

**APPEAL IN TERMS OF SECTION 49(1) OF THE NATIONAL HERITAGE RESOURCES
ACT 25 OF 1999, BEFORE THE APPEAL COMMITTEE**

HELD AT THE OFFICES OF HERITAGE WESTERN CAPE, CAPE TOWN

CASE NO: 15022403ZS0302M

In the appeal between

NPV HOLDINGS (PTY) LTD

Appellant

and

HERITAGE WESTERN CAPE

Respondent

APPEAL COMMITTEE:

SHEKESH SIRKAR

Chairperson

NICOLAS BAUMANN

Member

KARIN DUGMORE-STROM

Member

KATHERINE DUMBRELL

Member

TSELISO LESHORO

Member

APPEAL RULING

INTRODUCTION

1. This is an appeal in terms of Section 49(1) of the National Heritage Resources Act No. 25 of 1999 ("the Act"), read together with Regulation 12 of PN 336 in Provincial Gazette 5937 dated 25 October 2002 ("the Regulations"), against the decision by the Impact Assessment Committee ("IACom").
2. IACOM is the delegated authority of Heritage Western Cape ("HWC"). It issued the following decision dated 6 September 2017:

"The Committee resolved not to support the proposed development as has been tabled (in its current form) as it was felt that the scale, bulk and proposed interventions impacted negatively on the identified heritage resource as a whole and in particular the highly significant LHC2 Building and the interstitial space."

3. The appeal was heard by the Appeal Committee ("the Committee") on 18 October 2017 and the matter was adjourned to allow the Committee members to further deliberate on the issues, in as much as they are complex in nature.

4. Various documents were made available to the Committee for consideration and we shall refer to the documents by title and author where applicable.

THE PARTIES AND REPRESENTATION

5. The Appellant is NPV Holdings (Pty) Ltd ("the Appellant"), which is the registered owner of Erf 54472, Claremont, situated at 167 Main Road, Claremont, upon which the Werdmuller Centre stands.
6. The Respondent is Heritage Western Cape, the provincial heritage resources authority in terms of the Act and its delegated authority, IACom, is the committee which took the decision that is the subject of the current appeal.
7. The parties were represented before the Committee on 18 October 2017, as follows:

7.1. Mr. Rael Gootkin and Mr. Hendrik Kotze, of Werksmans attorneys, on behalf of the Appellant;

7.2 Ms. Katherine Robinson introduced the matter on behalf of HWC;

In addition, interested and affected parties were represented as follows:

- 7.3 Prof. Noeleen Murray; Mr. Nellis Beyers; and Mr. Mike Scurr made submissions on behalf of DOCOMOMO.
- 7.4 Dr. Stephen Townsend made submissions on behalf of Cape Institute for Architecture.
- 7.5 Submissions were also made by Ms. Cindy Postlethwayt; Prof. Walter Peters; and Mr. Piet Louw.

NATIONAL HERITAGE RESOURCES ACT, 25 OF 1999

8. The National Heritage Resources Act, 25 of 1999 is the controlling legal framework for heritage management in South Africa and it lays down general principles for the identification, assessment, and management of heritage resources of the country.
9. *Heritage resource* is defined in the Act as "*any place or object of cultural significance*". "Place" includes, *inter alia*, a site, area or region; a building or other structure; or a group of buildings or other structures; and open space; and in relation to the management of a place, includes the immediate surroundings of a place.

10. The Act requires the heritage significance of any place or object to be assessed so as to ensure the appropriate level of management of the country's heritage resources.

11. The Act further provides for a system of formal protection for national and provincial heritage sites. Heritage resources significant enough to be considered as part of the "national estate" , may include, *inter alia*, the following:
 - 11.1 Places, buildings, structures and equipment of cultural significance;
 - 11.2 Landscapes and natural features of cultural significance;
 - 11.3 Historical settlements and townscapes.

12. The Act defines *Cultural significance* as aesthetic, architectural, historical, scientific, spiritual, social, linguistic or technological value or significance. The heritage assessment process assesses the nature and degree of heritage significance.

13. The Act aims to promote good management of the national estate, and to enable and encourage communities to nurture and conserve their legacy so that it may be bequeathed to future generations in as much as our heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being. It has the potential to affirm the diverse cultures of South Africa, and in so doing shape our national character.

14. Our heritage celebrates our achievements and contributes to redressing past inequities. It educates and deepens our understanding of society and encourages us to empathize with the experience of others. It facilitates healing and material and symbolic restitution and it promotes new and previously neglected research into our rich oral traditions and customs.¹

15. Section 38 of the Act provides that any person who intends to undertake a development must at the very earliest stages of initiating such a development, notify the responsible heritage resources authority and furnish it with the necessary details. "Development" is categorized in section 38(1) of the Act and includes any development or other activity which will change the character of a site exceeding 5000 m² in extent; involving three or more existing erven or subdivisions thereof; the re-zoning of a site exceeding 10 000 m² in extent; or any other category of development provided for in regulations by the South African Heritage Resources Authority or a provincial heritage resources authority.

16. Section 38(2) provides that if there is reason to believe that heritage resources will be affected by such development, it must notify the person who intends to undertake the development that an impact assessment report must be submitted by an approved person and the report must be considered timeously by the responsible heritage resources authority. Any decision taken by a provincial

¹ The National heritage resources Act, no 25 of 1999 – preamble.

heritage resources authority may be taken on appeal in terms of section 49 of the Act.

17. HWC, in exercising a public power is confined to exercising only such powers as were lawfully conferred upon it, which is the principle of legality. Any conditions imposed by HWC must accord with its conservation mandate in terms of the Act and must be directly in line with the principles of heritage resources management set out therein.
18. In considering an appeal, HWC must have due regard to the cultural significance of the heritage resource in question (Regulation 12(5)(a)), the principles of heritage resource management (as set out in section 5 and prescribed under section 6(1) & (2) of the Act) (Regulation 12(5)(b)), and any other relevant factor which is brought to the attention of the appeal committee by the appellant, HWC or any other person directly affected by the decision (Regulation 12(5)(c)).

BACKGROUND

19. The affected property is the remaining extent of Erf 54472 Cape Town, measuring 6 451 m² in extent and bears the address of 167 Main Road, Claremont. The property currently accommodates a vacant commercial building known as the Werdmuller Centre. It was conceptualised in the late 1960s by architect, Roelof Uytenbogaardt and was built by Old Mutual, and completed in 1975.

20. The Werdmuller Centre is located in the Claremont Central Business District on the Main Road, bounded by Newry Street, Claremont Boulevard and Ralph Street. It comprises 2(two) distinct portions, referred to as LHC1 (Western portion of site, facing onto Main Road, Claremont) and LHC2 (Eastern portion of site, facing onto Claremont Boulevard & the Transport Interchange).The ground floor consists of entirely retail use. The interstitial space between LHC1 and LHC2 is a pedestrian thoroughfare, which provides a pedestrian link between the bus and taxi ranks and the train station.

21. The Werdmuller Centre has been identified as a heritage resource on the basis of its architectural significance and association with the architect Roelof Uytenbogaardt ("Uytenbogaardt"). Its architectural significance emanates from its Corbusian structural and spatial concepts.

22. The inability of the Werdmuller Centre to perform as expected was reported in the "News Round-up" section of *Architect and Builder* in November 1978.² Under the title "Shopping Centre under attack" the article noted that the three year old (at that time) R2,2 million Werdmuller Centre, designed by Uytenbogaardt had not produced the returns hoped for by Old Mutual, its owners, at that time.

² Shopping Centre under attack, *Architect and Builder*, November 1978, p. 24

23. In 1990, Mr. Derek Stuart-Findlay was appointed Provincial Property Manager for Old Mutual in the Cape, Natal and Namibia and as part of his portfolio, he took over the management of the Werdmuller Centre. Mr. Stuart-Findlay reported that tenants and shoppers could not relate to the Werdmuller Centre which had acquired the nickname 'Weirdmuller Centre'. Mr. Stuart-Findlay reported further that the Werdmuller Centre stands virtually empty in the center of a potentially highly successful urban renewal scheme.
24. In 2012, the last remaining tenant, Paul Bothner vacated the building which resulted in Old Mutual restricting public access to the site and erecting a steel hoarding barricade around its perimeter.
25. In late 2012, NPV Holdings (Pty) Ltd, the Appellant in this matter, submitted a bid to acquire the property and the sale was formally concluded in 2014. While the heritage process is ongoing, the Werdmuller Centre remains closed to the public, and is leased intermittently for short periods as a film set.

HERITAGE IMPACT ASSESSMENT – PHASE ONE (by Mr. ASHLEY LILLIE & Prof. WALTER PETERS)

26. Mr. Ashley Lillie and Prof. Walter Peters authored the Phase One Heritage Impact Assessment ("HIA") dated July 2016, which was submitted to HWC, in terms of

sections 38 (3)(c) - (e) of the Act. The HIA was initially triggered by section 38 (1)(c)(i) of the Act, in that the proposed redevelopment of the Werdmuller Centre would change the character of the site, which exceeded 5000 m² in extent.

27. HWC advised that the Impact Assessment Committee ("IACom") was of the view that a heritage resource would be affected should the proposed redevelopment of the Werdmuller Centre progress, and that a HIA report was therefore required in a two phase process. Both HIA reports were to undergo public participation prior to it being submitted to HWC for ratification.
28. In April 2016, the Inventories, Grading and Interpretation Committee ("IGIC") of HWC noted that the Werdmuller Centre should be graded as Grade II due to its unique architectural significance. This grading and significance of the Werdmuller Centre would entail that any intervention thereon must respect such values.³
29. On or around 20 May 2016, a response was submitted in respect of the grading of the Werdmuller Centre by the owner, viz. NPV Holdings (Pty) Ltd, the appellant herein. The appellant was of the view that the Werdmuller Centre as a whole does not have sufficient heritage significance to be a Grade II site. Furthermore, LHC2, being the interstitial space and the *brise soleil* and arcade along Newry Street, warranted a Grade IIIA grading, due to its architectural and aesthetic significance.

³ Phase One Impact Assessment Report: Ashley Lillie and Walter Peters – July 2016, p. 5.

LHC1, having only contributed significance through its association with LHC2, should therefore only warrant a Grade IIIC grading.⁴

30. On 20 April 2016, the IGICom of HWC took the decision to grade the Werdmuller Centre as a Grade II site and to initiate procedures to formally protect it. Within the context of the Grade II decision, it was recognised by IGICom of HWC that the issue of sustainability was important in considering the management of the Werdmuller Centre as a heritage resource, and that a Phase One HIA be submitted for consideration.
31. The architectural design of the Werdmuller Centre was executed by, *inter alia*, Uytenbogaardt (1933 - 1998) who was appointed by the previous owners, Old Mutual, to redevelop the Main Road portion of the block it had acquired in Claremont into a shopping complex, following 'forced removals' by the apartheid government and the demolition of what purported to have been small-scale housing stock.⁵
32. The significance and grading of the Werdmuller Centre was evaluated in the HIA against its architectural structure and finishes. It is noted that Uytenbogaardt was a highly significant and influential architect and academic, with several of his buildings (i.e. Van Zyl apparel store in Paarl, Bonwit Clothing Factory, Belhar and

⁴ *Ibid*

⁵ *Supra*, note 3, at p.35

Steinkopf community centers, UWC Sports Centre, Hout Bay Library etc.) being recognised through various accolades.

33. The Wermuller Centre, being one of Uytendogaardt's works, was a relatively small retail outlet subjected to the design concept of a modern souk, initially intended for commercial use, and is recognised as an important architectural building because of its incorporated *Corbusian* structural and spatial concepts⁶ (ie. the use of a ramped circulation system, amongst other "Corbusian" inspired architectural strategies). The *Le Corbusier* concept employed at the Wermuller has been recognised as being inspired, in particular, through the work of the Swiss-French architect, Charles-Édouard Jeanneret, known as *Le Corbusier*, in his building named the Carpenter Center, the core concept of which is an S-shaped ramp linking sections of the campus.⁷
34. Notwithstanding the above architectural significance of the Wermuller Centre, it was noted that there is a disjunctive to the complex, with the portion known as "LHC2" generally regarded as being more successful architecturally than "LHC1". There are aspects in common to both portions of the Wermuller Centre:- amongst these the reliance upon the spatial concept of *Le Corbusier's Dom-ino Skeleton* (1914-15) (i.e. exteriors are squared, angled and rounded corners to the flat slabs); the use of reinforced concrete; and the choice of curved dogleg stairs; and details for incorporating and shielding electric lighting from damage. It was further noted

⁶ *Supra*, note 3, at p.35

⁷ *Supra* note 3, at p18

that the Werdmuller Centre is relatively intact and far from being structurally unsound, although various finishes to the concrete are crumbling, and in need of repair and maintenance.⁸

35. In respect of the recognition of the Werdmuller Centre, it has been noted in the HIA that, notwithstanding its architectural significance, it had not been recognised by accolades in previous years since its inception in the late 1960's. It is further noted in the HIA, that the authors are not in agreement with the grading assigned by IGIC of HWC, which they consider as being 'tentative' given the failure of HWC to invite any submission by the owners of the property prior to making their assessment on the issue of grading.⁹
36. In respect of the heritage indicators, it has been noted in the HIA that due to the many differing floor levels of LHC1, the spaces cannot easily be reconfigured beyond shop sizes. It has been noted that LHC2 is of exceptional architectural merit. Thus, any redevelopment to the property should, in the first instance, seek to retain LHC2 in total. It is further noted that in light of the unsuccessful retail purpose of LHC1, such an experiment is not worthy of repetition, and that portion of the Werdmuller Centre can be given over to redevelopment.¹⁰

⁸ *Supra*, note 3, at p.35

⁹ *Supra*, note 3, at p.37

¹⁰ *Supra*, note 3, at p.38

37. It was further noted that the chromium-plated doors and shopfronts could be conserved and incorporated either in a redevelopment or in any replacement or bulking up of LHC2. In addition, the two porticos with office spaces along Newry Street, which is articulated from the rest of LHC1, should be retained. In light of Werdmuller Centre's being built of a reinforced concrete framed structure, which is precisely detailed and executed with a variety of finishes, it was proposed that the conservation thereof be done by re-affixing the finishes or removal of painted surfaces with prior experimentation, with minimal impact on the existing fabric and character with the conserved portions not to appear as new.¹¹
38. The specific indicators of the Werdmuller Centre¹² were noted, *inter alia*, in the HIA as follows:
- 38.1. retention of LHC2 ;
 - 38.2. allow demolition of a portion of LHC1, with the exception of:
 - a) the colonnaded office silvery along Newry Street, which is detached and articulated from the rest of LHC1; and
 - b) the 'double curve transverse wall';
 - 38.3. if the retention of the sub-paragraph (b) above proves unfeasible, a reconstruction of the same form and finish on the precise footprint , in part or in full be considered; and

¹¹ *Supra*, note 3, p.40

¹² *Ibid*

- 38.4. the chromium-plated steel doors contained within LHC1 to be carefully removed, and preferably, re-used in the new development.
39. In respect of the socio-economic circumstances and indicators of the Werdmuller Centre, it is noted in the HIA that it is located in a pivotal position in Cape Town's suburb of Claremont. It was developed at the same time as the nearby highly successful Cavendish Square, also an Old Mutual Property. Thus, any redevelopment of the Werdmuller Centre should not only capitalise on the location, but that such development should ensure that adequate attention is given to ensuring the economic viability of the property so as to avoid a recurrence of the dire circumstance it currently faces.¹³
40. According to the Socio-Economic Commentary, read with the Feasibility and Structural Study prepared by the owner and Quest Quantity Surveyors contained in the HIA¹⁴, the Werdmuller Centre has the unique potential, due to its urban context, to serve all income levels of society from the very wealthy to the very poor, in a sustainable and feasible manner.
41. In addition, it was proposed that the redevelopment of the Werdmuller building will create over 200 construction jobs during the construction and provide an economic

¹³ *Supra*, note 3, at p.48

¹⁴ Annexure 4, at pp.11 to 13 of the *Phase One Impact Assessment Report: Ashley Lillie and Walter Peters – July 2016*

boost to the area with 110 new full time employment opportunities created in the finished development.

42. Upon consideration of the above factors, it was recommended in the HIA that HWC endorse the findings in the report as follows¹⁵:

"8.1. Retain LHC2, the railways portion backing Claremont Bypass/Boulevard. As the lower two floors follow the precedent of the 'open-plan', a re-alignment of the glass infilling could be considered, as could further development over, provided it is clearly distinguishable from the existing.

8.2. Allow demolition of LHC1 with the exception of:

- a) the colonnaded office sliver along Newry Street, which is detached and articulated from the rest of LHC1;*
- b) the stainless steel doors, which should be carefully removed and, preferably, integrated in the new development; and*
- c) the "double curve transverse wall".*

¹⁵ *Supra*, note, 3, at p. 52

If retention of the latter (c) provides excessive, a reconstruction of the same form and finish on the precise footprint, in part or in full, could be considered.

- 8.3. *The development proposals to be assessed in a Phase Two report, to be submitted to Heritage Western Cape after public consultation."*

HERITAGE IMPACT ASSESSMENT PHASE TWO (by Ms CINDY POSTLETHWAYT & PROF. WALTER PETERS)

43. The Phase Two Heritage Impact Assessment of the Werdmuller Centre was co-authored by Ms. Cindy Postlethwayt and Prof Walter Peters in July 2017, ("Phase Two HIA") in terms of section 38(4) of the Act. In contrast to the Phase One HIA, this HIA report focused on the development proposals of the Werdmuller Centre.
44. In respect of the development proposals, it was noted in the Phase One HIA that the LHC2 portion of the Werdmuller building would be largely retained, as well as the LHC1 parallelogram office building, including the portico and pedestrian colonnade along Newry Street. The remaining portion of LHC1 would be demolished and replaced by a new building consisting of basement parking,

ground floor detail, 1st floor gym, new upper parking levels and a new commercial / residential tower above.¹⁶

45. In terms of the Phase Two HIA, an assessment of the impacts of the proposals on the Werdmuller Centre found that the heritage indicators had been satisfactorily met. It noted further that given the demolition proposed and extent of re-development, it was accepted that the Werdmuller Centre as a heritage resource would inevitably be impacted upon, but would be within acceptable limits given the context of, *inter alia*, the socio-economic factors. In addition, provision had been made in the redevelopment for a display on the history of the building, and the building had been extensively documented with a Conservation Management Plan put in place.¹⁷
46. It was recommended as part of the Phase Two HIA that HWC endorses the report as having met the requirements in terms of section 38 (3) of the Act, and that HWC approves the proposed development included in Annexure C2 of that report, and allows the development to proceed to the next phase, provided that the drawings are substantially in accordance with the proposals contained in Annexure C2. ¹⁸
47. On 06 September 2017, the IACom Committee of HWC considered the Phase Two HIA and resolved, *inter alia*, not to support the proposed development as had been

¹⁶ Executive Summary: Heritage Impact Assessment Report: Cindy Postlethwayt and Prof Walter Peters - July 2017, at p.3

¹⁷ Ibid, at p.5

¹⁸ Supra, note 15 at p. 6

tabled, as the scale, bulk and proposed interventions impacted negatively on the identified heritage resource (the Werdmuller Centre) as a whole, particularly the highly significant LHC2 building and the interstitial space between LHC1 and LHC2.

APPELLANT'S GROUNDS OF APPEAL

49. We now turn to deal with the Appellant's grounds of appeal as outlined in its written submissions.

50. The Appellant identifies various countervailing considerations, which they claim are unambiguous and substantial, as follows:

"13.1. First, the property has for over 40 years failed to fulfil the function for which it was designed, namely a shopping centre. One of the reasons for its failure is that it offers impractical access routes and spaces both for customers and for retailers. It has never serve the people for whom it was intended.

"13.2. Second, the building was designed in two distinct entities, referred to in the HIA as LHC1 and LHC2. Since soon after the opening of the centre in 1975, and again since then, there have been many attempts at remedying

shortcomings in the design and construction of the building. These attempts did not succeed in increasing the viability of the building as a shopping (or, for that matter, other public) destination. It resulted in a badly altered mish-mash of components.

13.3. *Third, without drastic intervention and a substantial financial investment, the building has no future. For all of the sometimes emotive responses to the proposed redevelopment by some interested and affected parties, no socially practical and financially feasible alternative has been suggested by those who object to the redevelopment.*

13.4. *Fourth, the building is an impediment to the regeneration and sustainable development of the Claremont Central Business District (CBD).*

13.5. *Fifth, the building is deteriorating and is increasingly becoming a danger to the public."*

51. Appellant also submits that in the required balancing of considerations, the disputed significance of the heritage value of the building is inevitably outweighed.

52. Appellant submits that IACom reached a wrong conclusion as a result of the following:

"15.1. IACom did an unjustifiable about-face in relation to the heritage indicators identified in the Phase 1 HIA.

15.2. IACom did not properly evaluate the revised design proposals.

15.3. IACom did not give proper weight to the fact that the building has failed to fulfil its function for 40 years, did not properly consider the socio-economic impact of the proposed development, and did not properly consider the consequences if the development is not permitted.

15.4. IACom was influenced by an irrelevant consideration, namely that the property has been nominated as a provincial heritage site (PHS).

15.5. The IACom meeting was procedurally unfair in several respects."

53. Appellant makes the following further submissions:

53.1 IACom made little of the revised proposals, apart from expressing vague and undefined concerns in relation to the "scale, height, treatment and bulk" of the proposal. Appellant and its design team were given no opportunity to establish the true nature of any such concerns or to respond thereto.

- 53.2 Appellant denies that the property warranted a Grade II grading, and denied that it warranted declaration as a provincial heritage site.
- 53.3 IACom itself had no delegated power to declare the property a provincial heritage site.
- 53.4 In terms of the HWC Delegations, both IGICom and IACom are authorised to grade heritage resources. IGIC has the power to assess and grade sites nominated for declaration as a provincial heritage site, and may make recommendations concerning formal protection of a site
- 53.5 Whilst the consideration of grading through an HIA prepared in terms of the Act had legally constituted requirements and procedure, including a right of appeal, HWC does not have any such requirements in respect of the IGICom process. It may make a "decision" solely on the basis of the nomination documents. There is no right of appeal, nor is there any public participation required. Only following such a "decision" must the owner be informed and provided 30 days in which to respond. Only then is a formal process of notification for the proposed declaration initiated and interim protection permitted.
- 53.6 IGICom should not, in general, accept nominations for the declaration of a site as a provincial heritage site during a section 38 process.

- 53.7 The heritage authority may not legitimately refuse an application on the basis that the site may be declared a provincial heritage site in terms of an uncompleted application. The application has to be decided on the basis of the status of the site as it then stands.
- 53.8 The process leading up to the grading of the property as Grade II by IGICom was in fact flawed and unfair.
- 53.9 The heritage significance of a building, together with the feasible possibilities for adaption and conservation should have driven IACom's assessment of development proposals.

ASSESSMENT

54. The Appeal Committee is tasked with weighing up the different factors in considering whether IACom came to the correct conclusion based on the facts before it.
55. In this matter we need to weigh up the apparent failed commercial purpose for which the Werdmuller Centre was designed, as submitted by the Appellant, against protection of heritage resources, coupled with the socio-economic benefits that may be derived if the development is permitted to proceed, as well as other related aspects, and assess whether one trumps the other.

56. We accept that there may be socio-economic benefits to a future development of the Appellant's property. However, we cannot detract from the fact that the property has been identified as having heritage value, and a careful balancing act is therefore required in deciding this appeal. However, it is in dispute whether the Werdmuller Centre does indeed have heritage value and this is borne out by the fact that we are faced with starkly competing views on the matter.
57. The management of heritage resources takes place under the three-tier system which is set out in section 8 of the Act. The South African Heritage Resources Agency ("SAHRA") is responsible for the identification and management of Grade I heritage resources; a provincial heritage resources authority, (i.e. HWC in this matter), is responsible for the identification and management of Grade II heritage resources; and a local authority is responsible for the identification and management of Grade III heritage resources.
58. Section 27 (2) of the Act provides that a provincial heritage resources authority:

"must identify those places that have special qualities which make them significant in the context of the province or a region"; and

"must investigate the desirability of their declaration as provincial heritage sites",

[EMPHASIS ADDED]

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 this section"

59. The only immediate consequence of grading, which is essentially the identification of place or site as a heritage resource, is that it determines which authority is responsible for the management of the resource. Once the grading has been done, the authority concerned carries out an investigation, as set out in section 27 (2) of the Act. After that investigation, HWC may *declare* a place as a provincial heritage site, in terms of section 27 [(6)]; may issue provisional protection orders, in terms of section 29 (1) of the Act; or may designate the area in question as a protected area, in terms of section 28 (2) of the Act.
60. The Act contains procedural protections which must be observed before further steps are taken. Of particular relevance to this matter are:
- 60.1 Section 27 (8), which sets out the procedures to be followed before the declaration of a place as a heritage site. These include giving the owner an opportunity to make representations.
- 60.2 Section 28(2), which provides that a provincial heritage resources authority may declare an area as a protected area only with the consent of the owner.

61. It is to be noted that the opportunity afforded to the owner to make representations in terms of section 27 of the Act, only takes place *after* the identification of a site or place as a heritage site (i.e. after the site has been graded by a particular heritage authority) and during the prescribed process of formally *declaring* that particular site or place as a heritage resource in terms of section 27 (8) of the Act.

62. It follows that the *grading* of a particular site, or place, as a heritage resource is an internal process and is a management tool for a heritage resources authority. It would accordingly not be bound nor required to follow the mandatory and material procedure envisaged in section 27 (8)(d) of the Act (i.e. providing an owner with a reasonable opportunity for representations to be made prior to declaring his/her or its site or place as a heritage site) at the particular point of grading of a site. In as much as grading does not have an external legal effect, it would then follow that the remedy in section 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 would not be available , i.e. the remedy to approach a court to set aside or review a decision of a heritage resources authority to grade a particular site or place as a heritage resource.

63. This is accordingly not the forum to dispute the grading of the site, although we accept that on commencing the process of formal protection, there are mandatory statutory procedures that must be adhered to by HWC. Notwithstanding the contestation of the grading of LHC 1 and LHC 2 respectively, which has impacted the proposals put forward on behalf of the Appellant, it is clear that the Werdmuller Centre has heritage value, which is capable and worthy of protection.

64. Over the past 5 or so years, Claremont, in the environs of the transport interchange has gained traction in terms of viable urban use of both private and public spaces. This has happened in the wake of the City of Cape Town's more recent policy-based encouragement of higher densities, and as property owners have developed larger buildings (of mixed use, particularly residential use) in response to recent policy.
65. The proposed development of the Werdmuller Centre is poised to capitalise on the new socio-economic context. However, it is recognised that the City's densification policies, while generally welcomed, need to be treated with caution in their implementation. Heritage legislation acts as a balancer that counters a possible trend towards densification at all costs.
66. One interested and affected party suggested that the economic, social and architectural solution that will synthesize a viable solution for the project as a heritage resource is a "qualitative design approach". The socio-economic commentary provided in the HIAs is limited in its scope and does not adequately address the question of finding an acceptable quantum of bulk to sustain economic value. Rather, it appears that only two options have been explored – i.e. a "full bulk" option, and a "no-additional bulk" option.
67. The consultants have argued in both the first and second phase HIA reports that the Werdmuller Centre is comprised of two parts (i.e. LHC1 and LHC2), which

were designed at different times, and were not really convincingly integrated as a workable entity. The LHC1 component has been altered to a great extent over time, in an attempt to improve its functionality, while the LHC2 component has functioned more effectively as it was built. However, we accept that both parts are currently in a poor state of repair, having suffered long term lack of maintenance and upkeep.

68. Heritage indicators provided in the Phase One HIA have essentially been accepted by HWC, and these indicators are supported by the Committee as an appropriate set of principles to guide the redevelopment of the site in a manner which can meet the requirements of the Act. In particular, the design indicators allow for the addition of both parking on site, and for the bulking up of accommodation. Both of these are acknowledged as economic feasibility drivers for the project, and are therefore acceptable, albeit not in their current proposed form.
69. With regard to the issue of parking:
 - 69.1 The underground parking as per the current design proposals are acceptable as a sensible solution opened up by the part-demolition of LHC1.
 - 69.2 However, the parking access ramp on the Ralph Street side is viewed with caution as its impact on pedestrian flow on the Ralph Street side is questionable.

- 69.3 The addition of upper level parking is not regarded as an absolutely compelling economic break-even requirement at this point, and can only be re-assessed in due course once the Appellant submits a quantum of bulk inspired design proposal. It is understood that this analysis should form part of the contextual analysis which would be part of the land use application process, and does not fall within the ambit of this appeal.
70. The addition of a tower component is generally acceptable. The economic driver of a tower as the *sine qua non* for allowing a viable development has been motivated in a compelling manner in the HIAs. Interested and affected parties' suggestions that the building be sold and developed instead by an "art patron", are considered unrealistic currently, and fly in the face of good heritage management practice. In any event, this approach does not resolve all the issues associated with the Werdmuller Centre.
71. The design proposals currently before the Committee have not adequately addressed the HIA Phase One indicators sufficiently in essence or in detail.

LHC2:

72. A renewed attitude to the detailed conceptual approach to the design of LHC2 and the interstitial space is needed. The proposals as shown in the existing application would be overly damaging to the heritage significance of the heritage resource, and are therefore not totally acceptable in its present form.

73. The conceptual, supportive heritage-grade divide between the Grade II/Grade IIIA component (i.e. between LHC1 and LHC2), and the Grade IIIC component needs to be applied “sculpturally”, as a multi-layered, interlocking spatial response. The part of LHC1 which abuts the LHC2 interstitial zone needs to be approached in design terms with a minimal intervention, effectively providing a buffer zone, with the extent of the setbacks to be established by a heritage architect. This buffer must extend into LHC1. In contrast to this, the current design approach is the reverse, in that the “Grade IIIC” approach to design has impacted on the LHC2/interstitial space.
74. The alteration of floor levels at ground/ lower ground levels is accepted as a “necessary evil” in attaining the underground parking.
75. The removal of all the curved original internal walls (existing office component) is not accepted. A redesign that allows for keeping the original alignments of these walls, in all but exceptional, well-motivated cases to the contrary, is required. For instance, if the re-building of such walls along their original alignments is required for structural reasons, this will be acceptable if compelling motivation is provided.
76. The use of dark, reflective glazing as a finishing material for the double-curve wall element is not accepted. Whilst it is accepted that for construction logistics, this double-curved wall may need to be replaced, it is noted that the contribution

that this element currently provides in the sculptural ensemble derives from its matte finish and plastic form. We have difficulty with this being replaced with a reflective, faceted surface.

77. However, the proposal that this wall can be re-interpreted as a natural light-providing element is supported, in the context of the fact that one of LHC1's inherent design flaws was, and remains, the lack of light in many areas. It is suggested that instead of faceted glazing, one of the many forms of mesh claddings available be used as a finish, with glazing behind. Examples of mesh finishes are to be researched, and are to be illustrated in the design proposals. If necessary for natural lighting, a section of strip glazing, consistent in detail with Uytendogaardt's original strip glazing, should be explored.

78. A rational fire design which explores fully the possibility of using the existing LHC2 stairways as fire escapes, in this important heritage context, is to be provided, in accordance with the submissions of the interested and affected parties. Only if such a rational fire design report absolutely requires the addition of a new fire escape will the addition of the new external stair on the corner of Newry Street and Claremont Boulevard be acceptable. If such a stair is indeed required in terms of the rational fire requirements, this stair is to be redesigned so as to read as a conceptually separate architectural entity, not purely in terms of its materiality, but also spatially. For instance, it could be more appropriate for it to have a partly solid wall, lending some visual continuity to its relationship to the

existing building. In the current proposal it reads architecturally as an “applied box”, rather than a thoughtful contrast. Architectural contrast, as a design strategy, needs to be applied appropriately, and with subtlety, in this instance, given the recognised sculptural heritage value of the resource.

79. Of particular concern is the proposed changes to the volumetric nature of the space and the extent of glazing proposed by the Appellant. An architect with appropriate skills and expertise in the conservation of modern architecture should be appointed to advise on the interventions in the areas identified. This appointment should be approved by HWC, as being suitable for this project.

80. The need to close part of the interstitial space is reluctantly accepted as a management tool for securing the space. However, the structural proposal for inserting a very tall glass element into the existing interstitial space is not acceptable, for the following reasons:

80.1 The glazing grid introduces a grid of glazing bars into the space, which is visually disruptive to the sculptural qualities of the space;

80.2 Neither the structural solution for the glazing, nor the structure for carrying the glazing, is visually and materially “separate” enough from the existing structure;

80.3 A new proposal for the glazing, which uses a glazing system that emphasises the vertical, soaring, quality of the space, and allows the

horizontal curved Uytendogaardt elements their visual prominence, should be investigated and applied to the design proposal.

81. The night time closure of interstitial space has been documented in the report as a concern, yet the design does not show any proposal for closure of this space outside of the proposed "mall". Any type of sliding and/or folding night time closure will have a spatial impact, both in open and closed form, and will be tricky to design. A suitable design proposal to resolve this should be provided for approval.

82. In the circumstances, revised proposals for LHC2, the interstitial space and the detailing of the other portions to be retained (i.e. the parallelogram structure) would also have to be re-submitted to HWC for approval.

LHC1:

83. The alterations suggested in the design proposals to the existing building, and the retention of certain building portions are generally accepted as delineated in the HIAs.

84. In particular, interested and affected parties have requested that the real need for the extent of parking proposed be considered in the light of the vast range of

options for public transport available in the immediate environs. While it is recognised that the range of individuals who will constitute the potential buyer market for the development are likely to want to use vehicle transport as one of their transport options, it is nonetheless as likely that many of them will be solely users of other forms of transport.

85. The architectural solution for the accommodation portion of the “tower”, both in terms of form and finish, is considered acceptable, as the 3D renderings show a building which has depth to the façade, and has attempted to pick up elements of the existing Werdmuller Centre, without necessarily mimicking them. On the other hand, the architectural solution for the parking portion of the “tower”, both in terms of form and finish, is not acceptable.
86. On the ground floor exterior at Newry Street, pedestrian flow below the “parallelogram office” portion has been unduly narrowed at one point. This needs to be rectified in the next phase of design work.
87. In the light of the fact that signage for commercial components has been a problem in the past, a suitable signage strategy for the building, which complements the architecture, is to be drawn up, and fully illustrated on architectural drawings.
88. There is a strong argument by some of the interested and affected parties that, as mooted by the heritage consultants, the drastically altered LHC1 component is

of lower-heritage significance, whilst the LHC2 component is of very high significance. However, some interested and affected parties dispute this conceptual "split" in the assessment technique applied to the overall site, and argue instead that the complex can only be assessed in terms of its heritage significance as a whole.

89. The treatment of LHC2 and the interstitial space between LHC1 and LHC2 requires further consideration from a heritage perspective. The nature and extent of the interventions proposed by the Appellant for the interstitial space could have a negative impact on the significance of that space, which provides the frame to LHC2. This contributes significantly to the heritage character of the space, particularly its cultural and volumetric qualities.
90. The proposed use of a cementitious slurry for the concrete repair is not supported by the Committee as it will substantially alter the character of the portions of the structure to be retained. Alternative methods which retain the off-shutter appearance of the existing concrete need to be considered. The proposed duly appointed architect would be in a position to advise on alternatives in that regard.
91. The original design did not take into account a range of climatic concerns. For many months of the year parts of the building are damp, dark and draughty. This remains a concern and should be addressed.

92. The Committee accepts the heritage indicators in the Phase One HIA, as an appropriate set of principles designed to guide the redevelopment of the Werdmuller Centre in a manner which can meet the requirements of the Act
93. Based on the conclusion the Committee has reached, it is not necessary to deal with the procedural issues raised by the Appellant, which, in any event have been cured on appeal. The powers of the Appeal Committee in terms of section 49 of the Act are consistent with that of a wide appeal. Being a wide appeal, the Committee accordingly has the power to rectify any irregularity or illegality that may exist in the proceedings *a quo*. It can completely re-hear and determine the merits of the dispute, with reference to additional information or evidence. It can make any order that is just in the circumstances of the case.
94. In weighing up the various factors, and having due regard to the contents of the HIA for phases one and two, the Committee is of the view that the Werdmuller Centre is worthy of conservation. While we intend to uphold the appeal, this will be done subject to certain specific conditions attached, in as much as every effort must be made to preserve the heritage value of the Werdmuller Centre.
95. The Committee notes that this matter presents an opportunity for an integrated response to be developed around what is regarded as a significant heritage resource.

96. We acknowledge the real socio-economic benefits that development of the Werdmuller Center, as proposed by the Appellant, but subject to certain conditions which would ensure that the heritage value of the building is conserved, would bring. However, we reject the submission that the Werdmuller Centre is just a commercial space in the context of development of the building, as this loses sight of the heritage value of the building, which can be dangerous for the heritage elements associated with the building.

RULING

97. In the circumstances, the following *Ruling* is made:

97.1 The appeal is upheld, subject to the following conditions:

In respect of LHC2 of the Werdmuller Centre:

- (a) The parking access on the Ralph Street side must not significantly impact the pedestrian flow;
- (b) The upper level parking as per the current design is not acceptable and should be re-assessed as part of the land use application process;
- (c) The part of LHC1 which abuts the LHC2 interstitial zone must be re-approached in design terms with minimal intervention so as to effectively provide a buffer zone, which must extend into LHC1;

- (d) The original alignments of the curved internal walls (existing office component) must be retained, in a manner that allows for the keeping of the original alignments;
- (e) The use of dark, reflective glazing as finishing material for the double-curve wall element is not accepted, and a form of mesh cladding, with glazing behind, as a finish, is to be researched and presented in an illustrated design proposal to HWC for approval;
- (f) A new proposal for a glazing system which emphasizes the vertical, soaring, quality of the interstitial space, and allows the horizontal curved Uytnebogaardt elements their visual prominence is to be investigated and applied to the design proposal of inserting a tall glass element into the existing interstitial space;
- (g) A suitable design proposal for the night time closure of the interstitial space, which will not have a spatial impact, must be submitted to HWC for approval;

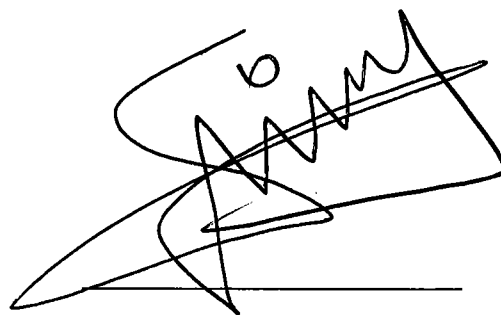
In respect of LHC1 of the Werdmuller Centre:

- (h) The pedestrian flow below the "parallelogram structure" on the ground floor exterior at Newry Street in the current design proposal must be rectified in the next phase of design work, to be submitted to HWC for approval;
- (i) An alternative method/s to the proposed use of a cementitious slurry for the concrete repair, which retain the off-shutter appearance of the existing concrete, must be considered, and submitted to HWC for approval;

(j) In respect of the "tower" component, a design strategy based on a "desirable quantum of bulk" model, which should demonstrate the contextual appropriateness of a tower, should be demonstrated in a further design proposal as part of the land use application process.

97.2 An architect with appropriate heritage skills and expertise in the conservation of modern architecture must be submitted to HWC, for approval, such professional to assist in monitoring compliance with the conditions imposed by the Committee, and must ensure that detailed design, including the installation of updated electrical and information technology components is carried out in a way that is consistent with the original design intentions of the building.

96.3 HWC must monitor and ensure that the above conditions are complied with by the Appellant, to its satisfaction.

A handwritten signature in black ink, appearing to read 'SHEKESH SIRKAR', written over a horizontal line. The signature is stylized and somewhat abstract.

SHEKESH SIRKAR

CHAIRPERSON OF THE APPEAL COMMITTEE

On behalf of the Appeal Committee

7 November 2017