impact Assessment provides no views from the SAAO site across the development. The MPT was thus unable to assess the visual impacts of the bulk of buildings

## 11. CONCLUSIONS, RELIEF SOUGHT ON APPEAL

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98. For the reasons set out above we submit that the MPT's decision to grant the Approvals is fatally flawed in fact and in law. In particular:
- 98.1. the Approvals are the result of an administratively unfair decision-making process;
- 98.2. in making the decision to grant the Approvals the MPT failed to have regard to, and apply the relevant principles prescribed in NEMA, SPLUMA and LUPA;
- 98.3. the MPT decided to grant the Approvals without considering material information, including an assessment of the climate change implications of the Proposed Development, a proper assessment of the effects of altering the floodplains and water courses on the Black and Liesbeek rivers including flooding risks;



- 98.4. the MPT failed to take account of material considerations adequately, including heritage impacts and the extent to which the Proposed Development was inconsistent with the MSDF, the Table Mountain District Plan and various City policies;
- 98.5. had the MPT correctly applied the relevant principles to a consideration of all the material facts it would have come to the conclusion that the Developer's applications should be refused, among reasons, because the Proposed Development is not in the public interest or in the interests of future generations, it is environmentally harmful and will decrease the City's capacity to address climate change impacts, it will irreparably damage valuable cultural values, and it is inconsistent with the Table Bay Local Development Plan, the MSDF, and number of City Policies, including: (1) the *Floodplain and River Corridor Management Policy (2009)*; (2) the *Management of Urban Stormwater Impacts Policy (2009)* (3) the *Climate Change Policy (policy no: 46824, adopt on 27 July 2017)*, and (4) the *Two Rivers Urban Park Contextual Framework and Phase 1 Environmental Management Plan, 2003*. We are instructed that it is also inconsistent with the City's Environmental Management Framework, 2012.
99. Consequently, we request that the Appeal Authority replaces the decision of the MPT to grant the Approvals with a decision to refuse them.

DATED at CAPE TOWN on this 26th day of October 2020

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**CP CULLINAN (Director)**



**ANNEX 1: DOCUMENTS NOT MADE AVAILABLE FOR PUBLIC COMMENT**

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[Emailed with this document]

**ANNEX 2: HEIGHT, MASS AND VISUAL IMPACTS**

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[Emailed with this document]

**ANNEX 3: OCA'S RESPONSES TO MPT'S REASONS**

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[Emailed with this document]

**ANNEX 3A: OCA COMMENTS RESPONSE TO MPT REASONS RE. HERITAGE ISSUES**

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**ANNEX 4: VISUAL IMPACTS IN RELATION TO SOUTH AFRICAN ASTRONOMICAL OBSERVATORY**

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**ANNEX 5: CITY'S APPEAL AGAINST GRANTING OF ENVIRONMENTAL AUTHORISATION**

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