

IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION, CAPE TOWN

WESTERN CAPE HIGH COURT  
2017 -04- 20  
CAPE TOWN/KAAPSTAD  
WES-KAAP HOË HOF

Case No:

In the matter between:

**BO-KAAP CIVIC AND RATEPAYERS ASSOCIATION**

First Applicant

**35 ON ROSE BODY CORPORATE**

Second Applicant

**FABIO TODESCHINI**

Third Applicant

and

**THE CITY OF CAPE TOWN**

First Respondent

**THE MUNICIPAL PLANNING TRIBUNAL, CITY OF CAPE TOWN**

Second Respondent

**THE MAYOR OF CAPE TOWN**

Third Respondent

**BUITENGRACHT PROPERTIES (PTY) LTD**

Fourth Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**OSMAN ADAM SHABOODIEN**

take the oath and state:

## I INTRODUCTION

1. I am a businessman, residing at 246 Buitengracht Street, Cape Town, which is in the Bo-Kaap. I am also the Chairperson of the First Applicant.
2. Save where the contrary appears from the context, the facts contained in this affidavit are to the best of my knowledge and belief true and correct. The legal submissions are made on the advice of the Applicants' legal representatives.
3. I am duly authorised to depose to this affidavit on behalf of all the Applicants. Supporting affidavits will be filed by or on behalf of the Second and Third Applicants.
4. This is an application to review and set aside decisions to approve the applications referred to below, as well as to interdict the implementation of those decisions pending the review. The applications in question (which are related and interconnected) were brought by the Fourth Respondent (**the Developer**), which sought permission to construct a building on the edge of the Bo-Kaap (i.e. on a City block bounded by Buitengracht, Longmarket, Shortmarket and Rose Streets), that is unprecedented in terms of both its size and massing. In having granted such permission, the City approved:
  - 4.1. an application for building work in the Heritage Protection Overlay Zone (HPOZ);
  - 4.2. an application to provide parking within 10m from the street on the ground and first floors;
  - 4.3. the consolidation of two erven; and

- 4.4. an application to build within 5 metres of a Provincial Main Road.
5. The site of the proposed development is 3150 m<sup>2</sup> in total. The building on the site will be 60 metres tall, consist of eighteen storeys and have 310 parking bays accessed off Shortmarket Street. It will also consist of 249 residential units with business premises on the ground, first and second storeys, and will take up most of a city block – from Rose Street to Buitengracht, and from Longmarket to Shortmarket. I refer to it as **"the Proposal"** or **"the Development"**.
6. The Applicants are all parties who objected to the application, both before the Second Respondent (**MPT**) and in an appeal before the Third Respondent (**Mayor**). There were also objections from more than a thousand other concerned residents of Cape Town. In addition, the local and provincial organisations tasked with preserving Cape Town's heritage – the First Respondent's own department of Environmental and Heritage Resources Management (**EHRM**), and Heritage Western Cape (**HWC**) – objected to the proposed development because of the highly detrimental impact it would have on the heritage of the Bo-Kaap, Riebeeck Square and Heritage Square.
7. Despite the detailed and substantiated objections which were submitted by more than 1000 persons, those objections fell on deaf ears. The MPT and the Mayor ignored the concerns of its residents, its own EHRM department and HWC. This it did despite the serious and obvious adverse implications that the proposal will have on an area of high heritage value, such as the Bo-Kaap, Riebeeck Square and Heritage Square. Instead, the City has decided to grant permission for a building that will permanently change the character and heritage of the Bo-Kaap, creating a literal and figurative wall between the Bo-Kaap and the City, that will tower over surrounding buildings.

8. In having granted the approvals that it did in respect of the development, the City followed an unfair process:

8.1. First, it failed to make available the minutes of the pre-application consultations that the Developer held with the City and also did not accurately summarise what occurred at those meetings in the documentation made available to the MPT, the Mayor and the public.

8.2. Second, persons seeking to object to the Proposal were not provided with access to all relevant documents, including the Heritage Statement which was seemingly provided by the Developer to the City some months after the closing date for objections.

8.3. Third, the public were misled as to the scale of the building and were provided with inaccurate information in this regard. In addition, no Visual Impact Assessment was undertaken. This despite the fact that the magnitude of the building, as well as its serious, adverse impacts on views and vistas, including that of Table Mountain must be patently evident.

8.4. Fourth, the appellants were afforded less time than the prescribed timeframe for the purposes of lodging an appeal.

8.5. Finally, the "reasons" provided by the MPT were woefully inadequate; they show that there was no rational connection between the decision of the MPT and the reasons provided by it for that decision. The inadequacy of the MPT's reasons also prejudiced the appellants in exercising their rights of appeal and the resultant appeal decision.



9. In addition, the City's approvals were, I submit, substantively irregular in various material respects. The City's approvals are accordingly also challenged on a number of substantive review grounds, which can be broadly summarised as follows:

- 9.1. First, the City failed to properly consider the fact that part of the subject properties fall within the HPOZ, and the implications thereof from a heritage perspective. In particular, the City ignored the comments of its own EHRM and of HWC notwithstanding the relevance of those comments to the approval of development in an HPOZ.
- 9.2. Second, the City's approvals failed to have regard, alternatively failed to have proper regard, to at least five of its own policies, including its very own policies in respect of the regulation of tall buildings, densification, scenic drives and urban design. In its consideration of the Proposal, the City's decision-making bodies, through its responsible structures and representatives, manifestly failed to engage with the substance of those policies, preferring to simply assert compliance without analysis.
- 9.3. Third, the approvals granted failed to have regard, alternatively adequate regard, to the title deed condition in respect of Erf 144698.
- 9.4. Fourth, the approvals failed to have regard, alternatively adequate regard to the traffic and parking impact of the development.
- 9.5. Fifth, the conditions subject to which the approvals were granted do not respond to the many issues raised by the Applicants.
10. Both the process and reasoning adopted by the City are vitiated by fundamental reviewable irregularities, the consequence of which is that the resultant decisions fall

to be reviewed and set aside. The grounds relied upon for doing so are, in summary, that the impugned decisions: (a) were taken without considering or properly considering relevant factors; (b) are based on material mistakes of law and/or fact; (c) are so unreasonable that no reasonable decision-maker, could have reached them; and (d) were procedurally flawed. Reliance is also placed on irrationality as a ground of review both in relation to process and in respect of the resultant approvals. The grounds of review are addressed in more detail elsewhere in this affidavit.

11. It should be emphasised at the outset that the Applicants are not opposed to development on Buitengracht, or near the Bo-Kaap, or indeed on the subject properties. They are opposed, however, to a building of massive, and indeed unprecedented, proportions in an area of the City with a rich history, heritage and culture, which will be out of place in the existing urban context, and will permanently degrade the rich history, heritage and culture of the Bo-Kaap.
12. The remainder of this affidavit is structured as follows:
  - 12.1. **Part II** describes the parties and the basis on which they assert standing to institute this application.
  - 12.2. **Part III** details the rich historical significance of the Bo-Kaap.
  - 12.3. **Part IV** addresses the key aspects of the subject properties.
  - 12.4. **Part V** provides a chronological background to the decisions that are impugned in this application and the processes followed prior thereto.
  - 12.5. **Part VI** addresses the procedural irregularities.

12.6. Part VII addresses the substantive grounds of challenge in relation to: (a) the HPOZ and heritage; (b) the failure to have regard, alternatively proper regard to the City's own policies; and (c) non-compliance with the requirements of the DMS in respect of parking.

12.7. Part VIII identifies the grounds of review that are relied on.

12.8. Part IX deals with the interdictory relief sought.

12.9. Part X addresses the appropriate remedy.

13. For convenience, I also include immediately below a table which lists the various Parts of this affidavit, as well as the sub-parts which fall within them, and provides the pages in this affidavit where they are to be found.

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*[Handwritten signature]*

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14. Before addressing each of these issues, I should explain that, prior to instituting these proceedings, the City, at the request of the Applicants' attorneys, provided a compact disc containing a range of documents that were said to have been considered by the decision-makers; and then also supplemented this with certain further documents provided in hard copy. Most of the documents provided were paginated. The Applicants have extracted the documents they rely on and attach them as annexures to this affidavit. When doing so I refer to the paginated page numbers as they appear in the documents provided by the City.

II THE PARTIES AND STANDING

The Applicants

15. The First Applicant is the **BO-KAAP CIVIC AND RATEPAYERS ASSOCIATION**, a voluntary association representing the interests of the residents of Bo-Kaap. I attach a copy of its Constitution marked "FA1". The First Applicant was formed for the purpose, *inter alia*, of devoting itself to the enhancement and preservation of the heritage of Bo-Kaap and to that end has the power to institute litigation. It is duly authorised to institute these proceedings as is apparent from the resolution attached as "FA2".

16. The Second Applicant is **THE BODY CORPORATE OF 35 ON ROSE RESIDENTS' ASSOCIATION**, a body corporate established under the Sectional Titles Act No 95 of 1986. It is duly authorised to institute these proceedings as is apparent from the resolution attached as "FA3".

17. The Third Applicant is **FABIO TODESCHINI**, an adult male architect, city planner, urban designer and heritage practitioner resident at 55 Dorp Street in the Bo-Kaap.
18. The Applicants institute these proceedings: (a) in their own name; (b) on behalf of the residents of Bo-Kaap who are adversely affected by the impugned decisions but lack the means to institute these proceedings in their own names; and (c) in the public interest including the interests of the residents of Cape Town and the Western Cape.

### The Respondents

19. The First Respondent is the **CITY OF CAPE TOWN**, a metropolitan municipality established in terms of chapter 2 of the Local Government: Municipal Structures Act No 117 of 1998, care of the Municipality Manager, 6<sup>th</sup> Floor, Podium Block, Civic Centre, 12 Hertzog Boulevard, Cape Town.
20. The Second Respondent is **THE MUNICIPAL PLANNING TRIBUNAL, CITY OF CAPE TOWN (MPT)**, established in terms of section 115 of the City of Cape Town's Municipal Planning By-law of 2015 (**the By-law**), which is cited c/o the City Manager, City of Cape Town at 12 Hertzog Boulevard, Cape Town. The Second Respondent was the Tribunal of first instance that approved the subject applications. While its decisions were subsequently replaced by the decisions of the Third Respondent which is the appeal authority, in the interests of caution the Applicants seek to set aside the decision of the Second Respondent too. They do so to avoid any possibility of an argument that the setting aside of the Mayor's decision would result in the MPT's decision remaining or reviving. The MPT's decision is also relevant in that the reasons of the MPT were to a large extent adopted by the Mayor.

21. The Third Respondent is **THE MAYOR OF CAPE TOWN (the Mayor)**, 12 Hertzog Boulevard, Cape Town. The Mayor is the appeal authority in relation to decisions taken by the MPT; and in that capacity she dismissed the appeal against the MPT's decision on or about 19 January 2017 and conveyed her decision to the appellants (including the First Applicant) on 25 January 2017. As Indicated above, the Applicants impugn the Mayor's decision in this matter, which they seek to have reviewed and set aside.
22. The Fourth Respondent is **BUITENGRACHT PROPERTIES (PTY) LTD (Buitengracht Properties or the Developer)**, a private company with its registered offices as reflected in the Companies and Intellectual Property Commission (CIPC) records as The Views – Founders Hill Office Park, 18 Centenary Road, Modderfontein, Gauteng. I attach a copy of a search result from Windeed reflecting the information from the CIPC records as "FA3A". Buitengracht Properties was the applicant for the subject approvals in this matter; and it is the developer of the intended development. No direct relief is sought against Buitengracht Properties save for: (a) an interdict (under Part A) that it be restrained from carrying out any work pursuant to the impugned approvals; and (b) costs in the event that it opposes the application. Subject to the foregoing, Buitengracht Properties is cited only to the extent that it has an interest in this application.

### III HISTORY OF THE BO-KAAP

23. Bo Kaap was built largely by and for the artisans of Cape Town between 1790 and 1825. It extends over 34 hectares and is bounded by Buitengracht Street, Rose Street, Carisbrook Street, Strand Street and the slopes of Signal Hill.



24. Although the Bo-Kaap has over centuries been home to people of various origins and religions, the area is closely associated with the traditionally Malay community of the Cape, which is predominantly Muslim. The ancestors of the majority of the Muslims in the Cape arrived from 1658 onwards as slaves, or political exiles from East Africa and South East Asia (India, Indonesia, Java Malaysia and Sri Lanka). Many of them were brought by the Dutch and were skilled craftsmen, artisans, famous scholars and religious leaders.
25. The first mosque at the Cape, the Auwal Mosque, was built in the Bo-Kaap neighbourhood in 1804 and is still in use.
26. The history of the Bo-Kaap reflects the political processes in South Africa under the apartheid years. The area was declared an exclusive residential area for Cape Malays under the Group Areas Act of 1950 and people of other religions and ethnicity were forced to leave.
27. The neighbourhood has been described as being atypical. In the mid-twentieth century, most working class people in South Africa were moved to the periphery of the cities under the Slum Clearance Act and neighbourhood improvement programmes. Bo-Kaap is however one of the few neighbourhoods with a predominantly working class population that continued to exist near a city centre.
28. The housing is made up of long continuous rows of small, mostly single-storeyed, flat roofed, parapetted houses; staggered to step down the slopes. All the houses face on to the street, with access to the front door immediately off the pavement via the narrow stoeps which often have low brick walls and stoep-seats at each end. The parapets are decorated with mouldings.

29. Virtually no houses in the Bo-Kaap have garages and people utilise street parking to park their vehicles from early evening until the morning. Rose Street is one of the roads that is particularly affected by this. Street parking in the Bo-Kaap, and particularly Rose Street, is not an event limited to the period after the end of the working day. Many people who work in the area of the CBD bordering the Bo-Kaap utilise available street parking in the Bo-Kaap to park their vehicles during the working day instead of having to pay for parking. The impact of the subject approvals on the issue of parking and traffic in the surrounding area is an issue that I shall return to elsewhere in this affidavit.
30. Bo-Kaap is architecturally and culturally an important part of the City. Sadly though, the development, given its sheer magnitude and proportions, will create a barrier between the City and Bo-Kaap.

#### IV THE SUBJECT PROPERTY

31. I attach a location map of the subject-property marked "FA4".
32. The development will span two separate properties: (a) Erf 144698 which is 2505 m<sup>2</sup>; and (b) Erf 8210 which is 645 m<sup>2</sup>, the result of which would be a consolidated site of 3150 m<sup>2</sup>. At the time of the application, Buitengracht Properties had purchased Erf 144698 and was in the process of acquiring Erf 8210 but had the power of attorney to act on behalf of the then owner of this property (Green Point Squash Centre (Pty) Ltd).
33. The majority of the property is zoned Mixed Use Subzone 3 (MU3). The primary uses under this zoning are: business premises, industry, dwelling house, second dwelling, boarding house, flats, place of instruction, place of worship, institution,

hospital, place of assembly, place of entertainment, hotel, conference facility, authority use, utility service, rooftop base telecommunication station, transport use, multiple parking garage, private road and open space.

34. A portion of the property (at the corner of Buitengracht and Shortmarket Streets) is zoned Transport Zone 2. I understand that no development is proposed within this zoning.
35. The Title Deed for Erf 144698 (a copy of which is attached as "FA5") makes that property subject to a special condition for the benefit of the City. The condition ("**Condition B**") reads as follows:

"B. Subject to the following special condition contained in Deed of Transfer No. 17550/1953 imposed by and for the benefit of the Municipality of Cape Town, namely:

The Transferor shall have the right to refuse permission to build or rebuild any building or structures on the said land unless the architecture of that portion of such buildings or structure which fronts on Rose Street is in conformity with the general design and architecture of buildings situate in such area or areas of the City of Cape Town which is known and/or classified as the Malay Quarter."

36. There is no such condition in respect of Erf 8210.

## V THE FACTUAL BACKGROUND AND CHRONOLOGY

### The pre-application consultations

37. It is apparent that Tommy Brümmer Town Planners (who represented Buitengracht Properties) had certain pre-submission consultations with the City. These consultations apparently took place on 21 May 2015 and 24 August 2015. The Applicants are unaware as to what was discussed at the meeting of 21 May 2015 or

the outcome thereof. That minute should have been included as part of Annexure G to the motivation of application submitted by the Developer. It was however not included in the copy of the motivation of the application made available by the City for inspection by the Applicants.

38. As will be confirmed by Prof Todeschini in his affidavit, he did have sight of a one-page minute of a pre-application consultation held on 24 August 2015 with the City. This was made available to Prof Todeschini by Tommy Brümmer Town Planners. I annex hereto a copy of that minute marked "FA5A". I shall return to the content of that minute elsewhere in this affidavit, when I deal with references to what took place at this meeting, and apparently, also a meeting in September 2015. I record that the Applicants have not seen an actual minute of the September 2015 meeting either but draw inferences as to what took place at that meeting with reference to the Urban Design Report<sup>1</sup> (which formed part of the motivation for the application to the City) prepared on behalf of the Developer.

### **The application**

39. In October 2015, Buitengracht Properties made application to the City:
- 39.1. in terms of section 42(b) of the By-law, for departures from the City's Development Management Scheme (DMS) to allow portions of the building above 38m to be closer to the street boundary than is permitted by Item 60(e) of the DMS;
- 39.2. in terms of section 42(f) of the By-law, for the consolidation of two erven;

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<sup>1</sup> Page 128; par 1.3.



- 39.3. in terms of section 42(i) of the By-law, for approval in terms of Item 64(e)(ii) of the DMS to have parking on the ground floor level for Block B at 0m in lieu of 10m to the street;
- 39.4. in terms of section 42(i) of the By-law, for approval in terms of Item 162 of the DMS to develop a new building in the Heritage Protection Overlay Zone (HPOZ);
- 39.5. in terms of section 42(i) of the By-law, to have a 0m building line on the Buitengracht Street boundary in lieu of 5 m as required by Item 121(2) of the DMS for a metropolitan road.
40. The motivation for the application, which was prepared by Tommy Brümmer Town Planners, appears as Annexure F to the City's report to the MPT at page 108, a copy of which is attached as "FA6". The motivation for the application was supported by:
- 40.1. an Urban Design Report prepared by Blue Green Planning and Design;
- 40.2. a report by Fabian Architects; and
- 40.3. a Traffic Impact Assessment by Kantey and Templer.
41. The application was motivated on the basis of the proposal being compliant with the City's policy framework and more particularly: (a) the Cape Town Spatial Development Framework; (b) the Table Bay District Plan; (c) the Tall Building Policy; and (d) the Urban Design Policy.



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### Internal reports from the City and HWC

42. On 7 December 2015, the Directorate of Energy, Environment and Spatial Planning in the Department of Spatial Planning and Urban Design submitted an internal report (a copy of which appears at page 1661 and is attached as "FA7"). That report stated *inter alia* as follows:
- 42.1. the proposal "generally aligns" with the provisions of the Cape Town Spatial Development Framework (2012) and the Table Bay District Plan (2012);
  - 42.2. the development does not trigger the Tall Building Policy or the Urban Design Policy, but reference is made to these policies for guidance;
  - 42.3. that due consideration has been given to the context of the location of the site as demonstrated through the Urban Design Report;
  - 42.4. support was given for a building that utilises allowable height but with massing sensitive to the Bo-Kaap and Riebeeck Square context.
43. On 9 December 2015, the Directorate of Asset Management and Maintenance Transport for Cape Town furnished a report to the Land Use Management Directorate which recommended the approval of the application subject to certain conditions. A copy of the report appears at page 1663 of the record presented by the City and is attached as "FA8".
44. In addition, there were reports by EHRM (the Heritage Department within the City) and HWC, neither of which supported the development. I shall detail the relevant aspects of these reports elsewhere in this affidavit.


B e

**Notice of the application**

45. The City was required to give notice of the application in terms of section 82 of the By-law which provides as follows:

**"82 Notice to a person**

- (1) The City Manager must cause a notice to be served, as contemplated in subsections (2) and (4), of the City's intention to consider the following applications –
    - (a) determination of a zoning or deemed zoning;
    - (b) rezoning of land;
    - (c) subdivision or amendment of subdivision;
    - (d) consolidation;
    - (e) amendment or imposition of a condition;
    - (f) removal, suspension or amendment of a restrictive condition;
    - (g) any other category of application contemplated in section 42(u) that the City Manager prescribes.
  - (2) The notice must be served –
    - (a) on a person whose rights or legitimate expectations are materially and adversely affected if the application is approved;
    - (b) in accordance with section 111 of this By-Law.
  - (3) If the City intends to rezone land which it does not own it must give notice to the owner.
  - (4) If notice is given in only one official language of the Province, the notice must contain a statement in each of the other official languages of the Province that the City will, upon request delivered within seven days of notification, translate the notice into another official language of the Province."
46. On 12 November 2015, the City gave notice of its proposed approvals in terms of the DMS, and of the proposed consolidation and departures in terms of the By-law. I attach a copy of the notice marked "FA9".



47. However, the initial advertisement by the City (as opposed to the notice) failed to refer to the consolidation application. For this reason, the advertisement was defective. This necessitated a further advertisement, with the full application being advertised in the press on 18 January 2016 with a deadline for comments of 18 February 2016.
48. The purpose of the application is described as being *inter alia* for the redevelopment of the majority of a City block (bounded by Buitengracht, Longmarket, Shortmarket and Rose Streets) into a 19 storey mixed use building consisting of 249 residential units, 324 parking bays (with vehicular access off Shortmarket Street) and business premises on the ground floor. The notice identified the specifics of the application as including:
- 48.1. the consolidation of Erf 8210 and Erf 144698, Cape Town;
  - 48.2. to permit portions of the building that were above 38 metres in height above base level to be closer to the street boundary in accordance with certain specifications;
  - 48.3. to allow parking bays on the ground and first floor levels to be closer than the 10m limitation to the street boundary;
  - 48.4. to permit building work within a Heritage Protection Overlay Zone;
  - 48.5. to permit a building to be 0 metres in lieu of 5 metres from a designated metropolitan road (Buitengracht Street).

### Objections to the application

49. The application attracted extensive opposition.
50. There were in excess of 1000 objections to the application (in response to both the first and second notices). (This included objections that were out of time and objections that did not include the requisite documentation.)
51. The First and Third Applicants (also on behalf of some local property owners and some interested and affected persons), jointly submitted a comprehensive objection to the approvals on or about 10 February 2016. A copy thereof is attached as "FA10".
52. Objections on behalf of the Second Applicant were submitted by Mr Willem Bührmann from Willem Bührmann Associates: Town Planners, Valuers and Property Consultants. A copy thereof is attached as "FA10A".

### Report to the MPT

53. On 26 May 2016, a report from the City's Land Use Management Department (authored by Mr Heydenrych) was furnished to the MPT, a copy of which is attached as "FA11". I shall address pertinent aspects of that report (referring to it as the report to the MPT) elsewhere in this affidavit.

### The hearing before the Municipal Planning Tribunal

54. A hearing occurred before the MPT on 7 June 2016. I attach a copy of the minutes of that meeting as "FA12" and highlight the following aspects thereof:

- 54.1. Councillor Bryant emphasised the growth in the CBD and that the "amazing growth" was something that "we" should be proud of.



54.2. The reasons given for the MPT's approval of the application consist of seven bullet points ("**the MPT's Reasons**"). They are:

- 54.2.1. that the proposal complies with the City's planning policies – examples of which, which were specifically mentioned, including: (a) the Table Bay District Plan; (b) the Densification Policy; (c) the Urban Design Policy; and (d) the Tall Building Policy;
- 54.2.2. that the proposal takes cognizance of the heritage resources within the area and has the potential to exhibit good urban design when the relevant conditions have been complied with, while sacrificing primary development rights;
- 54.2.3. the proposal will provide an adequate transition between the City and Bo-Kaap at street level, while reinforcing and defining Riebeeck Square, provided appropriate urban design and landscaping is implemented;
- 54.2.4. the massing and height of the building is located away from Bo-Kaap;
- 54.2.5. the interface and facades are considered to be acceptable and positive especially when relevant conditions are complied with;
- 54.2.6. the proposal will activate and improve surrounding streetscapes;

9<sup>e</sup>

54.2.7. the proposal is considered to be desirable in terms of section 99(3) of the By-law.

#### **Notification of the outcome of the MPT's decision.**

55. On or about 21 July 2016, the Applicants (and seemingly other objectors) were notified of the outcome of the MPT's decision, a copy of which is attached hereto as "FA13". A copy of the minutes of the MPT was attached to the notification and the recipient thereof was referred to the MPT's Reasons. Given that these minutes are attached as "FA12", they do not form part of "FA13".
56. The notification further stated that, if the addressee intended appealing against the decision of the MPT, such an appeal had to be lodged within 21 days from the date of notification.
57. It appears that certain objectors were not provided with the above notification through an oversight on the part of the City. Accordingly, on 9 September 2016 the notification was provided to such persons; and they too were afforded the opportunity to lodge an appeal within 21 days.

#### **The appeal process**

58. Twelve appeals in total (including those of the First Applicant, Second Applicant and Third Applicant) were lodged. I annex hereto, the appeal documents filed on behalf of the First, Second and Third Applicants as "FA 13A", "FA13B" and "FA13C".
59. It was only at this stage that the City established that "a number of objection letters were not included in the original report that went to the MPT" as they were seemingly not uploaded onto the City's electronic file.



60. On 19 October 2016, the District Manager submitted a report to the Mayor in respect of the appeal, a copy of which is attached as "FA13D". The report purports to provide a Departmental assessment of the appeal and the comments received thereon.
61. The appeal served at a meeting of the Mayor's Advisory Panel ("MAP") which was established in terms of section 121 of the By-Law. At this meeting, it was resolved that the consideration of the matter should be adjourned to allow the opportunity for interviews with the applicant and the appellants who had requested an interview.
62. On 30 November 2016 a meeting of the MAP was held at which the appeal served. At that meeting, there were oral representations from some of the appellants.
63. On 7 December 2016 there was a report to the Mayor from her MAP, containing the recommendations of the latter, a copy of which is attached as "FA14A". The minutes are attached marked "FA14B".
64. The appeal was determined on 19 January 2017. It was dismissed. The Applicants were informed of this decision by way of a final notification letter dated 25 January 2017, a copy of which is attached as "FA15". The letter repeated the appeal grounds as summarised in the District Manager's Report, and then noted *inter alia* that:
- 64.1. to the extent that any appeal ground raised by the appellants was not specifically listed therein, such ground was not disregarded, but rejected for the reasons given by the MAP, the MPT or in the reports filed by the City's officials to the Mayor;
- 64.2. the reasons for the MAP's recommendations were the following:
- 64.2.1. the self-same reasons given by the MPT;



- 64.2.2. the proposal also complies with the City's Spatial Development Framework, the Integrated Development Plan, the Economic Growth Strategy and the Transit Orientated Development Strategy;
- 64.2.3. where there were errors in the notification process extra time was allowed and agreed to by the applicant for people to submit comments on or objections to the application;
- 64.2.4. although only a portion of the property was affected by the HPOZ the City's EHRM Department had treated the application as if the whole property was affected by the HPOZ;
- 64.2.5. the application was desirable in terms of section 2(d) as contemplated by section 99(3);
- 64.2.6. in addition to the desirability of the application in terms of section 2(d), the application was desirable as contemplated in subsection 3(i) insofar as it related to traffic impacts, parking access and other transport related considerations, in that it bordered on Buitengracht which is a high order road and is thus an ideal location for land use intensification and increased density;
- 64.2.7. in terms of the transit development strategy more residential uses have to be encouraged in the City centre to address inefficiencies in the City;
- 64.2.8. the application was sensitive to the Bo-Kaap area;



64.2.9. the massing and height of the buildings faced along Rose Street and respond to the neighbouring buildings on each side of the building.

65. The Mayor accepted the recommendation of the MAP and agreed with its report to her. According to the Mayor, she considered in particular the view of the City's Environment and Heritage Department that surrounding heritage resources will be impacted on in a negative manner to a certain degree by the proposed development due to the design's size, height and magnitude. However, she agreed with the MPT and the MAP that the proposed development responds appropriately to the neighbouring buildings and the environment.
66. The Mayor conveyed her decision to the appellants by way of a letter dated 25 January 2017 in terms whereof she dismissed the appeals and confirmed the decision of the MPT with amended conditions.

## VI PROCEDURAL IRREGULARITIES

**The minutes of the pre-application consultations that Buitengracht Properties held with the City were not made available to the public, were not accurately summarised in the documentation provided, and the concerns raised therein were not taken into account**

67. It is clear that the By-law contemplates a pre-application consultation as is apparent from section 70 thereof. Section 70 identifies the purpose of such a pre consultation. It provides as follows:

**"70 Pre-application consultation**



- (1) The City may require an applicant to consult with an authorised official prior to submitting an application in terms of this By-Law in order to determine among other things the –
  - (a) information which must be submitted with the application;
  - (b) nature of the public notification to be carried out in accordance with Chapter 7;
  - (c) investigations which must be carried out;
  - (d) further applications required in terms of this By-Law or any other relevant law;
  - (e) sequence in which the applications should be processed;
  - (f) combined advertising of different applications required in terms of different laws;
  - (g) engineering services required and the need to liaise with other organs of state for services regarding engineering services;
  - (h) liaison required with other organs of state in order to align procedures for processing applications in terms of different legislation; and
  - (i) whether a package of plans approach is to be followed.
- (2) The City Manager may prescribe requirements to determine whether an application requires pre-application consultation, the nature of the information that is required, the procedures to be followed and the time periods within which such meetings must take place.
- (3) An applicant may in writing request a pre-application consultation.
- (4) The City must keep a record of a pre-application consultation."

68. As stated, it is apparent that Tommy Brümmer Town Planners (who represented Buitengracht Properties) had certain pre-submission consultations with the City. These consultations apparently occurred on 21 May 2015, 24 August 2015 and September 2015.



69. It is apparent from the minutes of 24 August 2015 (attached as "FA5A") that significant caution was expressed by the Spatial Planning and Urban Design Department of the City. That Department noted *inter alia*:
- 69.1. that the views looking down from Bo-Kaap be explored to evaluate the impact of the 60m tall building;
  - 69.2. that the various edges of the property were discussed with each being treated in an individual manner;
  - 69.3. that Urban Design indicators be used to inform the shape and massing of the building;
  - 69.4. that the impact of the building from Bo-Kaap needs special attention and that medium distance impact must be assessed;
  - 69.5. that Shortmarket Street is regarded as part of the City and connects Bo-Kaap to Riebeeck Square, Greenmarket Square, Darling Street, Grand Parade and District 6.
70. Notwithstanding these concerns having been pertinently raised by the City's Spatial Planning and Urban Design Department, they were not dealt with or taken account of in any meaningful way. Simply put, there is little if anything to demonstrate that there was any meaningful change to the proposal since the meeting of 24 August 2015 in order to respond to the concerns raised.
71. Equally significant, though, is that the minutes of 24 August 2015 were not included in the information made available to the public as part of the public consultative

process and nor were they made available to the MPT or the Mayor – this despite the fact that important concerns were raised which the Proposal did not respond to.

72. Indeed, as is apparent from the Urban Design Report (which formed part of the motivation for the application to the City), at least two pre-application meetings were held with responsible City officials from the urban design, land use planning, traffic and heritage departments in August and September 2015, in addition to the one held in May 2015. There is also disturbingly no indication of what was discussed at a pre-consultation meeting held in May 2015.

73. Furthermore, none of the concerns articulated at the meeting of 24 August 2015 found their way into the Urban Design Report. On the contrary, the Urban Design Report summarised the pre-application meetings in a very positive light along the following lines:

73.1. The Urban Design Report records that, at least at the August and September meetings, "the broad intent of the proposals, the urban design indicators and the general massing and articulation of the building were generally supported and the recommendations of the officials noted in regard to the proposed submission".

73.2. Furthermore, at the August and September pre-application meetings:

73.2.1. there was "positive support" for a tall building up to the 60 m height allowance in this locality provided that the massing was sensitive to Bo-Kaap and Riebeeck Square respectively;

73.2.2. "strong support" was given for the basement parking solution which eliminated parking from the facades of the building;

though it was noted that this was subject to the geotechnical investigation;

73.2.3. "strong support" was expressed for the residential nature of the building, and "support" was given to make use of the 30% residential incentive in the DMS;

73.2.4. "support" was expressed for the proposed treatments of the various edges of the building which all had a separate "energy" and external relationships; while Shortmarket Street in particular was seen as an important link to the City;

73.2.5. appropriate architectural treatment in a "classic" building celebrating the "prominent location" was emphasised;

73.2.6. "support" was given to the methodological analysis surrounding datum lines as reference points to the new building;

73.2.7. it was noted that the departures and consent required would need a public participation process.

74. Given the extensive indications of the "support" and "strong support" for the application, I respectfully aver that even at this early stage the outcome of the application was pre-determined by the City's officials. They did so, I respectfully aver, impermissibly and notwithstanding the content of the minute of 24 August 2015. Indeed, section 70 of the By-law does not contemplate the support (or otherwise) for an application as being amongst the purposes of a pre-application consultation.



**The Heritage Statement did not form part of the consultative process**

75. It is apparent that a Heritage Statement (authored by Aikman and Associates) was submitted on behalf of Buitengracht Properties in support of the application only in April 2016 (**the Heritage Statement**), long after the submission of the motivation for the application by the Developer. I attach a copy thereof as "FA16". As will be confirmed by Prof Todeschini, this document was not made available to objectors at the time that the application was advertised to interested and affected persons for comment, and indeed, Prof Todeschini will also confirm that the document first came to light just before the MPT hearing, when the report to the MPT, together with annexures, was made available to interested and affected persons for consideration.
76. Given the volume of paper that objectors received approximately two days before the MPT hearing, Prof Todeschini who made submissions on his own behalf and on behalf of the First Applicant at that hearing was not able to properly read and consider the document. To this end, he was deprived of an opportunity to engage meaningfully with the content of the Heritage Statement. He will further confirm that, had he had adequate time to analyse the Heritage Statement, he would have been able to submit a detailed critique thereof which would have provided a more balanced counterview to that expressed by the City.
77. The failure to have made available the Heritage Statement timeously also fell foul of the requirements of section 80(1)(d) of the By-law, which entitles a person objecting to an application to inspect such application. While the objectors in the present instance were afforded the opportunity to inspect the application, they did not have the opportunity to consider the Heritage Statement because the application did not include it.

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78. In addition, the statement from HWC was also not available to the public. Indeed, in the written submission made by the First and Third Respondents (FA10), the point was pertinently made that the City was statutorily required to invite comment from the appropriate heritage authorities and that neither the South African Heritage Resources Authority nor Heritage Western Cape had been invited to comment (at page 25). The public were accordingly not afforded the opportunity to engage with its content or indeed to make submissions in respect thereof.

**The scale of the building was under-estimated and a Visual Impact Assessment ought to have been obtained**

79. The ability of the public to engage meaningfully in the process was further undermined, and the ultimate fairness of the process was further tainted, by the fact that the photomontages that were made available to the public downplayed and indeed under-estimated the visual impact of the development.
80. Indeed, according to HWC:

"In our view, the photomontages with close up acute views along Rose Street, down play the considerable visual impact of the new development, as the upper levels are hidden from view, but would be fully visible when slightly further away or viewed along the steep upper sections of Longmarket and Shortmarket Streets. From these residential streets the proposed building would form a dominating wall of development and the "stepped massing" with numerous projecting balconies, roof gardens and green walls (elements that are foreign to Bo-Kaap) will merely cause visual clutter. It is suggested that an independent Visual Impact Assessment should be undertaken, rather than relying on selective photomontages by the project architects. Such VIA should also include views from within the Bo-Kaap including the iconic views down Longmarket Street and Shortmarket Street, as experienced by residents and visitors."

(emphasis added)



81. Despite this issue having been pertinently raised, no Visual Impact Assessment was done and nor were any further photomontages provided. Indeed, the decision-makers also showed no indication of having engaged with these statements. Had they done so, one would have expected: (a) a response to the criticism of the accuracy of the photomontages in depicting the true impact of the proposal; (b) a response to the criticism of the inclusion of "selective photomontages"; and (c) a justification and explanation as to why, despite the views of HWC, there was no Visual Impact Assessment undertaken.

82. Prof Todeschini in fact raised this very issue as part of his objection. The submission pertinently states (at page 45) as follows:

"Having generated our own view (figure 42) from a slightly higher viewpoint and having examined the above illustrations in great detail, as seasoned architects and built environment professionals, we have no alternative but to make the serious suggestion to the effect that the illustration prepared by the development proponent (figure 41) seems to falsify how the proposed building would appear. A comparison of the two figures by any reasonable reader should make it obvious that there is a high probability that there is a serious problem here. What the proponents appear to have done is two-fold:

- The image of the proposed building has been shrunk somewhat; and
- It has been set back from the perspective plane where it should have been.

The net visual effect of these contrivances has been that the image of the proposed building vis a vis its setting (in particular its relationship and relative scale, massing and height to the "The Studios" building would seem to us to have been falsified. Certainly the viewpoint appears to have been selected so as to avoid any reference to Heritage Square in its view frame."

83. There was no interrogation or engagement, or any reasoned explanation in response to the above concerns. These omissions demonstrate a manifest failure to have considered the aforementioned key issues as raised by HWC. This omission too, I

respectfully aver, rendered the process an unfair one and seriously compromised the public comment process. It also reflects a failure by the relevant decision-makers to apply their minds properly to all relevant considerations, and thus taints the decision-making on this basis as well. Indeed, the extent of the visual impact of the Proposal is clearly apparent from the attachments to the affidavit of **JASON PETER STAPLETON**, which is filed together with this affidavit. I respectfully aver that they do indeed show that the visual impact of the Proposal was downplayed in the photomontages made available to the public.

**The Appellants were afforded a period shorter than the prescribed timeframe for the purposes of lodging an appeal**

84. On 21 June 2016 the MPT issued its ruling in relation to the application in writing. This decision was communicated to all of the objectors, by way of correspondence delivered by registered mail.
85. The correspondence to the objectors was received by the Post Office, which issued the notification of registered mail, on 26 July 2016.
86. In terms of section 109(2) of the By-law, the time period for the lodgement of an appeal against a decision of the MPT is 21 days after deemed receipt of the notification. This is deemed to be 4 days after a notification of receipt has been issued by the Post Office (section 111(6) of the By-law).
87. Accordingly, the 21-day period for the filing of an appeal started to run on 30 July 2016, and 21 calendar days thereafter would have been the 20 August 2016. This notwithstanding, the City regarded the appeal period as expiring on 15 August 2016.



88. A letter was addressed to the Appeal Authority and the relevant City officials on 15 August 2016 (attached as "FA17"), which stated *inter alia*:

"The letter of notification was delivered by registered mail. We received the notification letter, which included the reasons, on 2 August 2016. That allowed 13 days for us to deliver a notice of appeal. We contend that in a matter of this complexity, 13 days does not afford us adequate notice of the right of appeal. The City of Cape Town ("COC") did have our email address and we could have been informed by email. Had we been informed by email we could have had 21 days to obtain legal advice and to deliver an appeal.

The postal service is extremely unreliable and the COC could have provided us with adequate notice by informing us by email. Section 111(1)(vi) of the By-Law empowers the COC to notify objectors by email."

89. On 15 August 2016 the City responded to the above request (attached as "FA18").

It stated:

"It is recommended that you submit your appeal today, as there is no mechanism for no extensions of time for appeals in the Municipal Planning By law."

90. The City proceeded irregularly in this respect, too; and also made an incorrect legal assumption. Section 109(4) of the By-law states that a late opposition to, or a comment on the appeal, will not be considered unless the Appeal Authority condones the late submission on good cause shown.

91. The period for the lodging of an appeal accordingly did not accord with the statutory prescripts under the By-law. However, in addition thereto, the truncated period for appeals materially and adversely affected the Applicants' ability meaningfully to exercise their rights of appeal. Had they been afforded the statutorily prescribed minimum timeframe of 21 days, they would have been able to take various further measures to bolster their appeal. For example, as Prof Todeschini will confirm, had he been given more time in which to submit the appeal he would have had the

opportunity to consider properly the Scenic Drive Policy, the Densification Policy, the District Plan, the Tall Buildings Policy, the Urban Design, and the traffic impact, and would also have undertaken a closer assessment of the departure application.

**The reasons provided by the MPT were inadequate and vague and thereby compromised the appeal process and the Applicants' rights in respect thereof**

92. As stated, the reasons for the MPT decision consist of seven bullet points. That, in essence, is the basis on which the MPT sought to justify approval of an eighteen storey building in a heritage rich area. Those reasons were patently inadequate, and I respectfully submit that this:

92.1. constitutes a self-standing basis on which to impugn the MPT's decision, and

92.2. compromised the appellants' rights of appeal and the resultant appeal decision.

93. As regards the provision of reasons, I am advised that a decision maker should: (a) set out their understanding of the relevant law, any findings of fact on which the conclusions depend (especially if those facts have been in dispute) and the reasoning process which led to those conclusions; and (b) do so in clear and unambiguous language, not in vague generalities or the formal language of legislation.

94. In the present instance, the MPT's reasons demonstrably show that there is no rational connection between the reasons given (which are no more than conclusions of law and fact) and the resultant decision.

95. The First and Third Applicants challenged the inadequacy of the MPT's decisions on the basis that they consisted of conclusions reached without setting out the MPT's understanding of the relevant law, policies and any findings of fact on which the conclusions depended. It was also complained that the reasoning process that led to the conclusions were not included. These complaints were ignored by the MAP.
96. Furthermore, as stated above, the inadequacy of the MPT's reasons prejudiced the Appellants in their appeal in that they had an insufficient explanation of the basis for the MPT's decision and what led the MPT to reach the conclusions that it did. This meant that the appellants had inadequate information to engage properly with the grounds of the MPT's decision, or thus with the fundamental question of how the MPT had erred. Despite this issue having been raised in the appeal of the First and Third Respondents, it was moreover not addressed in the reasons given for dismissing the appeals.

## VII SUBSTANTIVE GROUNDS OF CHALLENGE

### Ground 1: The HPOZ and Heritage Concerns

#### The legal framework: HPOZ and heritage

97. As a point of departure, I should mention that I am advised that overlay zoning is a regulatory tool that creates a special zoning district, which is placed over an existing base zone (or zones), and which incorporates special provisions in addition to those in the underlying base zone.
98. Overlay zonings are provided for in the DMS (i.e. Development Management Scheme), which is incorporated as part of the By-law (i.e. the City of Cape Town Municipal Planning By-Law, 2015 (as amended)).



99. The DMS prescribes a range of requirements that must be taken into consideration when preparing an overlay zone (Item 148). These include:
- 99.1. the development principles contained in the Spatial Planning and Land Use Management Act (**SPLUMA**), the Land Use Planning Act (**LUPA**) and the By-law;
  - 99.2. the City's planning vision and principles as set out in its Integrated Development Plan;
  - 99.3. 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;
  - 99.4. the principles as set out in an approved spatial development framework or a policy plan;
  - 99.5. environmental and heritage protection and conservation; and
  - 99.6. the principles of co-operative governance and the duties and objectives of local government as set out in the Local Government: Municipal Systems Act, 32 of 2000 and the Constitution of the Republic of South Africa, 1996.
100. The By-law also regulates the status of overlay zonings. In Item 150 it provides as follows:

**\*150 Status of overlay zoning**

- (1) An overlay zoning applies to land which the City has designated by notice in *the Provincial Gazette* as having that overlay zoning.
- (2) Land which has an overlay zoning is regulated by the provisions for that overlay zoning in this development management scheme in respect of –
  - (a) general provisions;
  - (b) specific provisions;
  - (c) use of property; and
  - (d) development rules.
- (3) An overlay zoning may vary the development rules or use rights relating to an area or land unit, or may set new development rules or use rights.
- (4) The provisions of an overlay zoning may be more restrictive or more permissive than the provisions applicable to the base zoning of the property concerned, or may set specific development rules for an area or land unit.
- (5) If the provisions of an overlay zoning are different to, or in conflict with, the provisions of a base zoning, the more restrictive provisions shall apply, unless stated otherwise in the overlay zoning concerned.
- (6) Any development rules in the overlay zoning that exceed or are more restrictive than the limitations of the base zoning are deemed to be approved permanent departures from the provisions in the base zoning.
- (7) The City may grant departures from the development rules or restrictions or provisions of any overlay zoning by following the departure procedures set out in this By-Law.
- (8) The overlay zoning may contain general provisions or specific provisions and the designation must indicate which provisions apply to a land unit, area or to the City.
- (9) The provisions of more than one overlay zoning may apply to a land unit or area."

(emphasis added)

101. According to the DMS:

- 101.1. Overlay zonings provide mechanisms for designating either city-wide or localised development management rules to deal with specific concerns, over and above the provisions of a base zoning (Preamble to Chapter 20 of the DMS).
- 101.2. Overlay zonings should be applied to promote the City's planning principles, goals, objectives and strategies as may be identified in the Integrated Development Plan (IDP), Integrated Metropolitan Environmental Policy Strategies or spatial plans (Preamble to Chapter 20 of the DMS).
- 101.3. The HPOZ makes provision for the protection of heritage places entered on the heritage register maintained by the provincial heritage resources authority, and for the protection of heritage areas as provided for in terms of the National Heritage Resources Act (Preamble to Chapter 20, Part 1 of the DMS).
- 101.4. The HPOZ also provides a mechanism for the protection of heritage places that the City considers to be conservation-worthy in terms of its heritage strategies (Preamble to Chapter 20, Part 1 of the DMS).
102. While the primary uses of the HPOZ are as stipulated in the base zoning, I respectfully aver that the matter does not end there. In terms of Item 162 of the DMS, the following activities affecting a place or an area protected as an HPOZ *inter alia* require the approval of the City:
- 102.1. for any development, including any physical intervention, excavation or other action other than those caused by natural forces, which may in any





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way result in a change to the appearance or physical nature of a heritage place or influence its stability or future wellbeing including: (a) the construction, alteration, demolition, removal or change of use of a heritage place or a structure at a heritage place; (b) carrying out any works at a heritage place; and (c) consolidation of land comprising a heritage place;

102.2. the addition of any new structure;

102.3. the partial demolition of a structure.

103. While the City is afforded a right of exemption in respect of the foregoing, it has neither exercised nor purported to exercise any such right in the present instance.

104. I am further advised and respectfully aver that in granting approvals in terms of Item 162 of the DMS the following principles apply:

104.1. First, given that the area that is zoned as an HPOZ is a heritage place, any development is subject to the prescripts of section 162 of the DMS.

104.2. Second, in terms of Item 164(2) of the DMS, in considering an application in terms of item 162(1), "the City must take into account the effect such activity will have on the significance of the heritage place or heritage area concerned" (emphasis added). The City is afforded the power to impose conditions it believes to be appropriate for the protection and enhancement of the heritage area or heritage place.

104.3. Third, it is clear that in applying Item 164(2) the matter does not end with what is allowable under the base zoning of the property. Instead, approvals in terms of Item 162(1) operate within the following parameters:



(a) the primary uses and the additional use rights of the property as stipulated in the base zoning are not altered by the fact that the property is located on an HPOZ (Item 160); (b) while the use of the property remains unaltered, other building restrictions are applicable to the property as a result of the effect of the proposed activity on the significance of a heritage place or heritage area concerned. Such building restrictions would, I am advised, include height restrictions, setbacks and massing.

105. I respectfully aver that, in the present matter, the City failed to comply with this legal framework when granting the approvals. Instead, it approached the subject approvals on the basis that the approval of development on an HPOZ cannot override the primary rights allowable on the property (which, according to the City included a height of 60m and eighteen storeys). This, I am advised constituted a fundamental and material error of law and/or fact. On the City's reasoning, irrespective of the implications of a development on the significance of a heritage place or heritage area, the City is not entitled to impose any restrictions that impact on the primary rights permitted on the property. On this fallacious reasoning, an HPOZ would have no bearing at all on the nature of developments approved on a property; while that approach also fails to give any meaning to Item 164(2) of the DMS, and merely pays lip service to its content.

The legal framework: Broader heritage implications

106. The City's approach not only failed to have regard to the HPOZ and give effect to the significance of a heritage place and a heritage area, it also manifestly failed to have regard to the implications of the development on the heritage value of the area. It was, however, duty-bound to do this in terms of a range of the City's policies which are addressed elsewhere in this affidavit.

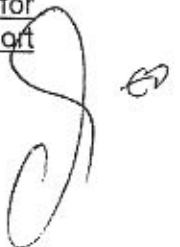


107. I am advised and submit that the City was also obliged to have regard to the implications of the development on the heritage value of the area by virtue of section 24 of the Constitution as well as the National Heritage Resources Act, 25 of 1999 (**the Heritage Act**). Section 27(18) of the Heritage Act provides that no person may destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of such site. The HWC's view was that, while the subject property abuts two declared provincial heritage sites, it does not require a permit in terms of section 27(18) of the NHRA. Even if this is so, I respectfully aver that the City in considering the implications of the development on the heritage place / heritage area, was duty bound to consider the comments of HWC, albeit as a commenting body and not an approving body.

#### The facts

108. On 14 December 2015 the District Head: Environmental and Heritage Resources Management (Table Bay and Tygerberg), within the City's Environmental Management Department, commented on the HPOZ impact of the proposed development as follows (the comment is attached as "FA19"):

- The identified heritage resources are the HPOZ urban streetscape interface, the Bo-Kaap residences along Rose Street, views of vistas of the mountain from various points in the City and archaeological discovery during excavation.
- The Buitengracht Street edge of the building requires a larger setback and canopy on street level and one storey to improve the pedestrian experience. There must be direct access to the building at various points along an active edge.
- The Rose Street building interface is too high and should emulate the development one block north. An appropriate edge and interface with Bo-Kaap should be 2 storeys with setbacks for subsequent storeys, as indicated in the Urban Design Report Figure 12, page 22.



(emphasis added)

109. On 8 March 2016 the City's Heritage Component of the Environmental and Heritage Resources Management (EHRM) Branch commented on the proposal. The comment appears at page 1666 and a copy thereof is attached as "FA20". According to the City's EHRM Branch:

109.1. There are several significant heritage resources and areas that will be impacted on by the proposed development. EHRM will consider the impact that the proposal will have on those resources and comment, with recommendations.

109.2. The following significant heritage resources will be impacted on by the proposal: (a) Riebeeck Square; (b) Erven 1299 and 1300; (c) Bo-Kaap precinct; (d) Cape Town City Centre HPOZ; (e) Heritage Square.

109.3. Riebeeck Square is a significant link between the City and the Bo-Kaap, with the public open space provided by the squares facilitating the historic connection between the residents of the Bo-Kaap and the City, who have an "important relationship". It is further stated:

"The massing of the proposed building is such that the greater bulk and sheerness of the design imposes onto Riebeeck Square which serves to further contain The Square's breathing space, boxing it in, which is counter-productive to the historic nature of the space. This is not seen as a positive impact on the open space.

The historic character of Riebeeck Square is one of openness with important views to Table Mountain and Signal Hill. These views should not be discarded but should be considered when impacted on. The proposed building impacts on views from Riebeeck Square and these impacts should be investigated further."

(emphasis added)

109.4. As regards the Bo-Kaap precinct:

"The Bo-Kaap is of very high heritage value with many levels of significance which forms part of the extremely important history of not only Cape Town but of South Africa. The Bo-Kaap is intricately woven into the early beginnings of Cape Town and has continued to play an important role in the heritage and history of our city.

On the City's heritage database Bo-Kaap is listed as a Provincial Heritage Site, a SAHRA Grade 1 Area and a Proposed HPOZ.

Bo-Kaap can be described on many levels of heritage significance one of which is the historic fabric and corresponding three dimensional scale and density of the area. This low impact, architecturally rich and unique area has always had a relationship with town to its south, a relationship of proximity that has struggled for sustainability due to the continued impact of new, large and bulky buildings that have served to erode that relationship. Larger, new buildings which replaced early structures have resulted in a lined barrier along both edges of Buitengracht and Rose Streets. These multi-story buildings have formed a vertical barrier between the town and the Bo-Kaap which removed the historic connection that has always existed between the two.

A contextual linking of the Bo-Kaap and town on a physical level is important from a heritage perspective and is rooted deep in the history of Cape Town. The proposed development compounds the ongoing separation by means of the design's bulk and height. The large visual mass of the proposed building is seen as a physical and visual mass of the proposed building and is seen as a physical and visual barrier which erodes the fragile relationship between the differing built environments of town and the Bo-Kaap. The loss of historic connection and association of Bo-Kaap with town impacts negatively on the heritage value of the Bo-Kaap.

The proposed development has opted for setting the massing and bulk back as the building gets higher which indicates an acknowledgement by the designers of the sensitive nature of the site and its relationship with Bo-Kaap. This impact should be investigated further with the aim of design revision that reduces negative influences."

(emphasis added)

109.5. A portion of the site falls inside the City's Heritage Protection Overlay Zone and an analysis is therefore required as to what impact the proposal will

have on the significance and character of the area or precinct. According to the report:

"HPOZ's are very important tools set in place for the protection, preservation and management of certain areas which have been investigated, studied and analysed. Those areas have been recognised to contain sufficient heritage value in terms of heritage resources, significance and character so as to be protected and managed. Proposed interventions in these areas should not impact negatively on any of the recognised positive heritage values but should seek to be informed by those exact values and to achieve a sensitive and welcome balance when placed in such an environment.

...

The proposal introduces a contemporary design approach to its interface at ground and street level. Further investigation is recommended as to the appropriateness of this approach.

The architectural language is fashionable and does not reference any obvious design indicators, the incorporation of which would serve to better place the new building in its sensitive position.

The overall height, bulk and visual mass of the proposed development has a pronounced impact on the existing built form and character of the immediate area and this is difficult to mitigate."

(emphasis added)

- 109.6. As regards Heritage Square: The proposed development is diagonally across Buitengracht from Heritage Square and will certainly impact it for obvious reasons of proximity. The proposed design is large and very high, higher than existing buildings in the immediate precinct and falls short of being sensitive to the existing, historical heritage significance of Heritage Square. This lack of sensitivity to existing heritage resources will certainly impact in a negative manner on those resources.

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109.7. EHRM is not opposed to the idea of adding built form to the site; nor is it opposed to the principle of a proposed design as an outcome of that idea. EHRM's suggestions are instead aimed at lessening the negative impact that the proposal has on the heritage resources in the area. The adverse impact arises from the proposal's height and bulk. In this regard:

"The overall height is seen as being problematic in achieving an appropriate intervention of a new building into the area. Our recommendation is for a reduction in height whereby a revised design relates most appropriately to the heritage resources which are impacted on. The effect of reducing the overall height and subsequent manipulation of bulk and massing might be more manageable in how the development relates to and impacts on surrounding heritage resources.

The architectural language of the proposed design should seek to recognise and use design indicators from the surrounding heritage resources. This will assist in establishing a sensitive presence for the proposed development and acknowledgement of the importance of recognising significance heritage value of other buildings, spaces and areas as well as the historical nature of the area.

How the proposed building interfaces at ground level with pedestrians should look at incorporating or referencing historic elements as opposed to the current proposal that appears to be very modern and contemporary.

EHM recommends that comment be requested by the applicant from Heritage Western Cape. We request that such comment be forwarded to us please.

Because of the nature of the impact that the proposed development will have on several significant heritage resources in the immediate context as well as on the HPOZ, EHM suggests that some form of heritage impact assessment, which includes a visual impact assessment be undertaken by the applicant and forwarded to us for further contribution."

(emphasis added)

110. In April 2016, a heritage statement was prepared on behalf of the Applicant, a copy of which is attached as Annexure N on page 1732 of the MPT Report and appended hereto as "FA20". The following aspects thereof warrant reference:



- 110.1. It recognises the great heritage significance of Bo-Kaap and that the proposed development will have to be sensitive to this.
- 110.2. It identifies the design principles adopted to reduce impacts on townscape and streetscape as follows:
- 110.2.1. the stepped massing to reach the allowable 60m height limit away from the Buitengracht edge, as well as significantly lower massing on the Rose Street edge;
- 110.2.2. the horizontal and vertical articulation and datum lines have been incorporated as recommended in the Urban Design Report;
- 110.2.3. the proposed height "counter balancing" the mass of the City Park building diagonally across Riebeeck Square.
111. On 11 May 2016, HWC responded to the proposal. A copy of the response appears at page 1765 and is attached as "FA21". According to HWC:
- 111.1. The site is located between two Provincial Heritage Sites, being Riebeeck Square and the Bo-Kaap, proclaimed in 1961 and 1966 respectively, with the Bo-Kaap furthermore having been identified by the South African Heritage Resources Agency to be of Grade 1 (national) significance.
- 111.2. The three design principles listed in the Heritage Statement which have been proposed in an attempt to reduce the impacts on townscape and streetscape do not accord with the mentioned protection status afforded to Bo-Kaap and Riebeeck Square:





- 111.2.1. As regards the stepped massing: the proposed cascading of the eighteen storey building down to a height of approximately five storeys on Rose Street attempts to make a gradual transition between the very tall façade on Buitengracht and the Bo-Kaap; however, the stepping effect alone is inadequate to mitigate the substantial heritage impacts on the Bo-Kaap which is a fine grained, predominantly one and two storey environment with a unique character.
- 111.2.2. As regards the datum lines: HWC disputes the datum lines that have been used to establish the heights and setbacks. According to HWC, while the base zoning and its associated development rules are recognised, the HPOZ takes precedence over these underlying development rights and was specifically promulgated to allow for context to inform development and where necessary to limit it. HWC further states that a height of 60 metres above the section of Buitengracht is inappropriate as it will dominate both the Bo-Kaap and Riebeeck Square and exacerbate the separation of Bo-Kaap from the West City.
- 111.2.3. As regards the "counter-balancing": HWC does not agree that the Netcare Hospital diagonally opposite Riebeeck Square can be used as justification for the construction of another insensitively scaled ziggurat building, or that supposedly counter balancing the mass of the hospital could successfully mitigate the negative effects of the existing hospital on the urban environment. However, HWC does not object to the



principle of a new building which does not dominate Riebeeck Square, serving as an "enclosing element" to the Square.

- 111.3. While the potential socio-economic benefits are not disputed, they are "comprehensively outweighed" by the detrimental impacts on acknowledged heritage resources.
- 111.4. The Heritage Statement is silent on the potential impact on the tourism economy which, according to HWC, will be negatively affected by a very large building looming approximately 16 storeys above the Bo-Kaap edge, overshadowing it and divorcing it from the West City.
- 111.5. In conclusion:

"It is HWC's view that the development proposal in its current form is inappropriate in this heritage context and that it will have a detrimental effect on the heritage significance of both Riebeeck Square and the Bo-Kaap. As noted in the CoCT Densification Policy, development that will be compromising the surrounding built environment should not be supported. We therefore strongly object to the current planning application.

The proposed mitigation measures, such as stepping down in height are inadequate to address the substantial impacts of an overscaled building. The applicants should be encouraged to re-conceptualise the development proposal, based on comprehensive heritage indicators and not to merely maximise development, with mitigation as an afterthought."

(emphasis added)

112. On 10 October 2016 the District Manager addressed a memorandum to the Mayor, a copy of which has been attached as "FA13D" (**District Manager's Report to the Mayor**). As regards the appeal ground that the approval by the MPT does not take into account the HPOZ provisions or the nearby heritage resources, the District Manager's Report to the Mayor refers to paragraphs 6.38 to 6.46 and 6.51 to 6.61 of

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the Report to the MPT. However, as is apparent, none of these paragraphs address the actual complaint:

112.1. Paragraphs 6.38 to 6.46 deal with the surrounding heritage resources. As regards Bo-Kaap, it recognises the high heritage value with many levels of significance, including the historical fabric and corresponding three dimensional scale and density of the area. It further recognises that the proposal does not trigger any of the listed activities in terms of section 38(1) of the NHRA. However it accepts that HWC is a commenting body and not an approving authority.

112.2. As regards the heritage evaluation (which is addressed at paragraphs 6.51 to 6.61 of the Report to the MPT), the City advanced a range of contentions in its report to the MPT, a good number of which are without merit as I shall explain hereunder:

112.2.1. Regarding the statement that, "despite the legislated heritage resources within the surrounding area (i.e. PHS [Provincial Heritage Site]), these resources do not have a legal standing to impose on the subject-property": What this statement ignores is that part of the property is in the HPOZ; and this imposes a range of obligations on the City in respect of the approval of applications. Instead of analysing the heritage impact, resort is had to nebulous concepts of "legal standing" in relation to heritage resources.

112.2.2. Regarding the statement that the calls of various objecting parties for a reduction in the height of the building due to its



impact on various heritage resources in the area have "not been quantified": It is unclear what "quantification" is purportedly required. However, insofar as the report to the MPT suggests that objectors such as the First and Third Applicants did not express a view as to what specific reduction in height was required, I emphatically deny this. I refer, for example, to pages 8 and 40 of the objection prepared by Prof Todeschini on behalf of First Applicant, himself and others. Page 8 of that objection records his discussion with the architect of the development about the need for between 9 and 10 storeys of the proposed building to be removed in order for the community and the professional team to be able to engage constructively around the proposal. At page 40 of the objection, Prof Todeschini expressly makes the assertion that height design indicators for a building to be constructed on that site ranged from between 2 to 9 storeys at most. I accordingly dispute that no quantification had been forthcoming from the objectors. In any event, I respectfully aver that the objecting parties raised important concerns in respect of the impact of the proposal on heritage resources in the area. I am also advised that it cannot be the case that, even if the objecting parties did not "quantify" that impact, the City was entitled to proceed (as it did) on the basis that there was no quantified impact. I accordingly respectfully aver that the City's reliance on the alleged absence of quantification cannot constitute a basis for it failing to consider properly or at all the impact of the proposal on the heritage resources in the area. The obligation



is on the City to quantify the impact, the negative nature thereof clearly being evident from the EHRM and HWC objections.

- 112.2.3. Regarding the statement that the calls for a reduction in height in order to limit impact or to allow for a "bridge" between the City and Bo-Kaap cannot override "the primary rights allowable on the property as well as the applicable legislative context": I respectfully aver that this reasoning displays a manifest lack of understanding of, or appreciation for, how an application in terms of Items 150(6) and 162(1) of the By-law are to be dealt with. It demonstrates that the City approached the application on the basis of the extant "primary rights", which it was not willing to depart from in an HPOZ. I am advised in this regard that the effect of this reasoning is to render Item 164(2) of the DMS meaningless in that, irrespective of how adverse an effect the proposal has on the significance of the heritage place or heritage area concerned, that adverse effect cannot, on the City's reasoning, feature in the decision-making process. I submit that this is entirely inconsistent with the prescripts of the DMS.

- 112.2.4. Regarding that the statement that any impacts on the Bo-Kaap area have been mitigated by the bulking of the building towards Buitengracht and the CBD, which is some 65m from Bo-Kaap: I am advised that this statement is problematic and irregular on a number of levels. First, it ignores the Scenic Drive Policy. Second, it ignores the fact that the most

offensive part of the building (in terms of height and massing) is in the HPOZ. Third, its reference to 65m is entirely arbitrary; it is unclear as to where it is measured from: namely, Rose Street or the steps in the ziggurate or the Buitengracht boundary or the City centre. Fourth, it ignores the view perspective from the Bo-Kaap and the wall that the residents of Bo-Kaap will be looking into.

112.2.5. Regarding the statement that the massing is designed to bulk the building towards the central city to abut other tall buildings in the city centre which is the economic hub of the city: This statement, too, is entirely incorrect. First, there are no other "tall buildings" abutting the subject development; eighteen storeys in the area is unprecedented. Second, the area of the City in which the development is to occur is by no means the "economic hub" of the City.

112.2.6. Regarding the view that there are no development rules as contemplated by Item 161: I respectfully aver that the existence of development rules is by no means a prerequisite for compliance with Item 164(2) of the DMS. As will be confirmed by Mr Bühmann this questionable view was previously conveyed to the MPT by Mr Tommy Brümmer, too. It is however an incorrect view and again reflects a fundamental misunderstanding of the By-law.

112.2.7. Regarding the statement that there is no mechanism or legal basis to circumscribe the permissible development rights of



the portion of the site outside the HPOZ: This comment ignores the fact that the Applicants' complaint covers the portion of the property that falls within the HPOZ; and that there are legal mechanisms to circumscribe permissible development rights in an HPOZ, which the City has failed to apply, as it has a duty to do in terms of Item 164(2). Furthermore, even if a portion of the property is not in an HPOZ, the City is nevertheless obliged to consider the heritage impact of the development under a number of its other policies.

- 112.2.8. Regarding the statement that the bulking of the building is in the lower levels of the building (9 storeys and below) which is of similar height to the adjacent existing building on Erf 148791: This statement is factually incorrect; there is absolutely no similarity in height in relation to the adjacent building referred to.
- 112.2.9. Regarding the statement that, in spite of the contentions by the objectors relating to the size and scale of the proposed building, its permissible massing and form is guided by the extent of the site, and that the objections to building on the site ignore the primary rights applicable to the property, while attempting to impose unsubstantiated limits over the subject property, and also ignore the changing nature of the CBD: I have already addressed the issue of the alleged supremacy of primary rights and submit that I have shown that such a contention is without merit.



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- 112.2.10. Regarding the statement that the current proposal is preferred given the building set-backs, massing and heights: In light of the issues raised by the Applicants, I respectfully aver that this explanation is woefully inadequate in light of the impact of the proposal on the heritage area / place.

Grounds of challenge

113. In the reasons for her decision dated 19 January 2017, the Mayor states as follows:

"18. I accept the recommendation of the Advisory Panel and agree with its Report to me. I considered, in particular, the views of the City's Environment and Heritage Department that the surrounding heritage resources will be impacted on in a negative manner to a certain degree by the proposed development due to the design's sheer size, height and magnitude. However, I agree with the MPT and the Advisory Panel that the proposed development responds appropriately to the neighbouring buildings and the environment."

114. The "reasons" of the MPT that the Mayor endorsed are contained in paragraph 17 of her report. The following "reasons" were of relevance to this issue: that the proposal takes cognisance of the heritage resources within the area and has the "potential" to exhibit good urban design when the relevant conditions have been complied with, while sacrificing primary development rights.

115. The MAP dealt with this issue in a single paragraph of its reasons. It stated that only a portion of the property was affected by the HPOZ whereas the City's Environment and Heritage Department had allegedly treated the application as if the whole property was affected by the HPOZ. The MAP further made the unsubstantiated statement that the application is sensitive to the Bo-Kaap area and that the massing and height of the building's façade along Rose Street responds to the neighbouring buildings on each side of the proposed building.

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116. I respectfully aver that in addressing the issue of heritage and the HPOZ in the manner that the Mayor (as well as MPT and MAP) did, the following is apparent:

116.1. First, the City accepted that it had to have regard to the implications of the proposed development from a heritage perspective. Indeed, it was duty-bound to do this in terms of Item 164(2) of the DMS.

116.2. Second, notwithstanding the City's conclusions, the Mayor (and indeed those considering the application before her) failed to engage with the comments from the City's Environmental and Heritage Resources Department, or with the comments of HWC, or with the objections of the objectors including those of the First, Second and Third Applicants. In other words, despite receiving comments from *inter alia* the two bodies which have special expertise in heritage matters, the Mayor failed to motivate or explain why she disregarded and departed from those comments. Nor did the Mayor explain how she came to the conclusion that the proposed development responds appropriately to the neighbouring buildings and the environment (which it plainly does not). This, I respectfully aver, demonstrates that the Mayor manifestly failed to consider, or at least consider properly, those comments. Evidently as a result, the Mayor failed, and was evidently unable, to provide any "reasons" for rejecting those experts' comments and insights. The Mayor instead contented herself with merely stating a conclusion. I respectfully submit that it is evident that the City's Land Use Management Department also did not address the impact of the proposed development with reference to the City's HPOZ, and either completely ignored or manifestly misunderstood Items 150 and 164 of the DMS. These fundamental flaws

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in its analysis were conveyed to the MPT in the City's report; but, instead of addressing them, the MPT perpetuated them.

117. The result of the Mayor's failure to consider the heritage impact is that she approved the proposal despite its significantly deleterious impact. In addition, the decisions of the Mayor and the MPT are based on a misunderstanding of the City's own laws and policies relating to heritage. Furthermore, the decisions fail to give due recognition to, or evidently understand, the impact that this massive, monolithic structure will have on the surrounding area. It is accordingly palpably unreasonable and should be set aside.

## Ground 2: The City's Planning Policies

### The legal framework

118. In considering the applications giving rise to the subject-approvals, the City was duty-bound to comply with the By-law.
119. In terms of section 99 of the By-law, an application must be refused if it fails to comply with certain threshold requirements. These include: (a) compliance with the requirements of the By-law; and (b) the requirement that the proposed land use must be desirable as contemplated by section 99(3) thereof.
120. In the event that an application is not refused, in terms of section 99(2), the decision-maker, when deciding whether or not to approve an application, must consider all relevant considerations including, where relevant, the following: (a) any applicable spatial development framework; (b) any applicable policy approved by the City to guide decision-making; (c) the extent of desirability of the proposed land use as contemplated in section 99(3); and (d) in an application for consolidation of a land

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unit: (i) the scale and design of the development; (ii) the impact of the building massing; (iii) the impact on surrounding properties.

121. In assessing desirability, section 99(3) of the By-law identifies the following: (a) socio-economic impact; (b) compatibility with surrounding uses; (c) impact on the external engineering services; (d) impact on safety, health and wellbeing of the surrounding community; (e) impact on heritage; (f) impact on biophysical environment; (g) traffic impacts, parking, access and other transport related considerations; and (h) whether the imposition of conditions can mitigate an adverse impact of the proposed land use.

#### Grounds of challenge

122. I respectfully aver that the impugned decisions fall to be reviewed and set aside on the following additional grounds:

122.1. First, it was peremptory that the application be refused in terms of section 99(1) of the By-law in that it did not comply with the By-law and was not desirable. The basis for this assertion is that there was non-compliance with Item 164(2) of the By-Law.

122.2. Second, in any event the Mayor failed to consider all relevant considerations as prescribed by section 99(2) of the By-law.

122.3. Third, the approvals are not desirable and are inconsistent with section 99(3) of the By-law.

122.4. Fourth, despite the Mayor, the MAP and MPT concluding that the proposal complies with the City's Planning Policies, this was manifestly not the case.



According to the MPT these planning policies were: (a) the Table Bay District Plan; (b) the Densification Policy; (c) the Urban Design Policy; (d) the Tall Building Policy, although the MAP also considered the following to be relevant: the City's Spatial Development Framework, the Integrated Development Plan, the Economic Growth Strategy and the Transit Orientated Development Strategy. The reasons in respect of the impugned decisions demonstrate no basis at all for a conclusion, based on reasoned analysis, as to whether (and, if so, to what extent) the proposal was compliant with the various policies.

- 122.5. Fifth, the City failed even to mention (let alone consider) one of its key policies – the Scenic Drive Network Management Plan. In terms thereof, Buitengracht is one of the City's approved scenic drives, yet the MPT and the Mayor failed to consider the guidance in that plan as to how to manage development along scenic drives.

#### The Table Bay District Plan

123. The Table Bay District Development Plan (TBDP) is one of eight district plans developed by the City. The TDP was also approved as a structure plan in terms of section 4(10) of the Land Use Planning Ordinance No 15 of 1985 (LUPO). In 2014, LUPO was repealed by the Western Cape Land Use Planning Act 3 of 2014 (LUPA). However, in terms of s 16(1)(b) of LUPA, the TBDP remains in force and only lapses two years after the date of commencement of LUPA. LUPA commenced on 1 July 2015, and so the TBDP will only lapse on 30 June 2017. I attach a copy of the TBDP as "FA22".



124. The By-law regulates the state of a district spatial development framework. Section 16 thereof provides as follows:

**"16 Status of a district spatial development framework and a local spatial development framework**

- (1) If an application is inconsistent with an applicable district spatial development framework or a local spatial development framework, the applicant must describe the inconsistency in –
    - (a) the application; and
    - (b) the advertisement of the application.
  - (2) A person who takes a decision in terms of this By-Law –
    - (a) must be guided by an applicable district spatial development framework and/or local spatial development framework;
    - (b) subject to section 22, may deviate from the provisions of an applicable district spatial development framework and/or local spatial development framework only if the circumstances justify the deviation.
  - (3) A district spatial development framework and a local spatial development framework do not confer or take away rights."
125. In terms of section 20 of the By-law, a structure plan listed in Schedule 1 (which includes the TBDP) is deemed to be a District Spatial Development Framework (DSDF) approved in terms of the By-law and remains in force indefinitely until withdrawn under the By-law.
126. The TBDP provides, *inter alia*, that when dealing with the various planning instruments, the TBDP will take precedence where there is any inconsistency with a higher order spatial development plan and policy (para 1.3.1, p 13). There are several references in the TBDP to the need to assess land use applications in terms of the plan with reference to the City's various planning policies. The policies relating to densification are given as an example (p 14).



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127. The TBDP's purpose is to be a district level Spatial Development Plan designed to indicate land uses in new development areas and upgrade interventions (TBDP p 11). The Table Bay District Boundary to which the TBDP applies includes the CBD and the relevant erven.
128. There are two key reasons why the MPT's and the Mayor's assessment of the TBDP are irrational:
- 128.1. They failed to consider multiple parts of the TBDP that demonstrate that the Development is undesirable; and
- 128.2. The aspects of the TBDP they did consider they either misrepresented or misunderstood.

***Failure to consider relevant elements of the TBDP***

129. There are seven vital elements of the TBDP to which the MPT and the Mayor failed to have regard. I respectfully aver that each of these constituted a material and relevant consideration that ought to have been taken into account in considering the subject application.
130. First, in Table 2.1, the TBDP sets out the **key strategies** to achieve sustainable equitable and managed growth. I highlight the following listed as sub-strategies to the strategy for building an "inclusive, integrated and vibrant City": (a) enhance the unique sense of place and quality of built form of Cape Town; (b) enhance the value of heritage resources and scenic routes; and (c) promote accessible, citywide destination places. Furthermore, while the strategy recognises that densification must be promoted in appropriate locations to improve economies of scale and increase thresholds required for public transport, it also however notes that planning

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decisions must be balanced, weighing the competing and conflicting demands of different interests in order to arrive at an optimum level of consensus to ensure short, medium and long-term social equity, economic efficiency and environmental sustainability. It further recognises that in building an inclusive, integrated and vibrant City, Cape Town's heritage must be respected and protected and enhanced, and a network of great destinations and public spaces should be established.

131. These concerns were – particularly in light of the objections – plainly relevant; yet, they were not considered.

132. Second, the TBDP specifically recognises the importance of **views** of the sea and mountain, and the **historical value of the Bo Kaap**:

132.1. When analysing the current Table Bay District, the TBDP records that "The character and urban form of Table Bay District has largely been determined by the historical development pattern as well as the natural constraints of the mountain and sea" (para 3.1.1, p 23).

132.2. The TBDP also recognises a number of challenges that present themselves when considering the Table Bay District and lists amongst the many the following: "Some parts of the district are at risk of losing its traditional character due to gentrification, for example, Salt River, Woodstock and the Bo-Kaap" [emphasis added] (para 3.3.1, p 37).

133. Again, this clearly relevant aspect is ignored.

134. Third, in Table 4.2, the TBDP deals with transport infrastructure and route designations. **Scenic routes** are set out therein and distinguished between S1, which are limited access routes which traverse areas of high scenic quality, and S2,

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which traverse areas of high scenic quality but which are frequently accessed. Buitengracht is an S2 route. The TBDP (at page 52) imposes specific district development guidelines for scenic routes, which include:

- 134.1. In general, development along scenic drives and routes should seek to retain significant views from the route and avoid negatively affecting the character of the landscape through which it passes.
  - 134.2. Any redevelopment along scenic drives and routes should focus on landscaping improvements to the (public and private) areas abutting the road.
  - 134.3. Land use management decisions should be guided by the Scenic Drive Network Management Plan (Vol 3, 2003) or subsequently approved management plans.
135. The fact that Buitengracht is a scenic route and subject to these additional restrictions was not considered. I return to this point when I address the Scenic Drive Network Management Plan below.
136. Fourth, the TBDP lists **Environmental Management Priorities** to be considered in determining planning decisions (pp 79-80). Many of these are directly relevant to the Development. I highlight the following (my emphasis):
- 136.1. encourage the enhancement of sites, features and areas of heritage value to maximize their quality and sense of history and the value they add to the City as a place to live and visit;



- 136.2. preserve the qualities of the various areas of the City, which exhibits a range of diverse character zones such as the City Bowl, Bo-Kaap;
- 136.3. existing and proposed Urban Conservation Areas will take on the status of Heritage Areas in terms of the National Heritage Resources Act No. 25 of 1999 (NHRA), but continue to be protected and managed in terms of the Planning Legislation;
- 136.4. all development adjacent to open spaces should be orientated towards the open space to encourage the use and passive surveillance of these areas;
- 136.5. ensure that proposed development is in keeping and appropriate to the historical nature of the City;
- 136.6. ensure the retention and protection of historical areas, sites and features – both above and underground;
- 136.7. ensure that construction activities within the district and, specifically within heritage and conservation areas do not negatively impact on the historical character of the area or fabric;
- 136.8. important heritage issues in these zones include archaeological, built environment, landscape and visual issues;
- 136.9. authorisation of the activities must be in compliance with the requirements of the NHRA, including those pertaining to impact assessment and heritage resources.

- 136.10. A heritage overlay is being developed and will become part of the new Cape Town Zoning Scheme (CTZS). Compliance with the CTZS will be required when it is in place.
137. Fifth, Table 6.2.2 comprises **development guidelines** for Sub-District 2: Central City. In the portion dealing with the Foreshore and City Bowl (where the erven are located), the plan lists a spatial development objective to "*encourage residential densification where possible and appropriate*".
138. Sixth, another spatial development objective for this area is to prevent **inappropriate development along scenic routes**, with the following being listed as a supporting development guideline [emphasis added]:
- "Prevent activities which compromise or restrict views along Orange/Mill Street, Buitengracht, Kloofnek Road, Signal Hill Road and Tafelberg Road."
139. As I explain below when discussing the Scenic Drive Network Management Plan, Buitengracht is a scenic drive precisely because of its proximity to the Bo-Kaap.
140. The substantive discussions of the heritage value of the area above, and the densification and urban design Policies below, demonstrate that these seven factors all weigh strongly against a finding of compliance. Indeed, and as Prof Todeschini stated at page 16 of the initial objections prepared by him on behalf of the First Applicant (dated 10 February 2016), what is clearly noticeable from the TBDP is that the policy regarding densification on the Buitengracht axis is not spatially defined anywhere near the site which forms the subject-matter of this application. Rather, desirable densification in terms of the TBDP is shown to be located quite a number of blocks well to the south-west of Wale Street.

141. The complete failure of the MPT and the Mayor to consider these aspects of the TBDP renders their conclusion that the application is compliant untenable and irregular.

***The TBDP was misrepresented and misunderstood***

142. The failure to consider plainly relevant aspects of the TBDP is not the only flaw in the MPT and the Mayor's evaluation. While it is unclear exactly what bearing the City's report to the MPT ultimately had on the Mayor's decision, to the extent that there was any reliance on the City's report to the MPT I respectfully aver that those references either misunderstood or misrepresented those aspects of the TBDP that it referred to.
143. The City's Report to the MPT identifies seven "aspects" of the TBDP which, it claims, shows the application complies with the TBDP (para 6.26). In the first instance, there is no basis for this arbitrary selection of factors and the exclusion of a range of other factors. Furthermore, a closer consideration demonstrates that several of those factors considered by the City in fact weigh against a finding of compliance:
- 143.1. *The concern to "protect the fine-grained character of the central city and provide suitable interfaces with the historical built fabric": Both the City's own EHRM and HWC concluded that the proposed development does not meet this requirement of the TBDP. It is difficult to understand how a development taking up almost an entire city block could be described as protecting the "fine-grained" character of the City ("fine-grained" referring to textured, integration of developments that are in keeping with the character of the surrounding areas), or how the massive building which has been approved interfaces with the historical built fabric of the Bo Kaap.*

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143.2. *The purported need to facilitate "intensification of development routes":*  
The reference to this aspect is puzzling as Buitengracht is not a development route, but a scenic route where development is discouraged, and can only be considered after due regard has been had to all the other control and assessment criteria in the By-Law, DMS and other relevant council policies.

143.3. *The argument that the Development would supposedly improve "the public realm by defining and enclosing public space with active facades and human scale building edges":* The proposed Development would in fact achieve neither of these goals: it would not enclose public space, nor create human scale building edges. Simply put, the City is plainly attempting to maximise the development opportunity by not having the building set back. The only public space is Riebeeck Square; there is no question of this being enclosed with active facades. In any event, it is highly unlikely that members of the public will cross Buitengracht (which is excessively busy), with the centre aisle made up of reserved parking, in order to access shops.

144. The remaining factors mentioned by the Department are, at best, neutral with regard to the Development:

144.1. It is debatable whether the development will reinforce the central city as a "vibrant business district" when it cuts off the Bo-Kaap from the city, and introduces development that will result in serious traffic congestion in Buitengracht, Shortmarket and Rose streets.

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- 144.2. It is doubtful that a development so out of sync with its surroundings can be said to "support urban regeneration" (para 6.26.3).
145. In sum, the conclusion that the Development is consistent with the TBDP can only be reached by ignoring the most relevant parts of that Plan, and reaching extremely questionable conclusions on other parts. A fair assessment would lead to a conclusion that the Development should not be supported in its current massive form.

#### The Tall Building Policy

146. The Tall Building Policy is attached as "FA23".
147. There are two questions to answer about the Tall Buildings Policy (TBP):
- 147.1. Did it apply to the application?
- 147.2. Was the Proposal consistent with the TBP?
148. Before I address whether the TBP applied and whether the proposed development was consistent with it, I first emphasise the (unjustifiably) insignificant role that this policy played in the decision-making process and thereafter give a general overview of the purpose and content of the TBP.

#### ***The City's failure to consider the TBP***

149. The MPT, the MAP and the Mayor merely make an unsubstantiated assertion that the proposal complies with the Tall Buildings Policy. However, no explanation is provided as to the basis for this assertion.



150. The only substantive engagement with the TBP is to be found in the report to the MPT. According to that Report (at par 6.30 and following), the proposal was circulated to the Urban Design Department which stated that the application did not trigger the TBP. This notwithstanding, the Report states "the proposal does not trigger the requirements of the Tall Building Policy as it complies with the principles of the policy in that ...". Not only is this reasoning circular and incoherent but it is also plainly wrong and as a result constitutes a material error of law and/or fact and is both irrational and unreasonable. I shall address the reasons for this assertion elsewhere in this affidavit.

***Purpose and content of the TBP***

151. The Tall Building Policy was approved by the City on 29 May 2013. The City recognises that the development of tall buildings has a direct impact on the identity, image and experience of the city. Some believe tall buildings represent a city of progress and one striving for international recognition. For others, tall buildings are a matter of concern, particularly in relation to views of Cape Town's mountain ranges, especially Table Mountain, and the visual connection to the sea. Other concerns relate to the integrity of protected heritage buildings, the experience of public spaces and the character of the urban fabric and the quality of the street environments for the City users and residents. The TBP recognises that each application must be dealt with on its own merit. This notwithstanding, the City considered it necessary to devise a clear and comprehensive approach that would save time, effort and money for both the City and applicants for height-related departures and allow for these issues to be dealt with in a systematic and consistent manner.
152. According to the City, the TBP was necessitated on account of various shortcomings such as the limited resources of the City and a lack of clarity in the zoning regulations

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*The City's failure to consider relevant parts of the TBP*

179. In addition, it is apparent that the City failed to consider multiple highly relevant elements of its own TBP.

180. First, the TBP makes it clear that the final height approved for each application will be dependent on its unique location, context and the application of the policy objectives and design guidelines provided in the policy. In general, tall buildings will *not be appropriate* where they:

180.1. hide or mask the unique topography of the City;

180.2. obstruct views from key public vantage-points;

180.3. have a detrimental impact on the City's historic environment;

180.4. have a significant adverse impact on the amenity value of local residents.

(TBP p 13)

181. All those disqualifying criteria are present in respect of the subject approvals. Yet – save for the incorrect assessment of the heritage value – they are not even mentioned in the Report to the MPT.

182. Second, the Report fails to consider the policy approach, principles or aims of the TBP as set out above. These include:

182.1. The impact that tall buildings could have on the social and economic wellbeing of related communities. The sheer size and mass of the development particularly on Buitengracht and the fact that it will be seen as a sheer wall from the Bo-Kaap indicates that it will have an impact on

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which had led to inconsistent decisions. Against this backdrop, the clarity and guidance provided by the TBP fulfils a two-fold purpose: (a) it provides the City with guidance; and (b) it assists developers and architects to know what will be acceptable. In so doing, it allows for a uniform and consistent approach.

153. The TBP describes its overall intention as being to ensure that all tall buildings are assessed in a balanced, transparent and objective manner and to prevent short-term interests overriding the long term sustainability of the City.
154. While the TBP does not introduce or take away existing development rights, it is applied by the City to facilitate its statutory development control functions so as to ultimately promote high quality design in appropriate locations.
155. The City's view, expressed in the TBP, is that taller buildings are part of the city's future and that, if developed with sensitivity to the environment and with awareness of the unique urban context, tall buildings can enhance their environment and serve as beacons of urban improvement. Building an unusually tall structure normally requires a departure from the existing regulations and may typically involve the removal of height or bulk restrictions. The overall impact of tall buildings should be assessed holistically through the planning process.
156. Under the heading "Policy Approach, Principles and Aims" there is the following important statement:

"In many cities around the world, the design of tall buildings is specifically dealt with in dedicated tall building policies and in the development approval processes. In Cape Town, this policy now aims to bridge the gap and facilitate appropriate solutions in both the context of the local area and the wider city, bearing in mind that Cape Town has a specific character and a context that is different to other cities. The policy brings to public knowledge that taller buildings should preferably be located in nodal areas and should enhance the character of the urban environment through quality design and



architectural excellence. The policy also highlights the impact that tall buildings could have on the social and economic wellbeing of related communities." (TBP p 9)

157. Amongst the main principles of the TBP (at p 9) are the following:

- 157.1. promote and encourage sustainable growth in the city by permitting greater building height in appropriate locations;
- 157.2. ensure that taller buildings fit into the context of the surrounding cityscape, without negative impacts;
- 157.3. recognise that growth is dynamic and that the approach to tall buildings should therefore be flexible with certain provisos including protection of the urban environment.

158. Specific aims of the TBP include (at p 9):

- 158.1. creating greater awareness of the issues surrounding the design and location of tall buildings;
- 158.2. ensuring that new tall buildings reinforce the attractive qualities of the built environment in order to sustain or improve the image of the City;
- 158.3. explaining clearly to developers the criteria and procedures to be adopted in the assessment of applications for taller buildings;
- 158.4. encouraging a high standard of design and architectural excellence, blending sympathetically with the local and city context and respecting attractive views across the city;

- 158.5. preserving areas of special character or interest, protecting principal views across the City and, most importantly, preserving the iconic skyline created by Table Mountain, a World Heritage Site;
- 158.6. preserving or enhancing the quality of Urban Conservation Areas, Heritage Areas and listed buildings of special character is also one of the aims of the Policy.

### ***Application of the TBP***

159. The MPT appears to have accepted the conclusion of the City's Urban Design Department that "*the application did not trigger this policy*". (Report to MPT, p 15). The reasoning for that conclusion is stated as follows: "*The proposal does not trigger the requirements of the Tall Building policy, as it complies with the principles of the policy*".
160. As stated, that is circular logic. There are two distinct questions: Does the TBP apply? If so, is the proposal compliant? The MPT's logic appears to be that, if the proposal complies, the TBP does not apply.
161. In any event, the TBP plainly does apply.
162. The application of the TBP occurs in two ways.
- 162.1. First, the TBP states that it "will apply whenever an applicant seeks approval of an application for relaxation of the Scheme Regulations" (TBP p 11).
- 162.2. Second, the TBP then states that, together with the Design Guidelines, it:

"[C]an however also be used generally as a reference guide for all taller building applications, especially to assist during pre-submission discussions. Taken together, these documents [the TBP and the Design Guidelines] promote an awareness of better design through an integrated and holistic understanding of the potential impacts of a tall building in relation to its place and purpose in the greater and immediate context of urban development." (TBP p 11)

163. The proposal did not seek a relaxation of the Scheme Regulations with regard to height or bulk. Accordingly, the first basis for application of the TBP does not arise.
164. However, as regards the second basis the proposed development is not only a "taller building" as defined in the TBP, it is a "*significantly tall building*" that requires the highest level of scrutiny. That appears from the following.
165. While the TBP recognises that there is no absolute definition of what represents a "tall building", it relies on international best practice as stated by the Council for Tall Buildings and Urban Habitat. This is an international not-for-profit organisation supported by architecture, engineering, planning and development and construction professionals. This Council is the world's leading body in the field of tall buildings and the recognised source of information on tall buildings internationally. There is a South African section of the Council which includes leading members of the architectural, engineering and related built environment professionals. The Council suggests that a building, in terms of international standards, of perhaps 14 plus storeys (or over 50 m in height) could be used as a threshold for considering it as a "tall building". The proposed building in this instance is **18 storeys and 60m high**.
166. Importantly, the TBP defines its scope as follows:

"In the Cape Town context, we believe that a tall building is a building that exhibits some element of "tallness" in one or more of the following categories (as based on the CTBUH definition): (a) height in relation to context, (b) height in relation to proportion and (c) height in relation to building technologies." (TBP p 8)

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167. It is clear that the development falls within the first category. In regard to the first category (height in relation to context), it is not just about the height of a building but about the context in which the proposed building is to be erected. Therefore, in a Cape Town context, a 10-storey building may not be considered a tall building in a high-rise metropolitan node such as the City Central Business District (CBD) and Foreshore, yet in another local node or CBD, this building may be distinctly taller than the average local urban form. The TBP notes that the number of floors is a poor indicator for defining a tall building because of the variation between floors from 2.4 - 4.6 m in height. Therefore, reference to a tall building is to a building 35 metres in height rather than to one containing 10 storeys.
168. According to the TBP, through a public participation process it was decided that, in the context of Cape Town's TBP, the following definitions (in relation to context) will apply:
- 168.1. In high order nodes, storey height of more than 10 storeys or 35 metres (whichever is the highest) is seen as a significantly taller building. Significantly taller buildings are commonly known as skyscrapers, and applications in this instance could be referred to the Trans-disciplinary Design Panel for further assessment. Referral to this panel would be at the discretion of the City.
- 168.2. In lower order nodes, the definition of a tall building will depend on the local context and here the building is seen as a substantially taller building if it is more than 1.5 times the permissible height as specified in the Zoning Scheme Regulations.

169. Again, it is clear that the proposed development is a "*significantly taller building*" – it is nearly double the threshold of 10 storeys and 35 metres.
170. Considering those definitions and the massive height of the proposed building compared to its surroundings, it clearly triggered the TBP. The City was required to consider whether or not it was compliant when exercising its power to grant or refuse the application. This, the City manifestly failed to do.

***Compliance with the TBP and the incorrectness of the City's reasoning***

171. The MPT and the Mayor accepted that (assuming it applied), the Proposal was compatible with the TBP. That conclusion is plainly wrong for two related reasons:
- 171.1. the reasons given for why the development complies with the TBP are wrong; and
- 171.2. the City failed to consider multiple relevant provisions of the TBP.
172. The Report to the MPT identifies the following reasons why the Development purportedly complies with the TBP.
173. First, the building is divided into three parts: base, middle and top (para 6.31.1). That is true, but fails to consider the impetus of the TBP which requires that each part of a tall building should consider the three parts of a tall building within its context. Tall buildings, due to their size, respond to the City in three ways or on three levels:
- 173.1. The base or podium – this must promote and support an active pedestrian/public realm.

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- 173.2. The middle or shaft – this talks directly to the surrounding built form and therefore elements from surrounding buildings should be picked up on to contribute to the contextual fit. The design of the middle or shaft should also be such that it minimizes shadows and increases sky views from the street.
- 173.3. The top or crown – this section should be sculpted to enhance the skyline character of the City. The TBP explains that if an application for a tall building is to be successful, the design must consider these three distinct parts (TBP p 18).
174. As the TBP explains, all parts should be *"carefully integrated into the whole building"* in order to make the structure *"more appealing than a block-shaped monolith with characterless floor plates"* (TBP p 18). This approach will encourage an attractive vertical definition of a tall building.
175. The development fails dismally to comply with these requirements:
- 175.1. The proposal does not pick up on elements from the surrounding buildings. It will, if built, dwarf the surrounding buildings (such as the 6 storey neighbouring building "The Studios") and it will be far and away the tallest building on the western side of Buitengracht. The tallest building along this stretch of Buitengracht is the relatively new Hilton Hotel on the corner of Wale Street and Buitengracht which appears to be an 11 storey building.
- 175.2. The proposal is not only far higher than the adjacent The Studios, but none of the elements of The Studios has been picked up in the planning for the

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proposed development. The proposed development is an entirely modernistic one and stands in stark contrast with the adjacent The Studios.

176. Second, the Report claims that the building seeks to "frame Heritage Square" and "limit any imposition on Bo Kaap". And later, it alleges that the "design and mapping of the building attempts to take into account the heritage landscape". I have already explained, in addressing the heritage of the site, why those conclusions are entirely erroneous and indeed irrational. They are certainly not supported by any person with expertise in heritage management, including the City's own department and HWC; indeed, such assertions are directly contradicted by these specialist bodies.
177. Third, according to the City the Proposal "attempts to mimic the local vernacular along Rose Street". From an urban design perspective, the expression "attempts to mimic" is meaningless. The City's planners and design officials should state whether the design succeeds in doing so or not. For the reasons set out earlier, I maintain that this statement is not correct.
178. Fourth, the Report acknowledges that "the building exceeds the height of the surrounding buildings" but claims that since those erven have similar rights to build similar tall buildings, this proposal is consistent with the TBP. Such reasoning, with respect, ignores the statement in the TBP that "a tall building should not be seen as a precedent for other applications in the same area. The final height that is approved will depend on the tall building's motivation towards an appropriate location, response to the context and its compliance with the Tall Buildings Policy assessment criteria." (TBP p 17) Because the TBP is engaged for all tall building applications, even those that do not seek departures, the fact that surrounding erven have similar rights is completely irrelevant.



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the social wellbeing of the Bo-Kaap community. It is also a well-known fact that the Bo-Kaap is a tourism destination. The proposed development may therefore also have an impact on the wellbeing of the tourist industry.

- 182.2. One of the specific aims of the TBP is "*preserving areas of special character or interest*" and preserving Heritage Areas. Despite the expressly recognised risk that tall buildings can negatively impact on areas like the Bo-Kaap, the MPT Report fails even to mention this aim of the Policy.
183. Third, the TBP contains ten policy statements which are used together with the assessment criteria to assess tall building applications. These were either inadequately considered or not considered at all. I will highlight the following five which are of particular relevance to the subject approvals and were ignored by the City:
- 183.1. The location of tall buildings must protect the key views to Table Mountain, other mountain ranges such as Koegelberg/Helderberg and the sea, from public spaces and key public places. In explaining this policy statement, it is stated that a major component of the City's unique appeal is centred on its Table Mountain skyline and views of the sea. These views must continue to be protected from inappropriate built form. The proposed development will clearly interfere with (and indeed significantly obstruct) views of Table Mountain, Lions Head and Signal Hill from in and around what is a heritage rich area.
- 183.2. Tall buildings should only be located in appropriate locations. In explaining this policy statement, reference is made to both the Cape Town Spatial

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Development Framework and the Cape Town Densification Policy which indicate that higher-density developments should be located at local urban nodes and along development routes, activity routes and transport corridors. In terms District Spatial Development Plans (of which one would be the TBDP) areas that are more suitable for mixed use would inform the location of tall buildings.

- 183.3. All tall buildings must contribute to a quality, active public realm at street and first floor levels. In explaining this policy statement, it is stated that priority in the design of a tall building must be given to "life on the street" for it contributes to genuine public life. This means tall buildings should be porous at street level having for example shops, cafes, restaurants, small businesses on preferably all sides. This was not considered at all by the City when granting the set-back departures that sterilise street facades.
- 183.4. Significantly tall buildings – like the proposed development – may be referred to a Trans-disciplinary Design Panel for assessment. There is no explanation why this building was not sent to such a Trans-disciplinary Panel. Even though the City has a discretion to make such a referral, there must be an explanation why it was not referred, particularly given the extent of the objections and that the main basis for objection was the height and scale of the development. Considering the special character of the area, the massive height and bulk of the building, and the multitude of objections, the failure to refer the application to the Trans-disciplinary Panel is inexplicable.

183.5. Designs are required to show "*that the burden on the local infrastructure are minimised and do not have a detrimental effect on the wider area*".

There is no consideration of this part of the TBP in the MPT Report.

184. Fourth, the TBP lists various assessment criteria to be addressed by an applicant. These include building placement and orientation, open space and connections to open space, heritage and cultural landscapes, sun shadows and sky view and wind impacts at street level. Amongst the assessment criteria for tall building applications are the following:

184.1. *Relationship to physical context*: Amongst the considerations are the impact the building has on important and significant views and the impact the building/development has on its immediate environment, at street-level and how well the building promotes the continuity of street frontages and the enclosure of spaces by the built form that clearly defines private and public areas.

184.2. *Contributions to permeability and legibility*: Amongst the considerations for this criterion is how well the development promotes accessibility and local permeability by making places that connect with each other and are easy to move through, putting people before traffic and integrating land uses and transport.

184.3. *Contribution to the public realm*: The important consideration is how the proposal contributes to the position of public and private open space and how well the development promotes attractive and safe public spaces and routes which meets the needs of all sectors of society across the wider

neighbourhood/city. The management of these spaces needs to be made explicit.

- 184.4. *Architectural elegance*: Amongst the considerations to be applied to this criterion are the scale, form, massing, proportion and silhouette of the building.
- 184.5. *Impacts to the local environment*: Amongst the considerations for this criterion are the impact of the building on the wind conditions at the base of the building and the impact of shading paths created by the building.
185. None of these are considered in the City's analysis of whether the proposed building complies with the TBP.
186. The City completely failed to conduct a fair and reasonable assessment of the TBP. It produced a circular and untenable explanation for whether it applied at all.

#### The Densification Policy

187. The Densification Policy, a copy of which is attached as "FA24", was approved by Council on 29 February 2012. It recognises the need to curb urban sprawl so as to promote the longer term sustainability of the City. At the same time, it provides clear guidelines for the types of densification that the City will promote. It is not simply a promotion of densification in all its forms, but a nuanced assessment of when, where and how densification should be advanced.
188. In approving the Development, the City completely ignored this context-sensitive, nuanced understanding of densification. It appears to read the policy as promoting

densification no matter the cost. That is plainly wrong. Its misapplication of its own densification policy is a reviewable ground.

189. In this section, I first summarise the import of the Densification Policy. I then explain why the City's approach to that policy was manifestly unreasonable; and why it also constituted a material error of law and/or fact.

***Key aspects of the Densification Policy***

190. Densification is defined in the Policy as *"the increased use of space, both horizontally and vertically, within existing areas/properties and new developments, accompanied by an increased number of units and/or population threshold"*. The Policy defines incremental densification as denoting the following *"small-scale densification that has a relatively low impact on the character of an area, e.g. the sub-division of a residential property or construction of a second dwelling."* It states that densification is *not an end in itself*, but a means of improving the sustainability of the City as well as the vitality of urban precincts. (Densification Policy, para 2.1, p 5)
191. Densification can take place in the developed areas of the City, on vacant in-fill sites within the developed areas, and on greenfield sites that coincide with the City's planned growth direction. The Policy notes that the Cape Town Spatial Development Framework supports *contextually appropriate densification* across the city (Densification Policy at para 2.4, p 5). In paragraph 3.2, the following important statement is made: namely, that *"the Densification Policy provides guidelines to be used by decision makers"*. (emphasis added)
192. The Densification Policy contains a number of objectives, including that the City should:

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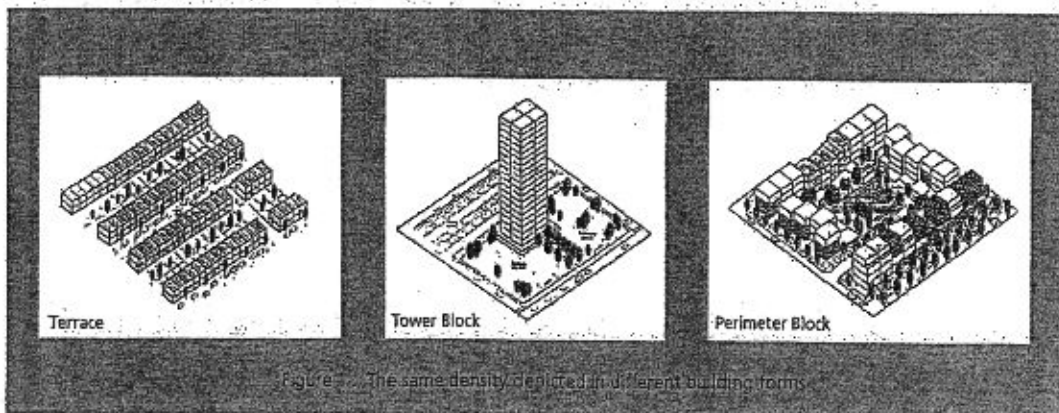
- 192.1. protect, manage and enhance the natural and built environment and significant cultural landscapes; and
- 192.2. ensure that the scale and character (in terms of bulk, height and architectural styling) of higher-density areas are appropriate to the immediate context. (Densification Policy at para 4.2, p 10).
193. In paragraph 4.3, the Densification Policy lists its "policy statements". I highlight certain of these:
- 193.1. "The City will promote densification in all areas. **However, importantly, a 'one size fits all' approach will not guide density decisions**". (emphasis added)
- 193.2. "Cape Town as a city is not defined by its urban or built skyline, and it is not intended for this to be the case in the future. The mountain skylines and views of the sea are the defining elements that make Cape Town unique, and views of them must continue to be protected from inappropriate built form through, for instance, the application of the Tall Buildings Policy" (emphasis added).
- 193.3. In determining the appropriate location, height, scale, form and orientation of a higher-density development in a particular location, the following factors must be considered:
- 193.3.1. generic considerations for densification related to the suitability of the area for land use intensification, such as surrounding land use character;

193.3.2. the applicable policy frameworks, namely the CTSDP, district level SDPs and local spatial plans, density plans and urban design policy;

193.3.3. contextual informants related to the development application and its immediate surroundings, such as the natural environment, land use, built and heritage character, infrastructure availability and capacity, and socio-economic considerations, should determine the densities appropriate in a specific location.

194. In Table 5, spatial location criteria and density parameters are set out. The highest density guideline is for activity routes and metropolitan and sub-metropolitan urban zones. This includes the CBD. The density guideline for these areas is 4 - 15 storeys.

195. The most important part of the Densification Policy is Figure 1. It depicts densification in three building forms, namely, the terrace, the tower block and the perimeter block. I reproduce it below:



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196. The Densification Policy indicates that these are the "*three generic building forms that support higher densities*". Importantly, the tower block is described as: "*Single, detached tower block buildings (on an erf), surrounded by open space.*" The terrace and perimeter block formats are the preferred generic forms, "*as their resultant urban form and city landscape are best suited to Cape Town*" (Densification Policy at para 2.2, p 5).
197. As I explain in more detail below, the Development does not comply with any of these three options.
198. In Table 6, the contextual informants that "*should guide the evaluation of development applications in their immediate context*" are set out. These include:
- 198.1. *Surrounding land uses: the general land use character of an area is important when considering the suitability of high density development.* Urban areas (existing or planned) characterized by a diverse land use mix (including different types of residential development) and a fine-built grain of development are best suited as locations for higher densities. If an area is solely single-dwelling residential, greater attention needs to be given to the height and form of new developments than where flats and other forms of mixed land use development already exist. Town houses or low-rise flats can be highly compatible within a single-dwelling residential area.

- 198.2. *Built and heritage:* "Higher-density forms of development need to be carefully evaluated in order to ensure that proposals fit in with the surrounding environment. The form and design of the development must be compatible with the area's built/natural character. If it is not possible to accommodate a compatible built form without negatively altering the existing built context, or compromising the surrounding built environment, the development should not be supported." (emphasis added)
- 198.3. *Infrastructure:* This entails a number of infrastructural factors including the capacity to accommodate larger flows of traffic and the capacity of existing bulk infrastructure services. Densification should not be supported where water, waste water and storm water capacity are reaching points of absolute constraint.
- 198.4. *Socio-economic:* the affordability of the product and the compatibility of the intended market and/or product with the surrounding local communities require consideration. Consideration should be given to the fact that multi-storey developments in low-income areas have not had a good track record, as they have become associated with negative social impacts.
- 198.5. *Community facilities and open-space provision:* the availability and/or provision of open-space and community facilities (libraries, clinics, schools, police stations) are important contextual informants in the evaluation of medium to higher-density proposals, such as the Proposed Development.
- 198.6. *Natural environment:* higher-density forms of development should not have an impact on the landscape and scenic aspects of the surrounding natural

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environment or on the operation of natural systems. The location, orientation, scale, height and design of higher-density developments in scenic and sensitive landscapes should therefore be *carefully considered to ensure that densification-related applications do not have a negative impact on the surrounding natural environment.*

199. Finally, I draw attention to Annexure 2 to the Densification Policy. This annexure deals with the assessment guidelines for small-scale incremental densification. The primary objective of incremental densification is to allow densification without substantially departing/detracting from the overall general built form and character of the area. Amongst the tools/mechanisms that could be used to achieve this are the following (my emphasis):

199.1. It is advantageous for new buildings to be modest in height and size and roughly to conform with the character and built form of the nearby locality.

199.2. The proposals should not create any unacceptable privacy problems for neighbours on its lateral boundaries – impact on abutting rights is an important consideration.

199.3. Substantial and appropriate soft landscaping on the public edges (to obscure the impact of the additional units further) may be required to reduce the visual impact on the character of the area.

200. As is clear, the Densification Policy supports densification but subject to very clear guidelines and limitations. It is not supportive of densification in areas and in ways that will interfere with the existing built environment, with the existing community, or with the unique context and heritage of Cape Town.



*The City's reasoning*

201. The City's Report deals with the Densification Policy in a single paragraph. It reads:

"The **proposal** to densify the property is supported and represents appropriate densification. Appropriate densification, facilitates a gradual restructuring of the City which is vital in terms of social, economic and environmental sustainability and is an important mechanism towards improving the inefficient city structure that currently exists. It is widely accepted in professional and academic planning circles that a compact urban form is an essential pre-condition for well performing cities. Perpetuating relatively large properties / low densities in areas such as this contributes to urban sprawl by displacing other development."

202. This was not adequately interrogated (or indeed interrogated at all) and was simply accepted by the MPT and the Mayor. This is a cause for significant concern given that the members of the MPT are all experienced town-planners to whom the relevance of actual compliance with the City's policy framework (including District Plans and the provisions of the By-Law) ought to have been a core consideration.

203. This is patently inadequate for an analysis of whether the Proposal complies with the Densification Policy. It merely asserts that the Proposal would constitute "*appropriate densification*" and then makes general statements about the desirability of densification. It does not analyse, with reference to the numerous guidelines and criteria in the Policy, whether this is the type of densification that the City has decided it will support.

204. More particularly, the City's position is fatally flawed and irregular for not considering the following five relevant issues.

205. First, it fails to address the fact that the Proposal is *not one of the three accepted forms for densification*. It is not a tower block surrounded by open space, but a tower

block without *any* open space. The sheer mass of the building on Buitengracht stepping down as it does to Rose Street shows little or no regard to any of the preferred building forms depicted on Figure 1. For this reason alone, the proposal is not compliant with the Densification Policy.

206. Even if the City could approve a form other than one of the three preferred forms, it would have to explain its deviation, and justify it in terms of the Policy. It failed to do so.

207. Second, the City did not consider the mandatory factors that must guide any decision about densification. In particular, the City ignored the contextual informants including: surrounding land uses, built and heritage environment, infrastructure, socio-economic impact, community facilities and open space, and natural environment. Those factors weigh against the development and would counsel for a far more modest form of densification. Instead of considering those factors and the detailed criteria in the Policy, the City appears to have concluded that, because the Development will result in densification, it is consistent with the Densification Policy. That is neither rational nor reasonable.

208. Third, the City failed to consider – as the Densification Policy required – how the Proposal would affect views of Table Mountain. As the Policy notes, the mountain skylines and views of the sea are the defining elements that make Cape Town unique and views of them must continue to be protected from inappropriate built form. The Proposal will seriously and negatively affect those views in two ways:

208.1. The views which residents of the Bo-Kaap currently enjoy of the CBD and Table Mountain will undoubtedly be impeded by the sheer mass and bulk



of the proposed development which has been described as being viewed as a wall separating the Bo-Kaap from the CBD.

- 208.2. Similarly, views from the CBD towards the Bo-Kaap are going to be hugely impacted by the sheer mass of the proposed development.
209. I am advised that the extent of the adverse effect of the proposal is aptly demonstrated in the affidavit that will be filed by Mr Jason Stapleton, of Meta Scale Consulting and Services, in which, through a range of photomontages, he shows the impact of the structure on the views of the residents of the Bo-Kaap and the views from the CBD.
210. Fourth, the City failed to address:
- 210.1. the objectives in para 4.2, including that densification is "appropriate to the immediate context"; and
- 210.2. the assessment guidelines for small-scale incremental densification in annexure 2, including that developments should be "modest in height and size and roughly to conform with the character and built form of the nearby locality".
211. Fifth, the City did not explain why it approved an 18 storey building when the highest building approved in terms of the densification policy is 4 to 15 storeys. While the Applicants accept that higher buildings may be built in some circumstances, a departure from the general policy position must be explained and justified. It was not. For the reasons set out above, it also could not be.



Urban Design Policy

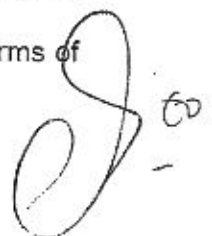
212. The Urban Design Policy (UDP), a copy of which is attached as "FA25", was approved by Council on 4 December 2013. The intention of that Policy is to guide the design process and formulation of development proposals so as to address the segregated nature of the city inherited from apartheid. It also seeks to make Cape Town safer, more economically prosperous, socially inclusive and environmentally sustainable, while also making it look and work better for all those who live in and visit the city (UDP p 3).
213. The UDP describes urban design as concerned with the process of creating holistic and sustainable human settlements. It is a practice which straddles the disciplines of spatial planning, architecture, heritage, landscape architecture, road and street design and environmental design. What distinguishes urban design from other development-related activities, according to the UDP, is that it seeks to introduce the creative process of spatial design into land development processes (UDP p 3).
214. The City concluded that the Development did not trigger the UDP, or that it complies with the UDP. A closer look demonstrates the opposite – it did trigger the UDP and does not comply with it.
215. The UDP recognises that it is the City's duty to develop policies to guide and regulate development and then assess development applications against existing policies through the land use planning and building plan approvals process. The district plans, for example, already include many sound urban design principles at the scale of the City which can be used to assess a proposed development. The intent of the UDP is to focus on *the local level, the scale of the site, precinct or neighbourhood* (UDP at para 1.2).

A large, stylized handwritten signature in black ink, located in the bottom right corner of the page. The signature is cursive and appears to be the initials 'J' followed by a large loop and the letters 'ED'.

216. The UDP is motivated by the City's observation that, although individual development decisions are localised, the collective impact of many poor design decisions over time has significant implications for how the City functions and is experienced. One of the implications is that development without regard for good urban design *"undermines the heritage, character and unique identity of the City and its neighbourhoods"*.
217. Three "desired outcomes" are fundamental to the UDP. It aims to:
- 217.1. introduce urban design thinking into the planning and preparation of development proposals by adopting an evidence-based mode of practice;
  - 217.2. provide a transparent framework of urban design principles and objectives against which development applications will be assessed – the UDP focuses specifically on those criteria that have a potential impact on the public environment and, more specifically, the interface conditions between the public and the private realms;
  - 217.3. form a basis, through the policy objectives and principles together, upon which applicants are invited to engage with the City in early pre-submission consultation.
218. Paragraph 2.1 of the UDP determines the development categories which are subject to the policy. The policy stresses that "all development proposals should be the result of good design" but lists several categories of development that "will be required to demonstrate compliance with the policy and be assessed against the criteria set out in the policy objectives and policy statements." (UDP at para 2.1) These categories include:



- 218.1. proposals that deviate from the approved forward planning vision and spatial policies of the City at local area scale;
- 218.2. proposals that include new public space and/or public or community facility;
- 218.3. instances where Site Development Plans are required for:
- 218.3.1. shopping centres (from neighbourhood to district scale centres); or
- 218.3.2. commercial developments exceeding a bulk of 1000 m<sup>2</sup>; or
- 218.4. instances where a delegated official considers that an application has the potential to have a significant negative impact on the public realm.
219. The policy contains a number of objectives. I shall highlight those that are germane for the purposes of the Proposed Development:
- 219.1. **Objective 1** is to ensure that development contributes positively to the urban structure of the City to create integrated and legible places and neighbourhoods. Accordingly, proposals should demonstrate how a new development fits into and contributes positively to its surrounding context, addresses spatial, economic and social segregation, improves integration and creates more legible urban places (UDP, p 8).
- 219.2. **Objective 5** is to promote development intensity, diversity and adaptability. A proposal must make efficient use of its site and seek to optimise its development potential through the intensification of built form (in terms of



height and coverage) in response to the elements of the urban structure. It should respond positively to the attributes of the particular site and its surrounding urban context.

219.3. **Objective 6** is to ensure enclosure and positive interfaces onto the public realm. The orientation of buildings should recognise the historical street pattern, reinforce the existing or proposed urban structure and respond positively to environmental conditions such as wind patterns so as to maximise level of comfort for the pedestrian and make places that are pleasant to be in.

219.4. **Objective 9** is an important objective. It provides that development should respect and enhance the heritage, character and unique identity of the City and its neighbourhoods. It is intended to safeguard the integrity of the natural features which form part of a neighbourhood's identity (including important vistas, view corridors and view of local landmarks) when considering development proposals. These qualities need to be identified during the design process and it needs to be demonstrated how the intrinsic qualities of the place will not be detrimentally transformed through development. Furthermore, it must respect the heritage and cultural landscape of the City and integrate new proposals within their existing context by:

219.4.1. knitting developments into the historic grain and open space system of the area, retaining the key elements of the cultural landscape, and creatively adapting buildings of historic or architectural value, responding sensitively in terms of building height, massing and the placement of buildings on the site;



219.4.2. continuing or introducing vertical and horizontal rhythms within the streetscape; and

219.4.3. complimenting the style and material palette of adjacent buildings in a contemporary manner, by using appropriate technologies and modern detailing. (UDP, p16; emphasis supplied)

219.5. Importantly, the UDP notes that the following related policies are relevant to this policy objective:

219.5.1. the Scenic Drive Policy;

219.5.2. the Tall Building Policy; and

219.5.3. the Cultural Heritage Strategy.

### ***Application of the UDP***

220. The City's first error (and reviewable irregularity) in this context was to conclude that the Proposal did not "*trigger*" the UDP. The City records that the Urban Design department "*stated that the application did not trigger this policy*". However, the City provided "*clarity*" given the objections. The Report then states – in the same language as the Tall Building Policy – that the Proposal "*does not trigger requirements of the Urban Design policy, as it complies with the principles of the policy*".

221. This logic is equally flawed here. Either the UDP applies, or it does not. Compliance does not determine application. Whether or not it applies depends on whether the proposal falls into one of the categories referred to above. It plainly does:

221.1. It requires deviation from the TBDP as described above. It therefore does not comply with forward planning and spatial planning policies at a local scale;

221.2. It includes the creation of new public space;

221.3. It will include three floors of shops, and is therefore a "shopping centre";

221.4. Its bulk exceeds 1000 m<sup>2</sup>; and

221.5. If a delegated official had considered its application, he/she should have concluded that it had "*the potential to have a significant negative impact on the public realm*". The City's apparent contrary assessment – that it contributes to an improved public realm because of its "*active / business edges*" – fails to appreciate the meaning and scope of public realm in the UDP.

222. It is not clear whether the City even considered whether the Proposal falls into one of these categories. Some of the statements (paras 6.29.1 and 6.29.2) suggest that it did, but they are framed as issues of compliance, not application. In any event, the conclusion that the UDP was not triggered is plainly incorrect. It was required to evaluate the Proposal in terms of the substantive and procedural constraints of the UDP. The City failed to do so.

**Compliance with the UDP**

223. The City's conclusion that the Proposal complied with the UDP is based on the following allegations:

223.1. balconies and windows provide overlooking "eyes on the street";

223.2. the street edge is defined with the building being on the street boundary;

223.3. parking is located within the building; and

223.4. the *"facades and articulation of the building attempts to respect the heritage and cultural landscape, particularly along Rose Street, with its design mimicking the Bo Kaap architectural vernacular"*.

224. I have already dealt with the erroneous claim that the Development respects the heritage and culture of the area. It most certainly does not, for the reasons already provided.

225. The remaining reasons – balconies, the street edge and parking – are accurate, but comparatively meaningless.

226. What is startling about the analysis of urban design is how it completely fails to engage with the core aspects set out in the UDP, and thus address questions such as the following:

226.1. Does it "fit into and contribute positively to its surrounding context"?

226.2. Does it "respond positively to the attributes of the particular site and its surrounding urban context"?



- 226.3. Does the Proposal retain the key elements of the cultural landscape, and respond "sensitively in terms of building height, massing and the placement of buildings on the site"? and
- 226.4. Does it continue or introduce vertical and horizontal rhythms within the streetscape and compliment "the style and material palette of adjacent buildings in a contemporary manner"?
227. The City did not ask these questions that are at the heart of the UDP. If it had, the answer in each case would have been "No". The Development is woefully out of touch with surrounding buildings. It is too tall, too large and poorly placed. It will negatively alter the character and nature of the surrounding urban environment. The City's analysis of the UDP was therefore hopelessly flawed.

Scenic Drive Network Management Plan (Scenic Drive Plan)

228. In addition to its mistaken conclusions that the proposed development complies with the four policies discussed above, the MPT and the Mayor completely failed to consider the City's own Scenic Drive Plan, a copy of which is attached as "FA26". Enquiries made by Mr Bührmann, and confirmed by him in his affidavit, confirm that the Scenic Drive Plan was formally adopted by the City and that it is still in force.
229. As I noted in the discussion of the TBDP, Buitengracht is an S2 scenic drive. The Scenic Drive Plan sets out in full the City's policy towards both S1 and S2 scenic drives. It also describes each of the 41 scenic drives, including Buitengracht.
230. With regard to Buitengracht, the Scenic Drive Plan notes the following:



- 230.1. Buitengracht is protected as an S2 scenic drive from the bottom of Kloof Nek Road to Coen Steytler Avenue.
- 230.2. Under the heading "**Assessment of Route Intrinsic Qualities**" the Plan states: "Bo-Kaap is the main scenic feature along this route, representing an area of **significant cultural and built environment.**" (emphasis in original) Later, under the topic of "cultural resources", it states: "Bo-Kaap precinct. Several historic commercial buildings and dwellings." It describes that in more detail as follows:
- "Above the CBD is the residential area of Schotsche Kloof (more commonly known as the Bo-Kaap or 'Cape Malay Quarter'). This area has many interesting buildings, colourful houses, many of which are national monuments as well as mosques and kramats or shins [sic]. It is therefore of cultural tourism importance. As such, the availability of economic infrastructure can be considered medium."
- 230.3. It recognises with regard to the "image of the route" that: "The conservation of buildings in Bo-Kaap is a major issue along this route. There are a number of unattractive multi-storey buildings along the northern side of this route that block views of Bo-Kaap." Similarly, on the issue of "visual quality" it recognises that "[f]oreground distractions preclude appreciation of wider views".
- 230.4. The City also noted that Buitengracht suffers "[s]evere traffic congestion ... during commuter peak hours."
- 230.5. The Scenic Drive Plan's conclusion with regard to Buitengracht is: "Conservation of Bo-Kaap built environment is of major concern. High restrictions and other land use control measures are required to reduce

the visual hindrance [sic] of buildings, in particular along the northern side of Buitengracht Road".

231. The Scenic Drive Plan was clearly relevant to the application. Yet it was not considered at all by the MPT or the Mayor. This inexplicable omission renders their decisions reviewable, not least for the reasons that follow in the next section.

Cultural Heritage Strategy for the City of Cape Town

232. In terms of the Cultural Heritage Strategy (attached as "FA27"), the City has committed itself to ensuring that the diverse cultural heritage of the City of Cape Town is protected and enhanced. This includes:

- 232.1. recognising the rich cultural history of the City of Cape Town;
- 232.2. recognising all cultures and religions represented within the City of Cape Town;
- 232.3. including cultural values, sites and landscapes of historic significance, areas of scenic beauty and places of spiritual importance in planning and decision-making.

233. The Cultural Heritage Strategy moreover recognises that these commitments need to be "further augmented by also ensuring that the diverse cultural heritage of Cape Town is also conserved, and that objects and socio-political dimensions are expressly also included".

234. According to the Cultural Heritage Strategy:

234.1. Heritage and heritage resources contribute significantly to the sense of identity and history of Capetonians. The recognition of the significance of heritage resources and their inclusion into City management and planning is vital if such resources are to be conserved for future generations to know and understand the past history of their environment and the struggles and developments that shaped it. History, diversity and cultural heritage also add to the unique qualities of the City and should be sensitively accommodated in development and planning of the City in order that such qualities may be retained as economic generators for tourism and business. (p 6, par 1.4)

234.2. In order for heritage management to be effective it should be integrated at an early stage into development management, environmental management, urban design, planning, and cultural and social initiatives. (p 9, par 1.8)

234.3. HWC is recognised as a key stakeholder. (p. 10, par 1.10)

234.4. Its Vision is described as follows:

"Cape Town is a unique historic city. It derives its character from evidence of a layered and multi-faceted history, its dramatic scenic setting, its historical townscapes and cultural landscapes, its cultural and heritage diversity and the traditions and memories that arise from its past.

The role of the City is to co-ordinate the protection and enhancement of this unique character.

The protection of heritage sites and the traditions and memories associated with them, are an important part of City management.

The City's vision is of a unique historic city where the heritage of its past and present inhabitants is respected, protected and enhanced through appropriate heritage management practices; adherence to



sensitive, socially aware and appropriate heritage concepts; and integration with other City responsibilities and policy objectives."

234.5. The following is stated as regards context and scale (p 14):

"The social and landscape context of heritage sites is critical in the understanding and conserving of their significance. The significance of a heritage resource is partly determined by its context and scale.

The context can be both social and spatial, taking into account both historical and contemporary perceptions of their significance. A heritage landscape may be significant by providing a context for a heritage element, while also representing a valuable heritage resource in itself.

Heritage resources can be interpreted and understood at a variety of scales, from an object to an entire landscape.

An understanding of the nature of significance at different scales is fundamental to a holistic approach to heritage management.

The City will consider the relevance of social and landscape contexts when making decisions affecting heritage resources.

The City will acknowledge the significance of scale in making appropriate conservation-related decisions and in evaluating heritage resources within broader contexts.

The City will ensure that the character of places based on their context and scale, (rather than individual sites and objects) is protected, wherever appropriate.

The City will ensure where possible that new developments in historic precincts acknowledge an appropriate scale as well as an appropriate architectural language. Scale, massing, articulation and texture will be regarded as critical considerations in determining a response to a development proposal."

(emphasis added)

235. The City neither considered nor had regard to its own Cultural Heritage Strategy. In having failed to do so, the City committed a further reviewable irregularity.



**Ground 3: The approvals granted failed to have regard, alternatively adequate regard, to the title deed condition in respect of Erf 144698.**

236. As stated, the Title Deed for Erf 144698 (a copy of which has been attached as "FA5") makes that property subject to a special condition for the benefit of the City. The condition ("**Condition B**") reads as follows:

"B. Subject to the following special condition contained in Deed of Transfer No. 17550/1953 imposed by and for the benefit of the Municipality of Cape Town, namely:

The Transferor shall have the right to refuse permission to build or rebuild any building or structures on the said land unless the architecture of that portion of such buildings or structure which fronts on Rose Street is in conformity with the general design and architecture of buildings situate in such area or areas of the City of Cape Town which is known and/or classified as the Malay Quarter."

237. Despite this condition, Buitengracht Properties has not made any application to the City for the relaxation of this condition. Hence, the applications made by Buitengracht Properties had to be considered in light of this condition. I respectfully aver that the City has failed to comply with Condition B in having granted the said approvals.

**Ground 4: The approvals granted failed to have regard, alternatively adequate regard, to the impact of the Proposal on traffic and public parking**

238. In the City Report to the MPT (FA11) it is concluded that the proposal will "not have a dramatic negative impact and ample off-site parking is proposed" (par 6.89.11). In relation to the appeal, the report to the Mayor (FA13D) states that the City officials undertook a detailed assessment of the Traffic Impact Assessment ("**TIA**") done by independent specialists and that the paragraphs 6.66-71 of the report to the MPT and conditions 3.9-10 of the Amended Annexure A addresses these concerns. It is

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further stated that the Chairperson of the MPT stated that the MPT had sufficient information to make a decision related to traffic aspects of the proposal (par 7.3.27).

239. I respectfully aver these conclusions failed to have regard or proper regard to a range of issues:

239.1. First, despite the multiple objections filed in opposition to the application for the proposed development, the issue of extreme traffic congestion that would be occasioned by the development and its impact on available public parking with specific reference to the fact that the Bo-Kaap in the main does not have access to off street parking available to the residents, this issue was not considered at all or not properly considered. It should be noted that this problem is exacerbated by the fact that the public who work in the CBD make use of free street parking in the Bo-Kaap at the expense of the residents. I have raised this issue in my introductory averments above.

239.2. A resident, Ms Dumas, was one of the many persons who raised an objection (a copy of which is attached as "FA27A") in respect of traffic and parking. She stated in terms that the development would result in a possible 300-400 cars being introduced to an already over-burdened area which would present a huge problem for the everyday commuter through the Bo-Kaap, and even more importantly, for the residents who have to navigate through the Bo-Kaap.

239.3. Second, the sources of assumptions made in the TIA regarding the site traffic distribution is either not given at all in certain instances or in instances where it is, it is done so obscurely that it is not at all clear where it comes from. From my own everyday experience, (as Prof Todeschini and Mr Bührmann will also



confirm in their confirmatory affidavits), traffic in the streets which border the proposed development is chaotic and often the congestion is so bad that it is not possible to navigate Rose Street in particular. Indeed, the objection filed by Olden and Associates (a copy of which is attached as "FA27B") ("the **Olden objection**"), highlights the real concerns as to whether or not the 324 bays provided for in the proposed development could be sufficient especially as the streets in the immediate proximity, namely: Shortmarket, Longmarket and Rose Streets are narrow streets. The Olden objection highlighted that the traffic generation of the proposed development is approximately 144 vehicular trips in the weekday morning peak hour and 328 in the weekday afternoon peak hour. The Olden objection expressly raised concerns about the sufficiency of the onsite parking, particularly having regard to the fact that existing business operations located at the corner of Buitengracht and Shortmarket Streets received delivery of tyres and other products through the medium of 10 ton trucks. This is also confirmed by Mr Bührmann in his accompanying confirmatory affidavit. The proposed access and egress to the development from Shortmarket Street would have a cumulative negative impact on traffic and parking in that area, with specific reference to the congestion that will arise at the T-intersection of Rose and Shortmarket Streets.

239.4. Third, paragraph 9 of the TIA states: "The site is easily accessible from the central City road network and ... (t)he one way pair of roads being Longmarket down to Buitengracht and Shortmarket up to Rose Street both work effectively in circulating traffic to the site". This statement is far removed from reality and the actual position on the ground. My own personal observations are that the area bordered by these three streets is subject to

chaotic traffic conditions in the morning and afternoon peak hour traffic times, and barely copes with current normal day traffic. Indeed, this very issue was expressly raised by Mr Bührmann in his oral submissions to the MPT. As will be confirmed by Mr Bührmann in his accompanying confirmatory affidavit, he specifically conveyed the following to the MPT (based on both his personal experience of travelling on these streets very often and his professional experience of 47 years as a town planner):

239.4.1. Buitengracht has become a "nightmare" during peak traffic hours;

239.4.2. Rose Street is used as an alternative traffic corridor by drivers who try to avoid the chaotic conditions of Buitengracht Street;

239.4.3. he disputes the claims by the developer that the development would have a "slightly significant impact" on the road network during peak hours and stated that that assertion "boggles the mind";

239.4.4. that the exhaust and tyre fitment centre located on the corner of Buitengracht and Shortmarket Street frequently has a traffic congestion build up around it as a result of its business activities;

239.4.5. the proposed development did not address issues such as loading and offloading to the proposed retail component of the development;

239.4.6. Rose Street is a very narrow street in which vehicles are parked on both sides of the road and that (consistent with what I have stated above), the residents of Rose Street do not have garages

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thereby requiring the occupants of those residences to park on the street – he explained that many of these residents who returned to their homes every afternoon were unable to find parking at or near their residences because Rose Street is utilised by many workers in that area of the City as free parking;

- 239.4.7. tail back traffic flow into and out of the proposed development would exacerbate the extreme pressure of one-way traffic flow up Shortmarket Street to the parking entrance of the development. This traffic will either be coming down Buitengracht (i.e. from the Wale Street side towards the harbour) turning left into Shortmarket Street, or coming up Buitengracht (i.e. from the harbour side towards Wale Street) turning right attempting to cross over the one-way traffic exiting the City via Buitengracht. This doesn't even take into account traffic flowing up Shortmarket Street from the CBD which endeavours to cross Buitengracht to Rose Street and the Bo-Kaap. If one adds to this already congested traffic flow with its inherent conflicted traffic movements, at least another 300 – 400 vehicles trying to exit the proposed development onto Shortmarket Street or to enter the proposed development from Shortmarket Street, the results would be disastrous for traffic flow in Buitengracht, up Shortmarket Street and along Rose Street. 2.4. Mr Bührmann will confirm that based on his experience as a town planner, the comment contained in the TIA that no provision need be made for parking to service the retail component of the proposed development because on street parking can be used and that the



retail segment will attract mainly pedestrian consumers from the CBD, is entirely flawed, having regard to the location of the site. It is located on the other side of Buitengracht that does not attract pedestrian movement which is confined to that side of Buitengracht that borders on Bree Street. Moreover, the impact of service vehicles off-loading goods at the proposed retail segment of the development ( $\pm 4000\text{m}^2$ ) would exacerbate the problems described as no facilities for such off-loading have been provided for.

239.5. Fourth, the public transport described in paragraph 10 of the TIA is plainly implausible in that the development contemplated is an upmarket development. As such, owners and occupiers of the apartments will probably own and use their private vehicles to come and go.

239.6. Fifth, in paragraph 13, the conclusions of the TIA are set out. In conclusion 2, it is stated: "The Level of Service (LOS) for the current traffic operations at the stop controlled intersection of Strand and Rose Street(s) is operating at fairly low levels of service. Conversely the signalised intersections at Buitengracht/Strand and Strand/Chiappini are experiencing acceptable LOS". This is entirely inconsistent with my own experience, and with the experience of Mr Bührmann and Prof Todeschini who will confirm this in their confirmatory affidavits.

240. As Mr Bührmann will confirm based on his vast experience as a town planner, the proposed development has the effect of forcing significant additional traffic up Shortmarket Street between Buitengracht and Rose Street, resulting in significant traffic flow onto Rose Street. Rose Street is not designed to be a relief road to

alleviate congestion from Buitengracht. It is, and has always been, intended to be primarily a residential road, addressing access to the densely populated and fine grained Bo-Kaap residential homes. Based on his experience, he will confirm that to permit the proposed development with its negative traffic implications, defies logic and undermines sound planning principles.

**Ground 5: The conditions subject to which the approvals have been granted do not address the Applicants' complaints**

241. The conditions subject to which the approvals have been granted do not address any of the Applicants' complaints at all as is apparent from FA15.

242. The conditions provide:

242.1. That the development of the property shall be generally in accordance with the plans drawn by Fabian Architects and provides that the details of the design along all facades shall be submitted to the Director: Planning and Building Development Management for approval prior to the building plan approval: this does not address the underlying concerns about the height and the massing of the building.

242.2. That a construction phase management plan shall be submitted: this does nothing to respond to the Applicants' complaints; instead it seeks to regulate the construction phase.

242.3. That the owner developer shall be responsible for all costs incurred in respect of the upgrading, extension, deviation, connection or removal of any existing stormwater, sewage, electricity, roads or other service work arising from the



development: the issue of payment responsibilities have no bearing whatsoever on the specifications of the development.

242.4. That all services upgrading, extension, deviation or removal must be done in accordance with the engineering design drawings which are subject to City approval: this requirement goes no way to addressing the complaints raised in relation to the development. In any event, such issues would be subject to approval by the City.

242.5. That the recommendations of the TIA shall be implemented at the cost of the developer, to the satisfaction of the City: for reasons addressed, I maintain that the TIA was fundamentally flawed and its recommendations do not in any meaningful way address the concerns raised about the Proposal.

242.6. That a traffic management plan shall be approved by the City: when the underlying concerns in respect of traffic have not been addressed, traffic management plans do little to ameliorate the traffic concerns.

242.7. That all points of infrastructure supply shall be consolidated to one supply per consolidated erf to the satisfaction of the City: this condition does not respond to any of the concerns raised.

## IX SUMMARY OF GROUNDS OF REVIEW

243. In summary, the City:

243.1. erroneously and irregularly concluded that the TBP and UDP did not apply to the Proposal;





- 243.2. erroneously and irregularly concluded that the Proposal was consistent with the TBDP, the UDP, the TBP and the Densification Policy; and
- 243.3. failed to even mention (let alone consider) the Scenic Drive Plan and the Cultural Heritage Strategy.
244. In the circumstances, the Decisions of the MPT and the Mayor are *inter alia* reviewable on the following grounds:
- 244.1. First, the City failed to consider relevant considerations (contrary to PAJA s 6(2)(e)(iii)). This flows from the "cherry-picking" attitude that the City adopted to the various policies. Instead of considering the policies as a whole, it addressed only those elements that it believed (wrongly in many cases) favoured approval. Most glaringly, they failed to consider the Scenic Drive Plan at all.
- 244.2. Second, by not considering the Scenic Drive Plan, and not accurately considering the other policies, the City failed to comply with a mandatory requirement of the empowering provision, namely s 99(2)(c) of the Planning By-Law. This is contrary to s 6(2)(b) of PAJA.
245. Third, by concluding that the TBP and the UDP did not apply at all, the City made material errors of law (PAJA s 6(2)(d)). The City also made multiple material errors of law in its determination that the Proposal was compliant with the TBDP, the TBP, the UDP and the Densification Policy.
246. Fourth, the decisions were riddled with material errors of fact in analysing the various policies. This makes the Decisions susceptible to review in terms of s 6(2)(i) of PAJA.

247. Fifth, as a result of the failure to engage with the most vital elements of the policies, the false conclusions that two policies did not apply, and the mistaken assessment of those limited parts of the policies that were considered, as well as an evident failure to appreciate the enormously prejudicial impact on the Bo-Kaap and heritage concerns in the City, the Decisions were so unreasonable that no reasonable person could have reached them (PAJA s 6(2)(h)).
248. In addition and for reasons already addressed the Decisions are also reviewable on: (a) procedural grounds; (b) for the failure of the decision-makers to have considered, alternatively properly consider, that a portion of the site fell within an HPOZ; (c) for the decision-makers' failure to have regard to the impact of the development on heritage; and (d) for the decision-makers' failure to comply with the Title Deed condition B referred to above.

## X INTERDICT

249. In terms of section 105(4) of the By-law, the City may on application suspend the operation of the decision pending the final determination of the review.
250. The Applicants have made application to the City (by way of correspondence dated 10 April 2017), requesting that it suspend the operation of the impugned decisions in terms of that section pending the final determination of the review. I attach a copy of the correspondence addressed to the City marked "FA28".
251. The City refused the Applicants' request, stating that it first needed to consider the review application once it was served on it before deciding whether to suspend the impugned decisions. I attach a copy of the City's correspondence dated 18 April 2017 as "FA29".



252. The same letter that was sent to the City ("FA28" above) was also sent by the Applicants to Buitengracht Properties on 10 April 2017. Buitengracht Properties was, requested therein to undertake not to implement the impugned decisions until such time that the review has been finally determined. Buitengracht Properties had not responded to that letter at the time of the finalisation of this affidavit, and has thus, by its silence, refused to accede to the request.
253. The result is that the Applicants have been left with no alternative other to seek an interdict on an urgent basis interdicting the implementation of the impugned decisions pending the final determination of their review. The Applicants accordingly do so under Part A of the Notice of Motion.
254. I am advised that in order to succeed in an application for interdictory relief, an applicant claiming an interim interdict must establish: (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm; (c) that the balance of convenience favours the grant of the interdict; and (d) that the applicant has no other remedy. I address below the various requirements for interdictory relief.

***Prima facie* right**

255. I respectfully submit that the Applicants have demonstrated, at the very least, a *prima facie* right to have the impugned decisions set aside; or, put differently, a *prima facie* case in their review of those decisions.
256. The grounds of review have been addressed at some length in the preceding section of this affidavit. Those grounds will be supplemented once the Applicants have had the benefit of considering the record of the City's decisions. For present purposes



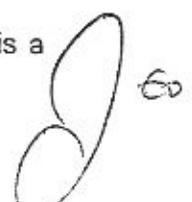
and for reasons addressed in this affidavit, I maintain (and am advised) that the Applicants have good prospects of success in the review.

### Irreparable harm

257. I am advised that the application for an order reviewing and setting aside the impugned decisions will, in the normal course, take approximately a year and a half to be finalised, taking into account potential appeals by the parties.
258. In the event that the impugned decisions are acted upon prior to the final determination of the review there is a real risk that by the time the review has been finalised, building operations would have commenced and a fair degree of progress would have been made. Indeed, the development may be close to completion (or even complete) and sales of units to *bona fide* third party purchasers are likely to have occurred. As a result, there is a real possibility that, even if (as I respectfully submit should occur) the Applicants' review grounds are upheld, the Applicants will (absent an interdict) be unable to obtain effective and tangible relief in their review.
259. In addition, the owners of properties neighbouring on, or abutting, the proposed development, as well as the residents of the Bo-Kaap generally, will have suffered considerable and irremediable disruptions as a result of any construction which commences. This is particularly so as a result of the relatively few access, egress and thoroughfare roads in the vicinity of the site.

### Balance of convenience

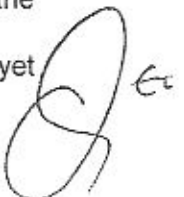
260. I submit that the granting of an interdict to prevent the implementation of the impugned decision pending the final determination of this matter will not harm the interests of the Respondents. Simply put, all that an interdict would result in is a



deferral of the development on the site for a limited period of time (and more especially, pending the outcome of the review). It should be emphasised in this regard that no development work of whatsoever nature has yet commenced on the site. Accordingly, an interdict at this stage will not have the effect of freezing building operations that are underway.

261. Furthermore, there is no prospect of any building operations commencing in the immediate future given that, as the Applicants have ascertained from the City, through the Applicants' attorneys of record, Buitengracht Properties has, to date, not yet submitted any building plans for approval; and, in the absence of approved building plans, the commencement of building operations on the site could not lawfully commence. Buitengracht Properties thus cannot at this stage contend that it has already scheduled building to commence – though it would doubtless attempt to do so shortly in the event of no interdict being granted, and Buitengracht Properties submitting building plans for approval on the strength of the impugned decisions. I should also add that, even once submitted, a key consideration in the approval of building plans would be the question of compliance with any applicable law as contemplated by section 7(1) of the National Building Regulations and Building Standards Act, No. 103 of 1977. I respectfully aver that it would be premature for the building plans to be approved pursuant to section 7 of that Act when the issue of non-compliance with the By-law is a key complaint underpinning this challenge. Buitengracht Properties could thus not seriously complain if they are unable to build pending the review, pursuant to an interdict.

262. By contrast, I submit that the Applicants would be irreparably prejudiced if the interdict were not to be granted. I have dealt with this issue in the preceding section of this affidavit. I merely reiterate that the prejudice would be self-evident if the Applicants succeeded in their review in impugning the challenged decisions, and yet



were ultimately unable to set the decisions aside on review due to the construction which had already taken place and/or the sales which had already been concluded with third parties.

263. Buitengracht Properties can also hardly complain about not being permitted to benefit from an unlawful decision: I respectfully submit that the converse is not an outcome which any court should sanction. Furthermore, any potential commercial prejudice to Buitengracht Properties will be considerably mitigated by the fact that the Applicants have already committed (in their attorneys' letter, "FA28" hereto) to pursuing their review on an expedited basis.

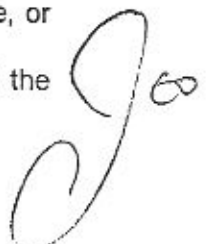
264. All in all, I submit that the Applicants will be considerably more prejudiced if the interim interdict is refused than Buitengracht Properties and the City will be if the interdict is granted and the review is ultimately successful. I accordingly submit that the balance of convenience clearly favours the Applicant.

**No other remedy**

265. I am advised and submit that the Applicants have no alternate remedy other than to seek an interdict. The harm that will be occasioned to them if an interdict is not granted cannot be compensated or redressed in any other way.

**Urgency (as regards Part A)**

266. I respectfully aver that, by its very nature, the relief sought in Part A of this application (i.e. the interdictory relief) is urgent. The Applicants cannot obtain adequate redress of that kind in the normal course. If the interdict is not determined urgently, but on the normal opposed motion roll, it will be heard at essentially at the same time, or only shortly before, the review; and that would defeat the very purpose of the



interdict, which is to preserve the status quo pending the review (and thus prevent irremediable prejudice being sustained until the review has been determined).

267. This application has also been brought with due expedition, as I submit the following time-line indicates:

267.1. After being advised of the dismissal of their appeal, the appellants had to consider their position, together with their professional advisers. One of the first issues to address was whether to remain with their existing attorney or seek different counsel. For various reasons, it was decided to engage new attorneys (the Applicants' current attorneys of record, ENS). This decision was made in the first half of February 2017, and the services of ENS were then employed.

267.2. The appellants provided ENS with the documents that had been made available to them two days before the MPT hearing in order to obtain advice as to their prospects on review. These pages ran to some 1800 pages. In order for ENS to advise the appellants of their rights and prospects, it was however also necessary for the relevant documentation which had served before the Mayor as the appeal authority to be obtained from the City. ENS accordingly wrote to the Mayor on 17 February 2017, requesting copies of the documents considered by her when determining the appeal. A copy of this letter is appended marked "FA30". The City's Kenny Phillips responded the same day. He advised of certain documents that had been sent to Bührmann, and also informed ENS that the appeal record would be placed on a compact disc (CD) and that he would let ENS know when the CD was ready for collection.



267.3. At the same time as writing to the Mayor, ENS wrote to the City's Building Control Officer in order to inform him that ENS had been instructed by certain of the appellants to advise them of their rights in relation to the approval of the development plan, as well as to apprise him of certain aspects relevant to any planning approval. On 20 February 2017, the Building Control Officer, Louis Coetzee, responded by informing ENS that: "*There is no Building Plan application yet for the proposed development on erven 8210 and 144698 that you refer to in your correspondence*". As far as the Applicants are aware, this is still the position.

267.4. The CD which was said to contain the appeal record was delivered on 20 February 2017. The documents were again extensive. They ran to 2725 pages.

267.5. The extremely voluminous documentation that was relevant to the proceedings before the MPT and the Mayor (totalling over 4500 pages) was then printed out, collated, considered and analysed by the Applicants, ENS, and other professional advisers, including junior counsel. It was also necessary for consultations to be had with appropriate experts in relation to those documents and the various issues raised thereby. This all occurred over the following month-and-a-half. In the light of the vast mass of documentation, the range of objections by interested parties which had been rejected by the City, and the extent of the development, planning and heritage issues implicated by Buitengracht Properties' applications, I submit that there can be no serious suggestion that this process was unduly protracted. In the light of the fundamental importance of the issue for the Bo-Kaap, and the life-changing ramifications for residents and occupiers of the surrounding



properties and the Bo-Kaap in general, it was also self-evidently critical that all potential aspects and ramifications be properly assessed.

267.6. After a firm decision had been made by the Applicants to bring review proceedings, the founding papers herein were prepared. As is readily apparent from even a cursory glance at the founding papers, it took some time for this founding affidavit to be prepared and finalised. Every attempt was, however, made to ensure that the founding papers were produced as speedily as possible.

267.7. When the founding affidavit was almost in final form, ENS wrote to the City and Buitengracht Properties, on behalf of the Applicants, in an attempt to avoid the need for Part A interdictory relief by obtaining an undertaking or a decision to suspend the operation of the impugned decisions pending an expedited review. As indicated above, that correspondence was sent on 10 April 2017. After it became apparent that no suspension or undertaking would be forthcoming, the founding affidavit and notice of motion were then finalised on that basis.

268. I submit that given the complexity of the matter – belied by the speed at which Buitengracht Properties' application progressed through the MPT hearing and the appeal – the professional team appointed by the Applicants have worked with due expedition to analyse the legal issues and the voluminous and complex record in this matter. I thus respectfully submit that there can be no suggestion that the Applicants have delayed unduly in bringing this application. They have instead launched this application as soon as they reasonably could, and prior even to building plans being approved (or, as far as the Applicants are aware, even submitted) on the strength of the impugned decisions.

A handwritten signature, possibly 'J. G.', with the initials 'EG' written to the right of it.

269. As regards the timing of proposed hearing of the interdictory relief under Part A (should this be necessary):

269.1. As mentioned above, the interdict which is sought by the Applicants cannot be heard in the normal course, and is by its nature urgent.

269.2. The hearing date (5 June 2017) was set with due regard for the time which the City and Buitengracht Properties (both of whom have intimate knowledge of all issues relevant to this application) might need to consider their position in relation to the Part A relief, and deliver any opposing papers, as well as the time by which an interdict would have to be in place to avoid the irreparable harm to the Applicants that would otherwise ensue. The Applicants have attempted to give the City and Buitengracht Properties as much time to respond to Part A as possible. I should add that, although this founding affidavit is a sizeable one, I am advised that it would be unnecessary for the Respondents to deal comprehensively with the merits of the Part B review in any affidavit dealing with Part A, and that the size of this founding affidavit is thus not an indication of what would be necessary or appropriate in any affidavit opposing the Part A relief.

## XI REMEDY

270. In the circumstances, the Applicants seek two-fold relief in this application:

270.1. First, an order, under Part A, interdicting the City and Buitengracht Properties from implementing the impugned decision pending the final determination of the review.



270.2. Second, an order, under Part B, reviewing and setting aside the Decision of the MPT on 7 June 2016 and the decision of the Mayor on 19 January 2017 to approve the following applications (which, it is submitted, stand or fall together):

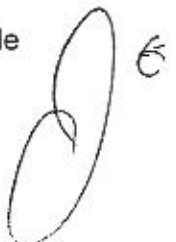
270.2.1. the application to permit the consolidation of Erf 8210 Cape Town and Erf 144698, Cape Town;

270.2.2. the application to permit building work within a Heritage Protection Overlay Zone in terms of Item 162(1) of the Development Management Scheme;

270.2.3. the application in terms of Item 64(e)(ii) and Item 182(e)(f) to permit parking bays on the ground and first floor levels to be closer to the 10 metre street boundaries, as stipulated in paragraphs 2.2.1. to 2.2.2.3 of the approval granted on 19 January 2017 and headed "Amended Municipal Planning Tribunal Annexure A".

270.2.4. the application in terms of Item 121(2) to permit a building to be 0 metres in lieu of 5 metres from a designated metropolitan road (Buitengracht Street – PMR 139).

271. The Applicants do not, as presently advised, seek an order providing for the remittal of the application to the MPT or the Mayor for reconsideration (though if this Honourable Court were to consider such an order necessary or appropriate in the event of the review succeeding, the Applicants would accede thereto). The Applicants' stance is based on the lapse of time since the initial application was made



in October 2015. However, in the event that Buitengracht Properties seeks to submit another application (fully and properly motivated and with due regard to the prevailing conditions), it may of course do so.

272. In the circumstances, the Applicants seek Orders as prayed for in the Notice of Motion to which this affidavit is attached.



**OSMAN ADAM SHABOODIEN**

Thus signed and sworn to before me at CAPE TOWN this 20<sup>th</sup> day of APRIL 2017, the Deponent having acknowledged that he knows and understands the contents of this affidavit, that same are all true and correct, that he has no objection to taking the prescribed oath, and that he considers the prescribed oath to be binding on his conscience.



**COMMISSIONER OF OATHS**

**EURAEFFIE BENTSIWA OPPON  
COMMISSIONER OF OATHS  
PRACTISING ATTORNEY R.S.A.  
MAURICE PHILLIPS | WISENBERG  
20TH FLOOR, 2 LONG STREET  
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