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**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

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**FOUNDING AFFIDAVIT**

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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-*

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- (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”;*<sup>1</sup>

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”;*<sup>2</sup>

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”;*<sup>3</sup>

<sup>1</sup> Annexure “FA11” of the Founding Affidavit, at para 6.36.

<sup>2</sup> 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".<sup>4</sup>

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.

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<sup>3</sup> Annexure "FA11" of the Founding Affidavit, at para 6.53.

<sup>4</sup> 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.





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.

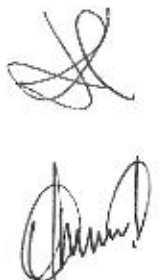


108. It also recognises that the proposed development will compound the separation as a result of the proposed bulk and height, calling it "*a physical and visual barrier*", and concluding this section with the comment "*(t)he loss of historic connection and association of the Bo-Kaap with the town impacts 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 21<sup>st</sup> 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.



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 13<sup>th</sup> 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**