

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

Case No: 7031/17

In the application of:

HERITAGE WESTERN CAPE
Party

Intervening

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

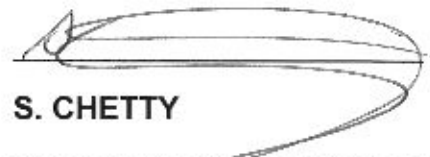
BUITENGRACHT PROPERTIES (PTY) LTD

Fourth Respondent

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Dated at CAPE TOWN this 3rd day of AUGUST 2017.



S. CHETTY

Office of the State Attorney

Attorneys for the Intervening
Party

4th Floor

22 Long Street

CAPE TOWN

Ref. 209/17/P9

Tel. 021 441 9229

TO: **THE REGISTRAR**
High Court
CAPE TOWN

D.O.

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BUITENGRACHT PROPERTIES (PTY) LTD

Fourth Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that application will be made on behalf of the above-named Intervening Party or orders in the following terms:

Part A:

ON 8 AUGUST 2017 at 10h00 or soon thereafter as counsel may be heard, the Applicant will apply for orders as follows:

- 1 Directing that the Intervening Party be granted leave to intervene in these proceedings as the Fourth Applicant;
- 2 Directing that the affidavit of Mxolisi Chrisptomus Dlamuka and its annexures stand as the founding papers of the Fourth Applicant in the review application;
- 3 Directing that any of the parties which oppose this part of the application pay the costs occasioned by such opposition, jointly and severally;
- 4 Further and/or alternative relief.

Part B:

THEREAFTER, if granted leave to intervene, the Intervening Party applies to the above Honourable Court for an order in the following terms:

- 5 Declaring that the Development on Erf 144698 and Erf 8210 Cape Town may not take place without a permit granted by the Fourth Applicant in terms of section 27(18) of the National Heritage Resources Act, 1999;

8 Further and/or alternative relief.

BE PLEASED TO TAKE NOTICE FURTHER that the annexed affidavit of Mxolisi Chrisoptomus Dlamuka will be used in support of this application.

TAKE NOTICE FURTHER that the Respondents are called upon, in terms of Uniform Rule of Court 53(1)(a), to show cause why the impugned decisions should not be reviewed and set aside

TAKE NOTICE FURTHER that the Intervening Party has appointed the offices of the State Attorney, 4th Floor, 22 Long Street, Cape Town, as the address at which it will accept notice and service of all process in these proceedings.

DATED AT **CAPE TOWN** THIS 13th DAY OF **JULY 2017**.

THE STATE ATTORNEY

Per:


S CHETTY

Attorneys for the Intervening Party
4th Floor, 22 Long Street,
CAPE TOWN

Ref: S Chetty/ 209/17/P9

Tel: (021) 441 9200

Fax: (021) 421 9364

(5)

To: **THE REGISTRAR**
High Court
Cape Town

And to: **ENS INC**
Attorneys for the Applicants
1 North Wharf Square
Loop Street, Foreshore
Cape Town

received copy hereof without prejudice
this 14 day of July 2017
at 11:12 am/pm
for ENSAfrica.com

(Ref. J. Zieff/S. Levetan/0421868)

And to: **FAIRBRIDGES WERTHEIM BECKER**
Attorneys for First, Second and Third Respondents
16th Floor, South Tower
The Towers
Heerengracht
Cape Town

RECEIVED COPY HEREOF
AT 11h28 ON
14 JUL 2017
FAIRBRIDGES WERTHEIM BECKER
PER

(Ref. D. Olivier / DD/aa/cit14/0392)

And to: **WERKSMANS**
Attorneys for the Fourth Respondent
Level 1, No. 5 Silo Square,
V & A Waterfront
Cape Town

2017-07-14
WERKSMANS
RECEIVED

(Ref. R. Gootkin/MC/BUIT 33767.2)

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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

FOUNDING AFFIDAVIT

I, the undersigned –

MXOLISI CHRISOPTOMUS DLAMUKA

do hereby state under oath as follows:



INTRODUCTION AND OVERVIEW

1. I am the Chief Executive Officer of Heritage Western Cape. I am duly authorised to make this application and depose to this affidavit on behalf of the Intervening Party, Heritage Western Cape (*HWC*).
2. The facts to which I depose are within my own knowledge, save where otherwise indicated, and are, to the best of my belief, true and correct.
3. I have read the founding papers in the application instituted by the First to Third Applicants (*the review application*).
4. This is the founding affidavit in HWC's application for leave to intervene as the Fourth Applicant in the review application, and for an order declaring that the proposed development on Erf 144698 and Erf 8210 Cape Town may not take place without a permit granted by HWC in terms of section 27(18) of the National Heritage Resources Act, 1999 (*NHRA*). HWC asks that if it is permitted to intervene, this affidavit will stand as its affidavit in the review application.
5. HWC seeks to intervene in these proceedings in order to fulfil its duty in terms of the NHRA to conserve heritage resources. I am advised and submit that HWC has a direct and substantial interest in the relief sought. The declaration which HWC seeks is dependent upon substantially the same questions of fact as those in the review application. The intervention by HWC in these proceedings is also one of convenience.



6. In this affidavit, I address the following in turn:
 - 6.1. First, the nature of HWC's interest in these proceedings;
 - 6.2. Second, the attitude of the other parties to the admission of HWC as a party;
 - 6.3. Third, the review of the City's decisions;
 - 6.4. Fourth, the basis on which the declaration is sought. In this section of the affidavit, I deal also with the relationship between a heritage site and its surrounding areas.

THE INTERVENING PARTY AND ITS INTEREST

The statutory framework

7. HWC is a provincial heritage resources authority in terms of section 23 of the NHRA, established as such by the Member of the Executive Council responsible for cultural affairs in the Western Cape, as set out in Provincial Notice 336 dated 22 October 2002.
8. I set out below some of the relevant provisions of the NHRA.
9. In terms of section 8 of the NHRA, HWC, as a provincial heritage resources authority, is responsible for the identification and management of heritage resources in the Western Cape that have special qualities making them significant within a provincial context.



10. A heritage resource is defined in section 1 as a place or object of cultural significance. A place is defined as including a site, area or region; a building or group of buildings and other structures or groups of structures; and an open space, including a public square, street or park. In relation to the management of a place, a place is defined as including its immediate surroundings.
11. Cultural significance is defined as meaning "aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance".
12. In terms of section 3(1), those heritage resources of South Africa which are of cultural significance or other special value for the present community and future generations, must be considered part of the national estate and fall within the sphere of operations of heritage resources authorities.
13. In terms of section 3(2), the national estate may include places, buildings and structures of cultural significance; places which are associated with living heritage; historical settlements and townscapes; and sites of significance relating to the history of slavery.
14. Section 3(3) states that a place is to be considered part of the national estate if it has cultural significance or other special value because of its importance in exhibiting particular aesthetic characteristics valued by a community or a cultural group; and because of its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons.



- 15. In terms of section 5, heritage resources management should recognise that heritage resources have lasting value in their own right and provide evidence of the origins of South African society, and as they are finite, non-renewable and irreplaceable, they must be carefully managed to ensure their survival for succeeding generations. Section 5(7) establishes the further principle that heritage resource management must take account of material or cultural heritage value and involve the least possible alteration or loss of it.
- 16. Section 25 sets out the powers and duties enabling and obliging heritage authorities to comply with their conservation mandate in terms of the NHRA.
- 17. Section 27(16) provides that a provincial heritage resources authority is responsible for the protection of provincial heritage sites in accordance with the provisions of section 27.

The relevant heritage resources

- 18. Within this statutory framework, HWC has responsibilities in respect of the following heritage resources implicated in the proposed development. I refer to the proposed development as *'the Development'*.
 - 18.1. The portion of the site of the Development that falls within the Cape Town City Centre Heritage Protection Overlay Zone (HPOZ);
 - 18.2. The Bo-Kaap, which is listed as a provincial heritage site and is therefore deemed to be within the HPOZ in terms of item 159 of the City's Development Management Scheme (DMS).



- 18.3. Riebeeck Square, which is listed as a provincial heritage site and which falls within the HPOZ.
- 18.4. Heritage Square, which falls within the HPOZ.
19. As I explain below, these heritage resources may be affected not only by development within their topographical boundaries, but also by developments in their immediate surroundings. Such developments therefore fall within the sphere of responsibility of HWC.

The process relating to the heritage impact of the Development

20. One of the grounds on which the Applicants have brought the review application is the heritage impact of the Development.
21. 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 Development, noting that 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. (This comment is FA19 to the Founding Affidavit.)
22. In the City's Heritage Component of the Environmental and Heritage Resources Management Branch (*EHRM*) comment of 8 March 2016 (*the City's EHRM comment*) (FA20), the following heritage resources were identified as significant and impacted by the Development:



- 22.1. Riebeeck Square;
- 22.2. Erven 199 and 1300;
- 22.3. The Bo-Kaap;
- 22.4. The Cape Town City Centre HPOZ;
- 22.5. Heritage Square.

- 23. With reference to Riebeeck Square, it was stated that the massing of the Development was such that the greater bulk and sheerness of its design imposes onto Riebeeck Square, boxing it in, which is counterproductive to the historic nature of the space and was not seen as a positive impact on the open space. Moreover, the Development impacted on the views from Riebeeck Square. It was recommended that these impacts should be investigated further.
- 24. The significance of erven 1299 and 1300 was limited to the age and related history of their two buildings and what little early fabric still remained.
- 25. The impact of the Development on the Bo-Kaap was said to include compounding the ongoing separation between the Bo-Kaap and town by means of its design's bulk and height. The large visual mass of the Development was seen as a physical and visual barrier which eroded the fragile relationship between the differing built environments of town and the Bo-Kaap.



- 26. The loss of historic connection and association of Bo-Kaap with town was said to impact negatively on the heritage value of the Bo-Kaap. It was recommended that this impact be investigated further with the aim of a design revision that reduced the negative influences.

- 27. With reference to the Cape Town City Centre HPOZ, it was stated that the Development introduced a contemporary design approach to its interface at ground and street level, and further investigation as to the appropriateness of this was recommended. The overall height, bulk and visual mass of the Development had a pronounced impact on the existing built form and character of the immediate area and this was difficult to mitigate.

- 28. Finally, it was stated that the Development was large, and higher than existing buildings in the immediate precinct, and fell short of being sensitive to the existing, historical heritage significance of Heritage Square.

- 29. The City's EHRM's comment concluded with the suggestion that some form of heritage impact assessment, which included a visual impact assessment, be undertaken by the Developer, because of the nature of the impact that the Development would have on several significant heritage resources in the immediate context as well as on the HPOZ. The City's EHRM also recommended that the Developer request comment from HWC.

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30. In April 2016, a heritage statement was prepared by Mr Henry Aikman at the instance of the Developer (*the heritage statement*). The heritage statement (FA16) supported the Development from a heritage perspective, stating that its design responded positively to urban design and heritage related design indicators, and the mitigation measures such as the stepping back of the upper levels mitigated potential negative impacts on the townscape and streetscape setting related to Riebeeck Square and the Bo-Kaap.
31. Thereafter, on 11 May 2016, HWC provided its comment on the Development (FA21) (*the HWC comment*). HWC noted that the Development was located between two provincial heritage sites. It stated that the Development did not trigger any approvals required in terms of sections 27 or 38 of the NHRA. For reasons which I explain below, HWC has since concluded and submits that this statement was not correct, and that approval is indeed required in terms of section 27.
32. HWC was of the view that the Development was inappropriate, as it would have a detrimental effect on the heritage significance of both Riebeeck Square and the Bo-Kaap. HWC therefore strongly objected to the Development.
33. With reference to the considerable visual impact of the Development and the reliance on selected photomontages, HWC recommended that an independent Visual Impact Assessment be undertaken.



- 34. While HWC was not a formal objector to the Development application, it was admitted as an objector in the appeal against the decision taken by the Municipal Planning Tribunal (MPT).
- 35. Following the dismissal of the appeal, HWC contends that the impugned decisions should be reviewed and set aside on various grounds related to the heritage impact of the Development.
- 36. I respectfully submit that the statutory responsibilities of HWC, the impact on the heritage resources implicated in the Development, and the previous involvement of HWC all demonstrate that HWC has a direct and substantial interest in the review application and should be authorised to intervene as a party.

THE ATTITUDE OF THE PARTIES TO THE INTERVENTION APPLICATION

- 37. On 24 May 2017, HWC's legal representatives wrote to the attorneys for the parties to the review application and requested their consent to the intervention of HWC as a party. I attached a copy of that letter ("MCD1").
- 38. On 29 May 2017, the attorneys for the Applicants replied that their clients consent to HWC's intervention in the matter ("MCD2").
- 39. Also on 29 May 2017, the attorneys for the Fourth Respondent replied that their client have no objection to HWC joining the proceedings ("MCD3").



40. On 30 May 2017, the attorneys for the First to Third Respondents replied that their clients wished to see HWC's application for leave to intervene, and the basis on which it is advanced, before taking a decision as to whether or not they will oppose the application ("MCD4").

THE REVIEW OF THE CITY'S DECISIONS

41. HWC contends that the impugned decisions should be reviewed and set aside. I address four issues in this regard:

41.1. The environmental right in section 24 of the Constitution;

41.2. Errors of law and misdirections arising from the report of the Land Use Management Department;

41.3. The lack of an independent and expert visual impact assessment;

41.4. The failure to give reasons.

The environmental right

42. Section 24(b) of the Constitution provides that everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.

43. The term "environment" is not defined in the Constitution.

- 44. "Environment" is defined in the National Environmental Management Act, 1998 (NEMA) as including aesthetic and cultural properties, characteristics more traditionally associated with heritage. NEMA refers to the "national estate" defined in section 3 of the NHRA, and the NHRA in turn refers to the environment. This reflects that heritage is part of the environment.

- 45. I submit that heritage is indeed part of the environment, and the conservation of cultural heritage is a facet of the constitutional right to the environment. I am advised that this will be addressed in argument to the extent necessary.

- 46. Section 5 of the NHRA sets out the general principles for heritage resources management. Section 5(3)(c) provides that "*laws, procedures and administrative practices must ... give further content to the fundamental rights set out in the Constitution*".

- 47. The City is obliged by section 7(2) of the Constitution to respect, promote, protect and fulfil the rights in the Bill of Rights.

- 48. I submit that the impugned decisions impact on and in fact limit the section 24(b) right. They do so by their negative impact on the heritage resources which form part of the environment.

- 49. A right in the Bill of Rights may be limited by a law of general application, "*to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*



- (a) *the nature of the right;*
- (b) *the importance of the purpose of the limitation;*
- (c) *the nature and extent of the limitation;*
- (d) *the relation between the limitation and its purpose; and*
- (e) *less restrictive means to achieve the purpose."*

50. The record demonstrates that the MPT, the Mayor's Advisory Panel (MAP) and the Mayor did not recognise this fact and its consequences, and have regard to that consideration.

51. Indeed, the record appears to contain no reference at all to the environmental right in the Constitution. The record refers only to the property (development) rights of the owner.

52. I respectfully submit that the absence of any reference anywhere in the record to the constitutional right to the environment demonstrates that the City's decision-makers did not have regard to-

52.1. the impact of the decisions on the constitutional right to the environment,

52.2. their constitutional obligations in that regard under section 7 of the Constitution; or



52.3. the matters to be taken into account in terms of section 36 of the Constitution, including (but not limited to) less restrictive means to achieve the purpose of developing the land in question.

53. I further respectfully submit that on this ground alone, the impugned decisions fall to be reviewed and set aside in terms of section 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The report of the Land Use Management Department

54. The report of the City’s Land Use Management Department (LUMD) concluded that:

54.1. *“While the City is currently considering creating a Bo Kaap HPOZ which would also include the rest of Erf 144698 and Erf 8210. However, as this has not been proclaimed yet, it has no statutory standing or influence over decisions on this application”;*¹

54.2. *“Despite the legislated heritage resources within the surrounding area ... these resources do not have a legal standing to impose on the subject property”;*²

54.3. The calls to limit the impact on the various heritage resources *“cannot override the primary rights allowable on the property as well as the applicable legislative context”;*³

¹ Annexure “FA11” of the Founding Affidavit, at para 6.36.

² Annexure “FA11” of the Founding Affidavit, at para 6.52.

54.4. "from a statutory point of view... no mechanism or legal basis exists to circumscribe the permissible development rights of the portion of the site outside the HPOZ, despite objections and the comments from HWC arguing for limiting development rights".⁴

55. I submit that these conclusions are incorrect in law, demonstrate a fundamental misdirection, and resulted in a failure to consider highly relevant considerations.

This is so when one has regard to:

55.1. the impact of a development in the surrounding area on a heritage resource site;

55.2. the legal effect of a heritage protection overlay zone (HPOZ);

Impact of development in surrounding area on a heritage resource site

56. As is explained by Dr Andre van Graan, and as is set out fully below, the surroundings of a heritage resource can impact on the heritage resource itself.

57. Where that is the case, the neighbouring heritage resource site can indeed have what is referred to as "a legal standing to impose on the subject property".

58. It is, I submit, a fundamental error of law and misdirection to conclude otherwise.

³ Annexure "FA11" of the Founding Affidavit, at para 6.53.

⁴ Annexure "FA11" of the Founding Affidavit, at para 6.57.



The legal effect of a Heritage Protection Overlay Zone

59. Item 150 of the City's DMS provides that:

59.1. 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.

59.2. 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.

59.3. 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.

60. Item 161(2) of the DMS echoes this in providing that any development rules in terms of an approved heritage protection overlay zoning that exceed, or are more restrictive than, the limitations of a base zoning, shall be deemed to be approved departures from the provisions of the base zoning.

61. While it appears that no specific development rules exist within the HPOZ which limit (for example) the permissible height of buildings, item 164(2) of the DMS stipulates that in considering an application like that of the Developer, the City must take into account the effect such activity may have on the significance of the heritage place or heritage site concerned.

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62. In light of these provisions, I submit that the contention that heritage concerns *"cannot override the primary rights allowable on the property"* is incorrect in law and resulted in a further misdirection.
63. I submit that it is also incorrect in law, and a further misdirection, to proceed on the basis that *"from a statutory point of view... no mechanism or legal basis exists to circumscribe the permissible development rights of the portion of the site outside the HPOZ"*.
64. I submit that to the contrary, a legal basis for this is provided by the DMS itself.
65. In terms of the DMS, both the Bo-Kaap and Riebeeck Square are deemed HPOZ's. This zoning gives rise to both obligations and powers on the part of the City. They include the obligation to protect the heritage resource, and the power to do so.
66. The relevance of these errors of law and misdirections on the part of the LUMD is the following:
- 66.1. The MPT relied on these erroneous conclusions in reaching its decision, and adopted and repeated the reasons in the LUMD report in the reasons for its decision;
- 66.2. The MAP in turn adopted and relied upon the reasons given by the MPT in making its recommendation; and

66.3. The Mayor in turn relied on the reasons given by the MPT and the MAP in reaching her decision.

67. Accordingly, if the LUMD erred, then so too did the MPT, the MAP, and the Mayor.

68. I respectfully submit that the impugned decisions are liable to be set aside on the grounds that the decision-makers:

68.1. were materially influenced by an error of law;

68.2. made the decision because they took into account irrelevant considerations (the view that they had no power to decline approval) and did not consider relevant considerations (that they had the power to decline approval).

The need for an independent and expert visual impact assessment

69. A key heritage issue is the visual impact of a development. In commenting on the Development, HWC raised concerns in respect of the photomontages furnished by the developer and recommended that an independent Visual Impact Assessment be undertaken, rather than relying on selected photomontages produced on behalf of the developer.



70. No such independent assessment was undertaken. The impugned decisions were made in the absence of a reliable report on the visual impact of the Development. The 3D scanned images attached to the affidavit of Jason Peter Stapleton as "JPS.2" and "JPS.4" demonstrate that the visual impact of the Development is significant, and was underplayed in the photomontages provided by the Developer.

71. I respectfully submit that the impugned decisions fall to be set aside on the grounds of the failure to consider a relevant consideration, namely the visual impact of the Development as shown by an independent visual impact assessment.

The failure to give reasons

72. The Mayor's Notice of Decision and Reasons dated 19 January 2017 are attached to the founding affidavit as "FA15" (*the Mayor's decision*).

73. In the Mayor's decision, under the heading "J. REASONS", the Mayor stated that:

73.1. she accepted the recommendation of the MAP and agreed with its report to her;

73.2. she had considered in particular the view of the City's EHRM that the surrounding heritage resources would 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;



73.3. however, she agreed with the MPT and the MAP that the proposed development responded appropriately to the neighbouring buildings and the environment.

74. I respectfully submit that the "reasons" given by the Mayor are however not in fact reasons – they are simply conclusions.

75. I respectfully submit that the Mayor's decision is liable to be set aside on the basis of her failure to give reasons.

THE DECLARATION SOUGHT BY HWC

76. As I have stated above, in its submission to the City, HWC said that it is a commenting and not an approving body. On further consideration, and on the basis of legal advice, HWC submits that this is not correct. The Developer requires a permit before it can undertake the Development. The reason for this is that the Development will damage and alter provincial heritage sites.

77. After this application had been launched, HWC briefed Dr Andre van Graan, an independent, experienced and highly qualified heritage practitioner, to prepare a report on this matter.

78. Dr Van Graan's qualifications, expertise and experience appear from his curriculum vitae, which is attached to his affidavit.

79. Dr Van Graan's report addresses two matters in particular:



79.1. The manner in which heritage sites relate to and are impacted on by their surroundings; and

79.2. The impact of the Development on the provincial heritage sites in this matter.

80. It is important for me to stress that the first issue addressed by Dr Van Graan, namely the relationship between surrounding land and a heritage site, is not relevant only to the declaration which HWC seeks. It bears directly on the grounds of review which I have identified above.

81. In his report, Dr Van Graan also comments on the City's EHRM comment and the heritage statement submitted by the Developer.

82. A copy of Dr Van Graan's report is attached as "MCD5". I summarise it below.

Heritage sites and their surroundings

83. Heritage sites are much more than their legally prescribed topographical dimensions. As has been underscored many times in international heritage charters, changes to the setting of heritage sites can damage the heritage significance of a heritage site.



- 84. Every place possesses its own peculiar identity and it is essential to comprehend that identity and take care of it as this is the essence of a cultural landscape. Cultural landscapes are manifestations of both physical as well as cultural practices. They have an element of fragility in contexts that are threatened with contextual change.

- 85. Fundamental to an understanding of the elements which define a heritage site is that it cannot simply be the aspects of the site itself, but also the impact that adjacent areas have on the site, that can destroy the unique qualities of the cultural landscape of the area.

- 86. In Cape Town, it would be manifestly apparent that, for example, permitting a large-scale development adjacent to the Castle of Good Hope would have an extremely negative impact on the Castle, not only because one would see the new development adjacent to the historic complex, but also because it would impact on views out from the open spaces of the Castle and seriously damage its heritage significance. The same can be said, for example, of development which would seriously impact on the iconic Table Mountain.

- 87. The same applies to the Bo-Kaap heritage site: it impacts on its surroundings, and is impacted on by development on surrounding land.

International heritage charters



88. In international precedent the notion of "setting" is considered to be very important in relation to the conservation of heritage. The conservation charters of ICOMOS, the International Council on Monuments and Sites, are internationally accepted as benchmarks of best practice in the conservation of the built environment.
89. In one of the earliest conservation charters, the Venice Charter of 1964, Article 6 states that the *"conservation of a monument implies preserving a setting which is not out of scale. Wherever the traditional setting exists, it must be kept. No new construction, demolition or modification which would alter the relations of mass and colour must be allowed."*
90. Article 9 of the Burra Charter, which is also internationally accepted as an important heritage benchmark, says *"Conservation requires the retention of an appropriate visual setting and other relationships that contribute to the cultural significance of the place. New construction, demolition, intrusions or other changes which would adversely affect the setting or relationships is not appropriate."*
91. In the Burra Charter, setting means "the area around a place which may include the visual catchment". As *The Illustrated Burra Charter* (2004) point out: *"At many places there is no clear distinction between a place and its setting. Only rarely is a culturally significant place self-contained without some link- visual, functional or historical- to the world around it"*.



92. Article 10 of the 1987 Washington Charter provides that *"When it is necessary to construct new buildings or adapt existing ones, the existing spatial layout should be respected, especially in terms of scale and lot size"*.

93. More recent international heritage declarations have been even more specific about the importance of the setting: the Xi'an Declaration on the conservation of the setting of heritage structures, sites and areas, adopted on 21 October 2005, includes the following articles:

"1. The setting of a heritage structure, site or area is defined as the immediate and extended environment that is part of, or contributes to, its significance and distinctive character.

2. Heritage structures, sites or areas of various scales, including individual buildings or designed spaces, historic cities or urban landscapes, landscapes, seascapes, cultural routes and archaeological sites...also derive their significance and distinctive character from their meaningful relationships with their physical, visual, spiritual and other cultural context and settings.

...

6. Legislation, regulation and guidelines for the protection, conservation and management of heritage structures, sites and areas should provide for the establishment of a protection or buffer zone around them that reflects and conserves the significance and distinctive character of their setting."



94. The recognition of the physical and cultural setting for heritage sites has been central to heritage thinking for some considerable time, and this has shaped both legislation and planning decisions in relationship to heritage sites.

95. Dr Van Graan thus demonstrates that a heritage site is not confined to the physical site, but also how it relates to and forms part of its surroundings. Changes to the surroundings of a heritage site may alter or damage the heritage site. The result is that a heritage site can be altered or damaged by development outside the site.

The impact of the Development on the heritage sites

96. Dr Van Graan states that the impact that the Development on Buitengracht Street will have on the Provincial Heritage Sites of the Bo-Kaap and Riebeeck Square, as well as the adjacent Heritage Square, should be understood within this framework. The demand that the setting of these sites, albeit outside the declared sites, is controlled in view of the major visual impact that it can have on the heritage significance of the sites is, in Dr Van Graan's opinion, reasonable and in line with international precedent.



97. Dr van Graan concurs with views of the City's EHRM and HWC regarding the negative impact of the development on the heritage resources implicated in the Development. In assessing any resultant damage to the provincial heritage sites by development in the area adjacent to the sites, he concludes that the scale and character of the Development will damage and alter the Bo-Kaap and Riebeeck Square.



98. The Bo-Kaap and Riebeeck Square are places which have very specific identities.
99. The 'space' of Riebeeck Square is defined by the buildings that surround it. They create a sense of enclosure and inform the scale and grain of the space. The trees on the centre of Buitengracht have helped to mediate the impact of the over-scaled more recent development but *"this would be completely overwhelmed by the proposed new development, the scale of which will not only destroy the coherence of the square but also the relationship that the square has to its context - the links down into the city, and equally importantly, the visual contextual link to Signal Hill which reads as a background 'wall' to the square."*
100. The cultural landscape of the Bo-Kaap is critically linked visually to the city below. *"Imagining 'boundary' as a zone, rather than a line, is poignantly demonstrated by the Bo-Kaap, and its nineteenth century definition. Whilst the architectural quality of the Bo-Kaap - of narrow houses and streets, and lack of public squares - was contained by Buitengracht Street at its eastern edge, the social practices through which the Bo-Kaap was constructed crossed Buitengracht Street."*
101. The contrast between architectural quality and social practices demonstrates the need for examining space through its different aspects: the solid void aspect is seen in the architectural space and the event-inhabitation aspect in the social practices. Thus the Bo-Kaap is linked to Riebeeck Square through social practices, with Riebeeck Square an important threshold to the Bo-Kaap.



102. The Bo-Kaap not only has a clearly identifiable architectural as well as socio-cultural identity, but its sense of place is linked to its visual connections with the city as well as its views to Table Mountain and its relationship to its location on the flanks of Signal Hill. This location sets up a dialogue between the Bo-Kaap and the city. The slope of the land, the narrow linking streets and the views down into the city establish a clear relational network.
103. The Bo-Kaap's identity is not only subscribed in physical terms but has also come to be identified with the social and religious practices of the Cape Muslim community, which has given the area a unique character. The setting of the Bo-Kaap is thus of critical significance and development on areas immediately adjacent to it will impact on and may damage these critical linkages, as the visual links are fundamental to its significance as a heritage precinct.
104. The Development's device of setbacks from Rose Street does not, in fact, reduce the impact of the development as suggested. This would only possibly be felt looking obliquely down Rose Street. From anywhere higher up in the Bo-Kaap the development would create a new alien topography, a visual bulwark, as alluded to in the HWC comment. By sloping up when the natural slope is down it destroys the essence of the relationship between the Bo-Kaap and the city.

105. The development between the Buitengracht and Rose Street has already disturbed the relationship. This was a consequence of apartheid planning decisions which disregarded the character and nature of the Bo-Kaap other than seeing it in isolation as "*the Malay Quarter*", and which (characteristic of the divisive planning practices of the past) looked at the Bo-Kaap but did not see it as part of the city.
106. The proposed development is of such a scale and character that it would be an extraordinarily intrusive element in the views out from the Bo-Kaap and will have a very deleterious impact on the heritage of the Bo-Kaap as a whole. The proposed development will also negatively impact on Riebeeck Square as well as the adjacent Heritage Square.

Comment on the City's EHRM's comment

107. Dr Van Graan expresses the opinion that the City's EHRM comment is clear and rational, drawing attention to the contextual impact that the development would have on adjacent heritage resources. It identifies the historic relationship that the Bo-Kaap has had with the city. The comment goes on to identify the problems faced by the area as a result of the impact of "*new, large and bulky buildings that have served to erode that relationship*" and mention is made twice of the erosion of the links that exist.

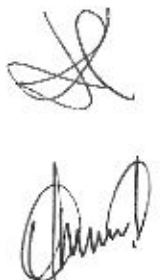


108. It also recognises that the proposed development will compound the separation as a result of the proposed bulk and height, calling it "*a physical and visual barrier*", and concluding this section with the comment "*(t)he loss of historic connection and association of the Bo-Kaap with the town impacts negatively on the heritage value of the Bo-Kaap*".
109. The City's EHRM thus demonstrates a clear understanding of the negative impact that the Development would have on the Bo-Kaap. The City's EHRM comment is, in Dr Van Graan's opinion, well-reasoned and factually based. It is consistent with many academic papers and dissertations which examine the role of the Bo-Kaap and its inter-relationship with the city.
110. It is also significant that the Bo-Kaap was clearly linked to Riebeeck Square. This urban space, originally called *Boerenplijn*, in the nineteenth century became known as Hottentot Square, recognising, albeit in racially derogatory terms, its role in relation to the Bo-Kaap as the place of settlement by freed slaves. There are no Christian churches in the Bo-Kaap and the nineteenth century conversion of the theatre on the square into a church - St. Stephen's - was in order to serve the community of the Bo-Kaap. The square therefore became a place of significance to the residents of the Bo-Kaap, as a focus for Christian worship, and as the open civic space related to the residents, since there are no public open spaces in the Bo-Kaap. The City's EHRM comment clearly identifies this significance as a space that lay between the city and the Bo-Kaap.



111. The City's EHRM comment importantly recognises that the views outward from the square to Signal Hill are important elements of the "*genius loci*" of the space - the elements which give it its special character. The Development changes the nature of the important civic space and will alter the essential character of the square and thus negatively affect its heritage significance.
112. It is particularly noteworthy that the City's EHRM clearly recognises the significance of the limiting implications of an HPOZ. An HPOZ's very purpose is to mediate and moderate development in historically sensitive areas.
113. The City's EHRM comment concludes that the lack of sensitivity to the existing heritage resources will certainly impact in a negative manner on those resources. This is a very clear and substantiated conclusion, addressing the very essence of the issue at hand.
114. Finally, it is noteworthy that no visual impact assessment was called for by the City in the application process. In Dr Van Graan's opinion, this should have been undertaken in order to inform the assessment of the heritage impact of the Development.

Comment on the heritage statement



115. Dr Van Graan comments that the heritage statement clearly ignores heritage indicators, and is based on design considerations that relate to potential bulk and creating views from the Development. It entirely ignores the immediate context. It appears that the Heritage Statement was produced after the design had been completed and is a post rationalisation of design decisions that have already been taken.

116. The heritage statement discusses the history of both Riebeeck Square and the Bo-Kaap but fails to adequately address the visual impact that the Development would have on these places. Far from giving any recognition to the actual heritage significance of the adjacent historic areas, it plays down their significance. So, Riebeeck Square's current use as a parking area is used to diminish its significance as a space. The temporal dimension of current use is not taken into account.

117. In considering the heritage status only the site is mentioned. The heritage statement quotes from generic urban design "*indicators of good performance*", which has nothing to do with heritage indicators. In describing Riebeeck Square and the adjacent Heritage Square, the heritage statement is purely descriptive and makes no mention of the heritage indicators raised by these places.

Two handwritten signatures in black ink, one above the other, located in the bottom right corner of the page.

118. That the square itself is ignored is clear in the comment that "*the generous width of Buitengracht Street and the entire width of the square itself (110m) visually accommodate the introduction of taller buildings into the streetscape*". Again on Rose Street, reference is made, not to the character of historic buildings on the west side, but to a not too successful new development on the south side which is described as "*sensitive to this interface*", which is not borne out in reality.
119. In addressing the significance of the Bo-Kaap it baldly states that "*it must be sensitive to its heritage significance*". No indication is given as to the nature of its heritage significance and the consequence that this would have on any potential development, nor, more importantly is there any clear indication of what heritage indicators must be applied in order to address the interface with the historic single and double storeyed houses on Rose Street.
120. The heritage statement entirely ignores the fact that the building is significantly taller than any building nearby on the west side of Buitengracht. It also refers to the height being similar to that of the old Christiaan Barnard Hospital, an extremely poor, over-scaled block development that is certainly no precedent for any sensitive development.

121. It concludes by characterising the area as one with *"urban decay, vagrancy and crime, particularly in the side streets, lanes and peripheral streets"*. This reflects a bias that is not borne out in reality and is part of what has often been described in academic studies of the historical development of the Bo-Kaap as seeing it as an area that was characterised by its retention of a Muslim and Coloured population, to be regarded as being oppositional to the development of the White city, an inappropriate and outdated attitude.
122. The assertion that development has already occurred in the area between Buitengracht Street and Rose Street seems to ignore the parameters on which these decisions were based. They occurred in the 1960s and 70s at the height of apartheid planning when the local (not White) community was ignored in favour of the economic needs and demands of the White business sector. That this should become the basis of continuing to isolate the Bo-Kaap seems extraordinary in the 21st century. Creating a barrier to the Bo-Kaap must be the antithesis of what inclusive, democratic planning should be developing.

Altering or damaging a heritage site

123. Section 27(18) of the NHRA provides that 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.

Two handwritten signatures are present in the bottom right corner of the page. The top signature is a stylized, cursive mark, and the bottom signature is a more legible, cursive name.

124. "Alter" is defined in the NHRA as any action affecting the structure, appearance or physical properties of a place or object, whether by way of structural or other works, by painting, plastering or other decoration or any other means.
125. Dr Van Graan concludes that the proposed Development will "alter" or "damage" the Bo-Kaap and Riebeeck Square heritage sites as those terms are understood in heritage conservation.

HWC's application for a declaration

126. HWC seeks an order declaring that the Development on Erf 144698 and Erf 8210 Cape Town may not take place without a permit granted by HWC in terms of section 27(18) of the NHRA.
127. I have set out above the direct and substantial interest of HWC in the review application. That also applies to HWC's interest in obtaining a declaration as sought in the notice of motion. In addition, I draw attention in particular to the following:

127.1. Section 27(16) of the NHRA provides that a provincial heritage resources authority is responsible for the protection of provincial heritage sites in accordance with the provisions of section 27. Riebeeck Square and the Bo-Kaap are provincial heritage sites adjacent to the Development, for which HWC has responsibility.

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127.2. While the Development will take place outside the Bo-Kaap, the erven on which it is to be built fall within the Bo-Kaap's immediate surroundings, and will have an impact on the provincial heritage sites for which HWC has responsibility.

128. On the basis of the expert opinion and advice of Dr Van Graan, and for the reasons given by him, the Development as currently proposed on land adjacent to the provincial heritage sites will damage and/or alter the provincial heritage sites. The consequence is that it may not proceed without a permit issued by HWC in terms of section 27(18) of the NRHA.

129. HWC seeks this relief in these proceedings because it takes the view that regardless of whether the review succeeds, a permit is required for the Development in terms of section 27(18) because of the impact of the Development. The question of the impact of the Development on the Bo-Kaap in particular is at the heart of the review application. The factual material relevant to the application for a declaration is or will be before the Court which hears the review application. It will avoid duplication of proceedings, delay, and the incurring of unnecessary costs if the application for a declaration is heard together with the review.

130. I understand the Fourth Respondent's position to be that it does not need a permit in terms of the NHRA for the Development. Of course, if the Fourth Respondent accepts that a permit is required, then there will be no need for the declaration.



- 131. The application for a declaration does not raise a hypothetical issue. The determination of the application will be of substantial practical importance.
- 132. The application relates to the existing rights and interest of the Fourth Respondent and HWC's compliance with its legislative duties. The obligations of both HWC and the Fourth Respondent will be determined by the outcome of the application.
- 133. The declaration sought is of great public importance, both in its impact on the future of the heritage sites, and more broadly in relation to the conservation of heritage resources.
- 134. A declaration would "clear the decks" for the proper consideration of the application in respect of the Development.
- 135. I respectfully submit that is convenient and in the interests of justice (including the public interest) and judicial economy for the application for a declaration to be heard together with the review application.
- 136. I further submit that the present case is a proper one for the Court to exercise its discretion in favour of HWC.

CONCLUSION

137. Having regard to all of the above, I respectfully request that this Court grant the relief sought in the attached notice of motion, including such further directions as this Court considers necessary or appropriate concerning HWC's participation in these proceedings.





MXOLISI CHRISOPTOMUS DLAMUKA

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn before me on this the 13th day of JULY 2017, and that the provisions of the regulations contained in Government Notice R1258 of 21 July 1971, as amended, have been complied with. The deponent confirmed that he has no objection to taking the prescribed oath and that he considers it to be binding on his conscience. I confirm that I have administered the oath in the prescribed manner.



COMMISSIONER OF OATHS

**KATHERINE MARY HANDLEY
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A.
24 BURG STREET, CAPE TOWN**

**The State Attorney
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iGqweta likaRhulumente**

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My Ref/My Verw/Isalathiso sam:
209/17/P9

Your Ref/U Verw/Isalathiso sakho

24 May 2017

Messrs Edward Nathan Sonnenbergs Inc.

Email: jzieff@ensafrica.com

Messrs Werkmans Attorneys

Tygerberg
(Ref: H A Kotze)
Email: hkotze@werksmans.com

Messrs Fairbridges Weitheim Becker Attorneys

Email: dolivier@fairbridges.com

Dear Sir/Madam

Bo-Kaap Civic and Ratepayers Association & Others v The City of Cape Town and Others (Case No. 7031/17)

1. We act on behalf of Heritage Western Cape.
2. Our client wishes to intervene as a party in the review application launched in the Western Cape High Court under Case No 7031/17.
3. Our client's position is that the decision of the Municipal Planning Tribunal on 7 June 2016 and the decision of the Mayor on 19 January 2017 to grant certain approvals in respect of Erf 144698 and Erf 8210, Cape Town, should be reviewed and set aside on grounds related to the heritage impact of the proposed development.
4. Please advise whether your client will consent to the intervention of Heritage Western Cape as a party, in which case we will bring an application for leave to intervene on an unopposed basis. This will avoid any delay that may be occasioned by an opposed application for leave to intervene.

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5. In the absence of consent from the parties to the review application, we hold instructions to proceed on an opposed basis.

6. We look forward to hearing from you.

Yours faithfully


S CHETTY
for STATE ATTORNEY
/ea



"MCD 2" (45)

Chetty Sharma

From: Chetty Sharma
Sent: 29 May 2017 10:28 AM
To: 'John Zieff'
Subject: RE: Message from KMBT_751

Good day

Thanks for the response. Will take instructions and revert as soon as possible.

Sharma Chetty
For the State Attorney, Cape Town
Tel. 021 441 9229

From: John Zieff [mailto:jzieff@ensafrica.com]
Sent: 29 May 2017 08:50 AM
To: Chetty Sharma; hkotze@werksmans.com; dolivier@fairbridges.com; Rael Gootkin
Cc: Daryll.Roelf@westerncape.gov.za; Penelope E Meyer; Stephen Levetan
Subject: RE: Message from KMBT_751

Dear Ms Chetty,

We acknowledge your letter of 24 May 2017, giving notice of the intention of Heritage Western Cape (HWC) to intervene in our clients' review application under Case No. 7031/17.

Our clients consent to that intervention. As your client has decided to challenge the same decisions as are impugned in our clients' application, little purpose would be served by your client's proposed review proceeding separately.

Please note, though, that the parties in Case No. 7031/17 have agreed to expedite that review, and have provisionally agreed that our clients' review application should be heard in the second half of October 2017. Please confirm that your client would likewise be amenable to the review being expedited, and also let us know whether a hearing date in the second half of October (and in particular the last week of October) would be suitable for your client and legal team. In order to facilitate a hearing in the second half of October, we will shortly propose a timetable that involves the respondents delivering their answering affidavits by Friday, 18 August 2017. In order to fit in with that proposed timetable, it would be optimal if your client could deliver its founding affidavit in support of the challenge to the decisions referred to in your letter by the end of June or the beginning of July 2017 at the latest.

Yours faithfully,
Edwards Nathan Sonnenbergs Inc.
Per:

J M Zieff

 **John Zieff**
director
dispute resolution
tel: +27 21 410 2500
mobile: +27 82 370 0808
email: jzieff@ENSafrica.com
offices: [ENSafrica locations](#)

From: Chetty Sharma [mailto:ShChetty@justice.gov.za]
Sent: 24 May 2017 04:40 PM





DELIVERED BY FACSIMILE

S Chetty
State Attorney
Telefax: 021-4219364

STAATSPROKUREUR: KAAPSTAD

2017 -05- 26

STATE ATTORNEY: CAPE TOWN

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OUR REFERENCE: Mr R Gootkin/mc/BUIT33767.2/#4899600v1
DIRECT PHONE: +27 21 405 5236
DIRECT FAX: +27 11 535 8514
EMAIL ADDRESS: rgootkin@werksmans.com

26 May 2017

Dear Madam

BO-KAAP CIVIC AND RATEPAYERS ASSOCIATION & OTHERS / CITY OF CAPE TOWN & OTHERS

We refer to your email addressed to our Mr Kotze.

You will note that the writer has taken over the matter.

We have consulted with our client and confirm that our client has no objection to your client intervening.

Yours faithfully
WERKSMANS INC

Per:
R GOOTKIN



Werksmans Inc. Reg. No. 1990/007215/21 Registered Office 155 5th Street Sandton 2196 South Africa

Directors: D Hertz (Chairman) AL Armstrong BA Aronoff DA Artelro T Bata LM Becker JD Behr AR Berman NMN Bhengu Z Bleden HGB Boshoff GT Bossr TJ Boswell MC Brönn W Brown PF Burger PG Cleland JS Cloete PP Coetsar C Cole-Morgan JN de Villiers R Driman LJ du Preez S Fodor SJ Gardiner D Gewer JA Gobetz R Gootkin ID Gouws GF Griessel J Hollesen MGH Hornball VR Hoslosky BB Hotz HC Jacobs TL Janse van Rensburg N Harduth G Johannes S July J Kallmeyer SLG Kayana A Kenny BM Kew R Killoran N Kirby HA Kotze S Krige PJ Krusche P le Roux MM Lessing E Levenstein JS Lochner K Louw JS Lubbe BS Mabasa PK Mabaso MPC Manaka H Masondo SM Moerane C Moraitis PM Mosebo KO Motshwane L Naidoo J Nkigij JJ Niemand BPF Olivier WC Oosthuizen S Padayachy M Pansegrouw S Passmore AV Pillay D Pisanti T Potter BC Price AA Pyzikowski RJ Raath A Ramdhan L Rood BR Roodhooij W Rosenberg NL Scott TA Sibidla LK Silberman JA Smit JS Smit RM Sono CI Stevens PO Steyn J Stockwell JG Theron JJ Truter KJ Trudgeon DN van den Berg AA van der Merwe HA van Niekerk FJ van Tonder JP van Wyk A Vatalidis RN Wakefield DC Walker L Watson D Wegierski G Wickins M Wichahn UC Willans DG Williams E Wood BW Workman-Davies

JOHANNESBURG • CAPE TOWN • STELLENBOSCH • TYGER VALLEY



"MCD4"
47



Our ref: DO/aa/CIT14/0392

Your ref: 209/17/P9

Date: 30 May 2017

Attention: Sharma Chetty
THE STATE ATTORNEY
Email: ShChetty@justice.gov.za

BY EMAIL

Dear Madam,

RE: BO-KAAP CIVIC AND RATEPAYERS ASSOCIATION & OTHERS V THE CITY OF CAPE TOWN AND OTHERS – CASE NO 7031/17

We refer to the above matter and to your letter of 24 May 2017.

We are mindful of the attitude adopted by the Applicant and the Fourth Respondent regarding the application for leave to intervene to be brought by Heritage Western Cape ("HWC").

The First to Third Respondents would like to see your client's Application for Leave to Intervene, and the basis on which it is advanced, before taking a decision as whether or not it will oppose such application.

The First to Third Respondents are conscious of the fact that there is a proposed timetable for the further conduct of the matter and would not wish to delay this unnecessarily. HWC's decision to seek an intervention into the review was however taken at a late stage. Please indicate when you will be in a position to let us have the Application for Leave to Intervene.

Yours faithfully
FAIRBRIDGES WERTHEIM BECKER

DEIRDRE OLIVIER
E-mail address: dolivier@fairbridges.co.za
Direct line: 021 405-7397
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Directors: Deirdré Olivier (Chairperson), John Bromley, Richard Cheeseman, Evelyn Chimombe-Munyoro, Herman Conradie, Caroline Dichmont, Bob Groeneveld, Kevin Hacker, Jean Herbert, Bernard Joffe, Amish Kika, Melanie Kilian, Louis Le Roux, Sinen Mnguni, Zunaid Mohamed, Julia Penn, Greer Penzhorn, Adela Petersen, Diane-Maree Rauch, Jayson Rebelo, Darryl Reece, David Short, Waheeda Shreef, Wickaam Smith, Jaco van der Westhuizen, Johann van Eeden, André van Rensburg. **Senior Associates:** Sheri Breslaw, Gaby Meintjes, Karol Michalowski, Jodi Poswellewski. **Associates:** Daniel Hart, Graham Houston, Nosiphiwo Qwabi, Julia Rushton, Inge Surtie. **Consultants:** Anne Boag, Hymie Chait, Solomon Gordon, Monty Hacker, Andrew Hewitt, Pleter Pretorius, Louis Rood, Peter Watts. **Practice Manager:** Robin Kirkby.

FAIRBRIDGE ARDERNE & LAWTON INC. - Reg. No. 1985/000003/21.

Also in Johannesburg

HERITAGE IMPACT OF THE DEVELOPMENT ON ERF 144698 & ERF 8210 CAPE TOWN

Review: Dr. André van Graan

Introduction

The proposed development lies partly in a declared Heritage Protection Overlay Zone (HPOZ) and adjacent to a number of sites of provincial heritage significance. In reviewing the case, it is clear that the consideration by the proponents for the development has been of the proposal itself and not from the perspective of the heritage resources themselves. The focus is largely site-specific and examines the proposed development and not the potentially damaging implications on the adjacent heritage resources. There is considerable focus on the town planning issues and the claiming of rights in terms of the sites zoning with claims that these take precedence over any limitations that heritage protection might impose.

This report examines the nature of heritage sites and the significant way in which they relate to their surroundings. It examines the manner in which significant changes to the surroundings, *which might themselves not be graded*, will damage the heritage sites themselves.

1. The nature of heritage sites

In considering the nature of heritage sites it is critical to bear in mind that heritage sites are much more than their legally subscribed topographical dimensions. Heritage sites cannot be viewed in isolation but need to be considered in their specific settings. As has been underscored many times in international heritage charters, changes to the setting of heritage sites can damage the heritage significance of a heritage site.

These heritage identities have been circumscribed over time and help to create a sense of place. This is the essence of what is described as *genius loci*, the characteristics that give any place its unique character. Permanence is the very genius of the Bo Kaap, that is, its own peculiar relationship with space, form and figure. *Self-identification remains as long as a place preserves the same identity*. The identity of place is assured by routine ways of building and by architectural style and this means that space, form and figure constitute the formal language that makes possible an unending array of new interpretations. Every place possesses its own peculiar identity and it is essential to comprehend that identity and take care of it as this is the essence of a *cultural landscape*. Cultural landscapes are manifestations of both physical as well as cultural practices. They have an element of fragility in contexts that are threatened with contextual change. Amos Rapaport in his 1992 paper '*On cultural landscapes*' describes the way in which cultural landscapes add up to a recognisable whole because the inhabitants of an area 'share the same mental schemata of their idealised landscape'. This schema is translated into a cultural landscape by human action in terms of the rules of that culture. This leads to systematic choices, a process that establishes styles of material culture, which in turn help to generate recognisable, culturally specific landscapes, such as the Bo Kaap. But the cultural landscape of the Bo Kaap is critically linked visually to the city below.

In the issue under review, the Bo Kaap and Riebeeck Square are places which have very specific identities. The 'space' of Riebeeck Square is defined by the buildings that surround it. They create a sense of enclosure and inform the scale and grain of the space. The trees



on the centre of Buitengracht have helped to mediate the impact of the over-scaled more recent development but this would be completely overwhelmed by the proposed new development, the scale of which will not only destroy the coherence of the square but also the relationship that the square has to its context- the links down into the city, and equally importantly, the visual contextual link to Signal Hill which reads as a background 'wall' to the square.

Fundamental to an understanding of the elements which define a heritage site is that it cannot simply be the aspects of the site itself but the impact that adjacent areas have on the site that can destroy the unique qualities of the cultural landscape of the area. In Cape Town, it would be manifestly apparent that, for example, the permitting of a large scale development adjacent to the Castle of Good Hope would have an extremely negative impact on the castle, not only because one would see the new development adjacent to the historic complex, but it would impact on views out from the open spaces of the castle and seriously damage its heritage significance. The same can be said of development which would seriously impact on the iconic Table Mountain. In Sam Fuller's (UCT 1999) MSc dissertation '*Continuity and change in the cultural landscape of Table Mountain*', he highlights the negative impact that economic expediency, which allowed development adjacent to and on the mountain, had on the mountain as a culturally significant artefact for many people.

2. The Bo Kaap heritage site

Imagining 'boundary' as a zone, rather than a line, is poignantly demonstrated by the Bo Kaap, and its nineteenth century definition. Whilst the architectural quality of the Bo Kaap - of narrow houses and streets, and lack of public squares - was contained by Buitengracht Street at its eastern edge, *the social practices through which the Bo Kaap was constructed crossed Buitengracht Street*. The contrast between architectural quality and social practices demonstrates the need for examining space through its different aspects: the solid void aspect is seen in the architectural space and the event-inhabitation aspect in the social practices. Thus the Bo Kaap is linked to Riebeeck Square through social practices, since the former theatre on the Square was converted into St. Stephen's Church in the nineteenth century to serve the Christian community of the Bo Kaap and until its appropriation by civic authorities as a car park was an important threshold to the Bo Kaap.

The architecture of the Bo Kaap is characterised by single and double-storeyed, largely flat-topped buildings that establish a strong sense of coherence. However, the Bo Kaap not only has a clearly identifiable architectural as well as socio-cultural identity, but its sense of place is linked to its visual connections with the city as well as its views to Table Mountain and its relationship to its location on the flanks of Signal Hill. This location sets up a dialogue between the Bo Kaap and the city. The slope of the land, the narrow linking streets and the views down into the city establish a clear relational network. The Bo Kaap's identity is not only subscribed in physical terms but has also come to be identified with the social and religious practices of the Cape Muslim community, which has given the area a unique character. The setting of the Bo-Kaap is thus of critical significance, and development on areas immediately adjacent to it will impact on and may damage these critical linkages, as the visual links are fundamental to its significance as a heritage precinct. It is vital to understand it in this context and not to see it as a ghetto for tourist consumption.

The proposed development's device of setbacks from Rose Street does not, in fact, reduce the impact of the development as suggested. This would only possibly be felt looking obliquely down Rose Street. But from anywhere higher up in the Bo-Kaap the development would create a new alien topography, a visual bulwark, as alluded to in the HWC comment. By sloping up when the natural slope is down it destroys the essence of the relationship between the Bo Kaap and the city. The development between the Buitengracht and Rose Street has already disturbed the relationship, but this was a consequence of apartheid planning decisions which disregarded the character and nature of the Bo Kaap other than seeing it in isolation as 'The Malay Quarter', a term popularised by the Nationalist writer, I.D. du Plessis. This perception of the Bo Kaap community as 'Other', was a way of excluding the community from the White-controlled central business district and a characteristic of the divisive planning practices of the past which looked at the Bo Kaap but did not see it as part of the city

The proposed development is of such a scale and character that it would be an extraordinarily intrusive element in the views out from the Bo Kaap and will have a very deleterious impact on the heritage of the Bo Kaap as a whole. The proposed development will also negatively impact on Riebeeck Square as well as the adjacent Heritage Square.

3. Comment on the comment made by the Heritage component of the City's Environmental Management branch:

The comment made on the proposal by the Heritage section is very clear and rational. It draws attention to the contextual impact that the development would have on adjacent heritage resources. The comment clearly identifies five resources:

- 1. Riebeeck Square
- 2. Erven 1299 & 1300
- 3. Bo-Kaap precinct
- 4. Cape Town City Centre HPOZ
- 5. Heritage Square.

The comment clearly recognises the 'very high heritage value' of the Bo-Kaap and its significance in terms of both the physical and the social development of the city. There is an identification of the architecturally rich character of the area and, very importantly, it identifies the historic relationship that the Bo Kaap has had with the city. The narrow streets running down from the Bo Kaap form important links into the city. The comment goes on to identify the problems faced by the area as a result of the impact of 'new, large and bulky buildings that have served to erode that relationship' and mention is made twice of the erosion of the links that exist. It also recognises that the proposed development will compound the separation as a result of the proposed bulk and height, calling it 'a physical and visual barrier'. They conclude this section with the comment 'The loss of historic connection and association of the Bo Kaap with the town impacts negatively on the heritage value of the Bo Kaap'.

There is therefore a clear understanding by the City's heritage section of the negative impact that the proposed development would have on the Bo Kaap. The comment is well-reasoned and factually based. It is also significant that the Bo-Kaap was clearly linked to Riebeeck Square. This urban space, originally called *Boerenplijn*, in the nineteenth century became

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known as Hottentot Square, recognising, albeit racially derogatory, its role in relation to the Bo-Kaap as the place of settlement by freed slaves. There are no Christian churches in the Bo-Kaap and the nineteenth century conversion of the theatre on the square into a church- St. Stephen's- was in order to serve the community of the Bo Kaap. The square therefore became a place of significance to the residents of the Bo Kaap, as a focus for Christian worship and as the open civic space related to the residents since there are no public open spaces in the Bo-Kaap. The heritage comment clearly identifies this significance as a space that lay between the city and the Bo Kaap. It also points out that it is a Provincial Heritage Site that is located within the City's HPOZ. The adjoining Heritage Square which is graded 3A by the city, also lies within the HPOZ, and is described as "a highly valued and recognised city block which highlights heritage values".

The comment talks of 'its deep heritage value as an open space which historically has been a connector between the town and the Bo Kaap'. It goes on to clearly enunciate that '*The massing of the proposed building is such that the greater bulk and sheerness of the design imposes onto Riebeeck Square which serves further to contain the Square*'. It importantly recognises that the views outward from the square to Signal Hill are important elements of the 'genius loci' of the space- the elements which give it its special character. The proposed development changes the nature of the important civic space and will alter the essential character of the square and thus negatively affect its heritage significance.

In all the comment made by the Heritage section I find it to be factual, accurate and clear in its consideration of the impact on the heritage resources of the area. It is particularly noteworthy that they clearly recognise the significance of the limiting implications of an HPOZ, a factor which is being erroneously interpreted as being overridden by 'rights'. This is an erroneous and illogical interpretation of an HPOZ since its very purpose is to mediate and moderate development in historically sensitive areas. The Heritage comment clearly spells out that '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...Proposed interventions in these areas should not impact negatively on any of the recognised positive heritage values, but seek to be informed by those exact values...' The comment concludes that the lack of sensitivity to the existing heritage resources will certainly impact in a negative manner on those resources'. This is a very clear and substantiated conclusion. I find the report addresses the very essence of the issue here.

Finally, I note that no visual impact assessment was called for by the City in the application process. In my opinion, this should have been undertaken in order to inform the assessment of the heritage impact of the proposed Development.

4. Comment on the Henry Aikman Heritage Statement:

I have been asked to comment on the heritage statement attached to the founding affidavit in the review application as "FA16".

The report makes supportive conclusions without any basis in terms of the identification of the heritage significance of the context of both Riebeeck Square and the Bo Kaap. The opening executive summary states: 'The proposed...redevelopment of the property as a mixed use complex reaching a height of 60m is supported from a heritage perspective'. It goes on to say that the design has responded to heritage related design indicators, which is



an extraordinary assertion to make in this context, particularly since it clearly ignores heritage indicators and is based on design considerations that relate to potential bulk and creating views from the development. It entirely ignores the immediate context. It appears that the Heritage Statement was produced after the design had been completed and is a post rationalisation of design decisions that have already been taken.

In commenting that the development will 'increase the residential population of the city' it has moved outside the field of heritage comment (and disregards the obvious fact that the residential element is not aimed at lower income households or indeed the Bo-Kaap community).

The report discusses the history of both Riebeeck Square and the Bo Kaap but fails to adequately address the visual impact that the proposed development would have on these places. Instead it relies heavily on town planning issues and comment to substantiate the design decisions. Far from giving any recognition to the actual heritage significance of the adjacent historic areas, it plays down their significance. So, Riebeeck Square's current use as a parking area is used to diminish its significance as a space. The temporal dimension of current use is not taken into account. Using a fifty year old comment by Picard to substantiate this is not a tenable reasoning.

That the heritage statement is being used to substantiate a prior design is clear in the manner in which reference is made to the changes in town planning legislation which allowed taller buildings and greater bulk in the city. All of the initial discussion is based on these planning parameters. The report states that the front portion of the site falls within the HPOZ but makes no immediate comment as to its implication. In considering the heritage status only the site is mentioned. The report quotes from generic urban design 'indicators of good performance' which has nothing to do with heritage indicators. Again, comment of an urban design nature is used in the description of the need for active street edges.

The report goes on to describe Riebeeck Square and the adjacent Heritage Square. Again it is purely descriptive and makes no mention of the heritage indicators raised by these places. That the square itself is ignored is clear in the comment that 'the generous width of Buitengracht Street and the entire width of the square itself (110m) visually accommodate the introduction of taller buildings into the streetscape'. Again on Rose Street, reference is made, not to the character of historic buildings on the west side, but to a not too successful new development on the south side which is described as 'sensitive to this interface' which is not borne out in reality.

In addressing the significance of the Bo Kaap it baldly states that 'it must be sensitive to its heritage significance'. No indication is given as to the nature of its heritage significance and the consequence that this would have on any potential development, nor, more importantly is there any clear indication of what heritage indicators must be applied in order to address the interface with the historic single and double storeyed houses on Rose Street.

It then goes on to discuss urban design issues with no mention of heritage considerations. It says that the building 'does not strive to be a landmark as such' entirely ignoring the fact that the building is significantly taller than any building nearby on the west side of Buitengracht. It also refers to the height being similar to that of the old Christian Barnard Hospital, an



extremely poor, over-scaled block development that is certainly no precedent for any sensitive development.

It concludes by characterising the area as one with 'urban decay, vagrancy and crime, particularly in the side streets, lanes and peripheral streets'. This reflects a bias that is not borne out in reality. It is part of what has often been described in academic studies of the historical development of the Bo Kaap as seeing it as 'The Other' and as an area that was characterised by its retention of a Muslim and Coloured population to be regarded as being oppositional to the development of the White city, an inappropriate and outdated attitude.

The assertion that development has already occurred in the area between Buitengracht Street and Rose Street seems to ignore the parameters on which these decisions were based. They occurred in the 1960s and 70s at the height of apartheid planning when the local (not White) community was ignored in favour of the economic needs and demands of the White business sector. That this should become the basis of continuing to isolate the Bo Kaap seems extraordinary in the 21st century. Creating a barrier to the Bo Kaap must be the antithesis of what inclusive, democratic planning should be developing.

5. Locating the issue in international heritage practice

The question that is central to the objection to the City's decision to approve the development is the resultant damage to proclaimed Provincial Heritage Sites by development in the area adjacent to the site. As mentioned earlier, views from and to heritage places are essential and internationally the notion of "setting" is considered to be very important in relation to the conservation of heritage. The conservation charters of ICOMOS¹, the International Council on Monuments and Sites, are internationally accepted as benchmarks of best practice in the conservation of the built environment. The concern about the setting of heritage spaces and places is raised in one of the earliest conservation charters, the Venice Charter of 1964.

Article 1 of this early charter says:

*The concept of a historic monument embraces not only the single architectural work **but also the urban or rural setting** in which is found the evidence of a particular civilization, a significant development or a historic event. This applies not only to great works of art but also to more modest works of the past which have acquired cultural significance with the passing of time*

Following on from this, Article 6 states that:

*The conservation of a monument implies **preserving a setting which is not out of scale**. Wherever the traditional setting exists, it must be kept. No new construction, demolition or modification which would alter the relations of mass and colour must be allowed.*

¹ICOMOS, the International Council on Monuments and Sites, works for the conservation and protection of cultural heritage places. It is the only global non-government organisation of this kind, which is dedicated to promoting the application of theory, methodology, and scientific techniques to the conservation of the architectural and archaeological heritage. Its work is based on the principles enshrined in the 1964 International Charter on the Conservation and Restoration of Monuments and Sites (the Venice Charter). ICOMOS South Africa is the local branch.

<http://www.icomos.org/en/about-icomos/mission-and-vision/mission-and-vision>

And finally Article 7 points out that "a monument is inseparable from the history to which it bears witness and from the setting in which it occurs".

The Burra Charter, developed by ICOMOS Australia is internationally accepted as an important heritage benchmark. It was originally adopted in 1979, but has undergone several revisions since then.

Article 9 of the Burra Charter says:

*"Conservation requires **the retention of an appropriate visual setting and other relationships that contribute to the cultural significance of the place.***

New construction, demolition, intrusions or other changes which would adversely affect the setting or relationships is not appropriate".

In the Charter, **setting** means '**the area around a place which may include the visual catchment**'.

As *The Illustrated Burra Charter* (2004) point out: "At many places there is no clear distinction between a place and its setting. Only rarely is a culturally significant place self-contained without some link- visual, functional or historical- to the world around it".

In Australian planning legislation there is a requirement that policy needs to ensure that the impact on the significance of a place is considered when considering applications for development within the setting. An example of this application was the development of the regional plan for the town of Parramatta in New South Wales, where the historical town's landform and views to places formed an integral element of the town's structure. In 1997 an inventory of views was commissioned for input into the regional environmental plan as it was considered that development in the mid-twentieth century had inadvertently obscured many of the major historical views in Parramatta and interrupted the visual relationships between buildings and their settings. The same approach was taken in Melbourne in 1992 when a proposed development by KPMG was rejected because of its scale and then reduced in height to relate to its setting. The same attitude was also applied to the setting of The Shrine in Melbourne and that of Storey Bridge in Brisbane.

In the 1987 Washington Charter: Article 10. *When it is necessary to construct new buildings or adapt existing ones, the existing spatial layout should be respected, especially in terms of scale and lot size.*

More recent international heritage declarations have been even more specific about the importance of the setting: The **Xi'an Declaration** on the conservation of the setting of heritage structures, sites and areas which was adopted in Xi'an, China by the 15th General Assembly of ICOMOS on 21 October 2005 includes the following articles:

1. **The setting of a heritage structure, site or area is defined as the immediate and extended environment that is part of, or contributes to, its significance and distinctive character.**

Beyond the physical and visual aspects, the setting includes interaction with the natural environment; past or present social or spiritual practices, customs, traditional knowledge,

use or activities and other forms of intangible cultural heritage aspects that created and form the space as well as the current and dynamic cultural, social and economic context.

*2. **Heritage structures, sites or areas** of various scales, including individual buildings or designed spaces, historic cities or urban landscapes, landscapes, seascapes, cultural routes and archaeological sites, derive their significance and distinctive character from their perceived social and spiritual, historic, artistic, aesthetic, natural, scientific, or other cultural values. They also derive their significance and distinctive character from their meaningful relationships with their physical, visual, spiritual and other cultural context and settings.*

Develop planning tools and practices to conserve and manage settings:

*6. Legislation, regulation and guidelines for the protection, conservation and management of heritage structures, sites and areas should provide for the establishment of a **protection or buffer zone** around them that reflects and conserves the significance and distinctive character of their setting.*

These principles have shaped development in many cities in both Europe and Asia. Well-known examples would include the control of development around St. Paul's Cathedral in London where the development of the ungraded area around the cathedral would have a serious impact on the setting of the cathedral and restrictions were placed on the height and scale of development to ensure that the cathedral retained its prominence in its setting. Another London example is the re-development of the south-east corner of Trafalgar Square which was controlled as it formed part of the setting of the square.

It can therefore be seen that the recognition of the physical and cultural setting for heritage sites has been central to heritage thinking for some considerable time and this has shaped both legislation and planning decisions in relationship to heritage sites. The impact that the proposed development on Buitengracht Street will have on the Provincial Heritage Sites of the Bo Kaap and Riebeeck Square as well as the adjacent Heritage Square should be understood within this framework. The demand that the setting of these sites, albeit outside the declared sites, is controlled in view of the major visual impact that it can have on the heritage significance of the sites is, in my opinion, reasonable and in line with international precedent.

I have been advised that it is for the Court to determine the legal meaning of the concept of a development which will "alter" or "damage" the heritage sites within the meaning of section 27 (18) of the National Heritage Resources Act. I therefore do not comment on that question. I am however able to comment on whether the proposed Development will "alter" or "damage" the Bo-Kaap and Riebeeck Square heritage sites as those terms are understood in heritage conservation. I have no doubt that it will have those effects.

André van Graan

PhD (UCT) MPhil (UCT) PG Dip Arch (U. Westminster) Pr. Arch (SA)



CV André van Graan

André van Graan is a registered Architect and an Associate Professor at the Cape Peninsula University of Technology where he has lectured for the past eighteen years. Originally appointed as a lecturer at the then-Peninsula Technikon (Pentech), he was promoted to Senior Lecturer in 2001 and was the Course Coordinator for the Architectural Technology course until the merger of the two Technikon architecture programmes in 2008. During this time he wrote and published a text book 'Communication in Architecture' which reframed the manner in which architectural history was taught to make it more relevant and appropriate to the local context, drawing on a study of local precedent. The text book has become the standard prescribed history reader at universities of technology in South Africa. In 2011 he was given ad hominem promotion to Associate Professor and from 2012-2015 acted as Head of the Department of Architectural Technology and Interior Design.

In 2004 he completed his Master of Philosophy degree at the University of Cape Town with a dissertation entitled: *The influences on the two Inner City Housing Projects of the Bo Kaap and District Six in Cape Town between 1938 and 1944*. This examined the socio political context in which housing development took place following slum clearances in terms of the Slums Act of 1934. It examined the social and political framework of the city in its implementation of housing redevelopment in the inner city. As part of the research, an in-depth investigation of the history and development of both District Six and the Bo Kaap was made, looking at the way that expropriation was undertaken by the city in the 1930s and examining the design and context of the Schotsche Kloof Flats and the Bloemhof Flats.

This was followed in 2011 by a PhD, also at the University of Cape Town, in the School of Architecture, Planning and Geomatics, that expanded on the grounds that had been touched on in the Master's dissertation and considered the impact of the project of modernism on the City in the period prior to the coming to power of the National Party in 1948. The thesis is entitled: *Negotiating Modernism in Cape Town 1918-1948. An investigation into the introduction, contestation, negotiation and adaptation of modernism in the architecture of Cape Town*. It focussed on the implications of the massive social engineering project that emerged in this period as the city developed from a colonial city into a modern city, manifested in the development of the Foreshore Reclamation Project and the Foreshore Plan of 1947 that laid the groundwork for the subsequent development of the city up to the present day. This had an impact on every aspect of development in the city from housing and residential development to the racialized removal of people of colour from the city to areas of the Cape Flats such as Langa, Kewtown and the stretch of urban development southwards that followed. Underlying the modernisation of the city was the introduction of town planning considerations and the development of a City Architectural Department and a Town Planning section. The time-frame of the thesis had not previously been covered in a study of this nature. The thesis draws attention to the architectural changes that occurred in the city in this period.

Andre van Graan's background in heritage matters stretches back to his post-graduate diploma in Architecture which he completed at the University of Westminster in London in 1976, specialising in Conservation Studies. This was followed by his working on restoration projects at Hampton Court Palace and Windsor Castle. Following his return to South Africa he joined the Heritage Committee of the then Transvaal Institute of Architects, ultimately chairing the Gauteng Institute of Architects



Heritage Committee as well as serving for many years on the Johannesburg Plans Committee of the then-National Monuments Committee (now SAHRA). During this time he also undertook a number of restoration projects including the Lutheran Church in Hillbrow, the Gordon Leith House in Houghton, the Drill Hall, farms in the Dullstroom and Vanderbijl Park areas, as well as preparing the seminal Art Deco survey of Boksburg on the East Rand. He was on the board of trustees of the Parktown-Westcliff Heritage Trust and wrote several articles on the architects and buildings of Parktown. In 1991 he was appointed Director of Architecture of the South African Institute of Architects, a post he held until 1995. In his capacity as director he liaised with all the regional institutes of architects, coordinating interaction with government as well as making international contact with architectural institutions elsewhere in Africa and in the UK in the lead-up to the democratisation of South Africa.

Returning to Cape Town, his birthplace, he continued to work on restoration projects in Durbanville, before commencing work at the Peninsula Technikon in 1999.

He joined the Heritage Committee of the Cape Institute for Architecture and has represented the regional institute on the South African Institute of Architects National Heritage Committee since 2008. From this time he has convened the Cape Institute for Architecture's Heritage Committee and has served on the ClfA Management Committee. From being the Vice-President of the Institute from 2008-2010, he was elected President from 2010-2012 and continues to serve on the Management Committee. He is also a member of Docomomo South Africa, an international organisation that documents early modernist architecture.

In terms of heritage scholarship, he has presented papers on aspects of architectural heritage at Rhodes University and Wits University in South Africa, as well as papers at conferences in Australia and the United Kingdom. His paper at the Oxford University Space + Place conference in 2013 was entitled: *Modernism as a Mechanism of Power and Control in Colonial Contexts: The Project of Modernity in Cape Town South Africa*. This paper is to be included in a forthcoming publication on Space and Place. He has been invited to present a paper on heritage tourism in Cape Town at the Third Indian Ocean Heritage Conference, to be held in St. Denis, Reunion Island, in October this year. He has also published a number of articles both in South Africa as well as in Britain on aspects of heritage and architecture. His article *Contested modernism: post Slums Act public housing in Cape Town* was published in the South African Journal of Art History in 2009. In 2012 he was invited to be a visiting academic at the Politecnico di Milano in Milan, working with a group of international students on a project for the World Expo of 2015. In 2013 he took part in a conference on architectural education on Reunion Island and was one of the founding member architectural schools of the 'Indian Ocean Network of Architectural Schools' (IONAS) accord, which includes universities in Africa, Malaysia, India, France and Australia.

In 1998 he joined the Vernacular Architecture Society of South Africa and served as Chairman of the Society from 2002-2010. The society focusses on the study and documentation of traditional and indigenous architecture of South Africa (more specifically of the Cape) in order to better understand its development and imperatives as well as issues of sustainability and threats to its preservation. He has also published articles in this field and given a number of public lectures on vernacular architecture and its origins.

As an academic he has supervised many post-graduate students both at UCT and at CPUT. At UCT he taught 'Research Methodology' on the MPhil (Conservation of the Built Environment) programme. Here he examined students' research proposal and also co-supervised a number of the students. Topics that they undertook included: heritage in planning legislation in Cape Town; Cape vernacular architecture, the Groote Schuur estate and its transfer into private ownership prior to 1994; apartheid policies and heritage projects; the protection of Voortrekker heritage, the restoration of Tulbagh; and African fortifications: comparing the Castle in Cape Town to Elmina Castle in Ghana. At CPUT recent supervision has been of theses dealing with modernism in the Dutch Reformed churches of the northern suburbs of Cape Town; adaptive re-use of industrial heritage; exhibition spaces in historic buildings; and attitudes towards informal settlements in Cape Town. In most of the research theses the focus has been on the architectural of Cape Town. In addition he has served as an external examiner at a number of universities in South Africa.



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

Case No: 7031/17

In the application of:

HERITAGE WESTERN CAPE

Intervening Party

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

AFFIDAVIT

I, the undersigned –

ANDRÉ VAN GRAAN

do hereby state under oath as follows:



1. I am a registered architect and an Associate Professor at the Cape Peninsula University of Technology, residing at 11 Liesbeek Road, Rosebank, Cape Town.
2. I depose to this affidavit in my professional capacity. My experience and expertise in heritage matters are apparent from my curriculum vitae, a copy of which is attached as "AVG1". I have been advised and respectfully submit that I have the expertise to express the opinions which are set out in this affidavit and in my report to which it refers.
3. The facts to which I depose are within my personal knowledge, save where otherwise indicated, and are to the best of my belief, true and correct.
4. I have read the affidavit of Mxolisi Chrisptomus Dlamuka, and confirm the contents of the affidavit insofar as it refers to me.
5. I further confirm the contents of my report, a copy of which is attached to the Intervening Party's founding Affidavits "MCD5". In summary:

The nature of a heritage site:

6. Heritage sites are much more than their legally subscribed topographical dimensions. As has been underscored many times in international heritage



charters, changes to the setting of a heritage site can damage the heritage significance of the site.

7. Every place possesses its own peculiar identity, and it is essential to comprehend that identity and take care of it as this is the essence of a cultural landscape. Cultural landscapes are manifestations of both physical and cultural practices. They have an element of fragility in contexts that are threatened with contextual change.

8. Fundamental to an understanding of the elements which define a heritage site is that it is not simply the aspects of the site itself, but also the impact that adjacent areas have on the site, that can destroy the unique qualities of the cultural landscape of the area.

9. In Cape Town, it would be manifestly apparent that, for example, permitting a large scale development adjacent to the Castle of Good Hope would have an extremely negative impact on the Castle, not only because one would see the new development adjacent to the historic complex, but also because it would impact on views out from the open spaces of the Castle and seriously damage its heritage significance. The same can be said, for example, of development which would seriously impact on the iconic Table Mountain.

The Impact of the proposed Development on the provincial heritage sites

10. The Bo-Kaap and Riebeeck Square are places which have very specific identities.



11. The 'space' of Riebeeck Square is defined by the buildings that surround it. They create a sense of enclosure and inform the scale and grain of the space. The trees on the centre of Buitengracht have helped to mediate the impact of the over-scaled more recent development but this would be completely overwhelmed by the proposed new development, the scale of which will not only destroy the coherence of the square but also the relationship that the square has to its context - the links down into the city, and equally importantly, the visual contextual link to Signal Hill which reads as a background 'wall' to the square.

12. The cultural landscape of the Bo-Kaap is critically linked visually to the city below. Imagining 'boundary' as a zone, rather than a line, is poignantly demonstrated by the Bo-Kaap, and its nineteenth century definition. Whilst the architectural quality of the Bo-Kaap - of narrow houses and streets, and lack of public squares - was contained by Buitengracht Street at its eastern edge, the social practices through which the Bo-Kaap was constructed crossed Buitengracht Street.

13. The contrast between architectural quality and social practices demonstrates the need for examining space through its different aspects: the solid void aspect is seen in the architectural space and the event-inhabitation aspect in the social practices. Thus the Bo-Kaap is linked to Riebeeck Square through social practices, with Riebeeck Square an important threshold to the Bo-Kaap.

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- 14. The Bo-Kaapnot only has a clearly identifiable architectural as well as socio-cultural identity, but in addition, its sense of place is linked to its visual connections with the city as well as its views to Table Mountain and its relationship to its location on the flanks of Signal Hill. This location sets up a dialogue between the Bo-Kaap and the city. The slope of the land, the narrow linking streets and the views down into the city establish a clear relational network.

- 15. The Bo-Kaap's identity is not only subscribed in physical terms but has also come to be identified with the social and religious practices of the Cape Muslim community, which has given the area a unique character. The setting of the Bo-Kaap is thus of critical significance, and development on areas immediately adjacent to it will impact on and may damage these critical linkages, as the visual links are fundamental to its significance as a heritage precinct.

- 16. The proposed Development's device of setbacks from Rose Street does not, in fact, reduce the impact of the development as has been suggested. This would only possibly be felt looking obliquely down Rose Street. From anywhere higher up in the Bo-Kaap the development would create a new alien topography, a visual bulwark, as alluded to in the HWC comment. By sloping up when the natural slope is down it destroys the essence of the relationship between the Bo-Kaap and the city.

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17. Development between the Buitengracht and Rose Street has already disturbed the relationship. This was a consequence of apartheid planning decisions which disregarded the character and nature of the Bo-Kaap other than seeing it in isolation as "*the Malay Quarter*", and which (characteristic of the divisive planning practices of the past) looked at the Bo-Kaap but did not see it as part of the city.

18. The proposed Development is of such a scale and character that it would be an extraordinarily intrusive element in the views out from the Bo-Kaap and will have a very deleterious impact on the heritage of the Bo-Kaap as a whole. The proposed development will also negatively impact on Riebeeck Square as well as the adjacent Heritage Square.

Comment on the City's EHRM's comment

19. In my opinion the City's EHRM comment is clear and rational, drawing attention to the contextual impact that the Development would have on adjacent heritage resources. It identifies the historic relationship that the Bo-Kaap has had with the city. The comment goes on to identify the problems faced by the area as a result of the impact of "*new, large and bulky buildings that have served to erode that relationship*" and mention is made twice of the erosion of the links that exist.

20. It also recognises that the proposed Development will compound the separation as a result of the proposed bulk and height, calling it "*a physical and visual barrier*", and concluding this section with the comment "*(t)he loss of historic*

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connection and association of the Bo-Kaap with the town impacts negatively on the heritage value of the Bo-Kaap".

- 21. The City's EHRM thus demonstrates a clear understanding of the negative impact that the Development would have on the Bo-Kaap. The City's EHRM comment is in my opinion well-reasoned and factually based. It is consistent with many academic papers and dissertations which examine the role of the Bo-Kaap and its inter-relationship with the city.

- 22. It is also significant that the Bo-Kaap was clearly linked to Riebeeck Square. This urban space, originally called *Boerenpleijn*, in the nineteenth century became known as Hottentot Square, recognising, albeit in racially derogatory terms, its role in relation to the Bo-Kaap as the place of settlement by freed slaves. There are no Christian churches in the Bo-Kaap and the nineteenth century conversion of the theatre on the square into a church- St. Stephen's- was in order to serve the community of the Bo-Kaap. The square therefore became a place of significance to the residents of the Bo-Kaap, as a focus for Christian worship, and as the open civic space related to the residents, since there are no public open spaces in the Bo-Kaap. The City's EHRM comment clearly identifies this significance as a space that lay between the city and the Bo-Kaap.

- 23. The City's EHRM comment importantly recognises that the views outward from the square to Signal Hill are important elements of the "*genius loci*" of the space - the elements which give it its special character. The proposed Development

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changes the nature of the important civic space and will alter the essential character of the square and thus negatively affect its heritage significance.

24. It is particularly noteworthy that the City's EHRM recognises the significance of the limiting implications of an HPOZ. An HPOZ's very purpose is to mediate and moderate development in historically sensitive areas.
25. The City's EHRM comment concludes that the lack of sensitivity to the existing heritage resources will certainly impact in a negative manner on those resources. This is a very clear and substantiated conclusion, addressing the very essence of the issue at hand.
26. Finally, I note that no visual impact assessment was called for by the City in the application process. In my opinion, this should have been undertaken in order to inform the assessment of the heritage impact of the proposed Development.

Comment on the heritage statement

27. I have been asked to comment on the heritage statement attached to the founding affidavit in the review applications "FA16".
28. The heritage statement clearly ignores heritage indicators, and is based on design considerations that relate to potential bulk and creating views from the Development. It entirely ignores the immediate context. It appears that the



Heritage Statement was produced after the design had been completed and is a post rationalisation of design decisions that have already been taken.

- 29. The heritage statement discusses the history of both Riebeeck Square and the Bo-Kaap, but fails to adequately address the visual impact that the Development would have on these places. Far from giving any recognition to the actual heritage significance of the adjacent historic areas, it plays down their significance. So, Riebeeck Square's current use as a parking area is used to diminish its significance as a space. The temporal dimension of current use is not taken into account.

- 30. In considering the heritage status only the site is mentioned. The heritage statement quotes from generic urban design "*indicators of good performance*", which has nothing to do with heritage indicators. In describing Riebeeck Square and the adjacent Heritage Square, the heritage statement is purely descriptive and makes no mention of the heritage indicators raised by these places.

- 31. That the square itself is ignored is clear in the comment that "*the generous width of Buitengracht Street and the entire width of the square itself (110m) visually accommodate the introduction of taller buildings into the streetscape*". Again on Rose Street, reference is made not to the character of historic buildings on the west side, but to a not too successful new development on the south side which is described as "*sensitive to this interface*", which is not borne out in reality.



32. In addressing the significance of the Bo-Kaap it baldly states that "*it must be sensitive to its heritage significance*". No indication is given as to the nature of its heritage significance and the consequence that this would have for any potential development, nor, more importantly is there any clear indication of what heritage indicators must be applied in order to address the interface with the historic single and double storeyed houses on Rose Street.
33. The heritage statement entirely ignores the fact that the building is significantly taller than any building nearby on the west side of Buitengracht. It also refers to the height being similar to that of the old Christiaan Barnard Hospital, an extremely poor, over-scaled block development that is certainly no precedent for any sensitive development.
34. It concludes by characterising the area as one with "*urban decay, vagrancy and crime, particularly in the side streets, lanes and peripheral streets*". This reflects a bias that is not borne out in reality and is part of what has often been described in academic studies of the historical development of the Bo-Kaap as seeing it as an area that was characterised by its retention of a Muslim and Coloured population, to be regarded as being oppositional to the development of the White city, an inappropriate and outdated attitude.
35. The assertion that development has already occurred in the area between Buitengracht Street and Rose Street seems to ignore the parameters on which these decisions were based. They occurred in the 1960s and 1970s at the height of apartheid planning when the local (not White) community was ignored



in favour of the economic needs and demands of the White business sector. That this should become the basis of continuing to isolate the Bo-Kaap in the 21st century seems extraordinary. Creating a barrier to the Bo-Kaap must be the antithesis of what inclusive, democratic planning should be developing.

International heritage practice

36. Internationally the notion of "setting" is considered to be very important in relation to the conservation of heritage. The conservation charters of ICOMOS, the International Council on Monuments and Sites, are internationally accepted as benchmarks of best practice in the conservation of the built environment.
37. In one of the earliest conservation charters, the Venice Charter of 1964, Article 6 states that the "*conservation of a monument implies preserving a setting which is not out of scale. Wherever the traditional setting exists, it must be kept. No new construction, demolition or modification which would alter the relations of mass and colour must be allowed.*"
38. Article 9 of the Burra Charter, which is also internationally accepted as an important heritage benchmark, says "*Conservation requires the retention of an appropriate visual setting and other relationships that contribute to the cultural significance of the place. New construction, demolition, intrusions or other changes which would adversely affect the setting or relationships is not appropriate.*"



- 39. In the Burra Charter, setting means "the area around a place which may include the visual catchment". As *The Illustrated Burra Charter* (2004) point out: "At many places there is no clear distinction between a place and its setting. Only rarely is a culturally significant place self-contained without some link- visual, functional or historical- to the world around it".

- 40. Article 10 of the 1987 Washington Charter states that "When it is necessary to construct new buildings or adapt existing ones, the existing spatial layout should be respected, especially in terms of scale and lot size"

- 41. More recent international heritage declarations have been even more specific about the importance of the setting: the Xi'an Declaration on the conservation of the setting of heritage structures, sites and areas, adopted on 21 October 2005, includes the following articles:

"1. The setting of a heritage structure, site or area is defined as the immediate and extended environment that is part of, or contributes to, its significance and distinctive character.

2. Heritage structures, sites or areas of various scales, including individual buildings or designed spaces, historic cities or urban landscapes, landscapes, seascapes, cultural routes and archaeological sites...also derive their significance and distinctive character from their meaningful relationships with their physical, visual, spiritual and other cultural context and settings.

...



6. Legislation, regulation and guidelines for the protection, conservation and management of heritage structures, sites and areas should provide for the establishment of a protection or buffer zone around them that reflects and conserves the significance and distinctive character of their setting."

- 42. The recognition of the physical and cultural setting for heritage sites has been central to heritage thinking for some considerable time, and this has shaped both legislation and planning decisions in relationship to heritage sites.

- 43. The impact that the proposed development on Buitengracht Street will have on the Provincial Heritage Sites of the Bo-Kaap and Riebeeck Square, as well as the adjacent Heritage Square, should be understood within this framework. The demand that the setting of these sites, albeit outside the declared sites, is controlled in view of the major visual impact that it can have on the heritage significance of the sites is in my opinion reasonable and in line with international precedent.

- 44. I have been advised that it is for the Court to determine the legal meaning of the concept of a development which will "alter" or "damage" the heritage sites within the meaning of section 27 (18) of the National Heritage Resources Act. I therefore do not comment on that question. I am however able to comment on whether the proposed Development will "alter" or "damage" the Bo-Kaap and Riebeeck Square heritage sites as those terms are understood in heritage conservation. I have no doubt that it will have those effects.




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ANDRÉ VAN GRAAN

I certify that the deponent has acknowledged that s/he knows and understands the contents of this affidavit which was signed and sworn before me on this the 13th day of JULY 2017, and that the provisions of the regulations contained in Government Notice R1258 of 21 July 1971, as amended, have been complied with. The deponent confirmed that s/he has no objection to taking the prescribed oath and that s/he considers it to be binding on her conscience. I confirm that I have administered the requisite oath.



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