



REFERENCE: 14/3/1/A3/54/0367/18

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Dear Mr du Preez

APPEALS LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE RESIDENTIAL DEVELOPMENT ON A PORTION OF THE REMAINDER OF THE FARM 757, SOMERSET WEST

1. The Environmental Authorisation ("EA") issued on 31 July 2018, and appeals submitted by Hannes Pretorius Bock & Bryant Attorneys on behalf of The Friends of the Helderberg Estate ("FOHE") and Anne Sterling Roberts on behalf of Mr Leon Booysen, which comply with the *National Appeal Regulations, 2014*, refer.
2. I have noted the comment from the holder in respect of the validity of Mr Booysen's condonation request and appeal. However, since condonation was granted, his appeal is deemed to be valid. The grounds of appeal are substantively similar to that of the FOHE.
3. After careful consideration of the appeals, as well as supporting documentation received, I have decided to dismiss the appeals and confirm the decision of the delegated competent authority in terms of section 43(6) of the National Environmental Management Act (Act No. 107 of 1998) ("NEMA").
4. The abovementioned EA and the conditions under which the authorisation was granted must be complied with and the following amendments must be implemented.
5. **AMENDMENTS/EXCLUSIONS TO THE ENVIRONMENTAL AUTHORISATION:**
 - 5.1. Condition E9 and Section G of the abovementioned EA is excluded from this authorisation.
 - 5.2. The following conditions of the EA are substituted and must be complied with:

Section E: Condition of Authorisation

Condition E3:

"This Appeal Environmental Authorisation is granted for –

- 3.1. A period of ten (10) years, from the date of this Appeal decision, during which period the holder must commence with the authorised listed activities; and
- 3.2. A period of twenty (20) years, from the date the holder commenced with the authorised listed activities, during which period the authorised listed activities for the development phase, must be concluded."

Condition E8:

"The holder must in writing, within fourteen (14) calendar days of the date of this Appeal decision notify all registered Interested and Affected Parties ("I&APs") of-

8.1. The outcome of the Appeal;

8.2. The reasons for the decision; and

8.3 The date of the decision."

6. The following corrections have been made to the EA:

Excluded:

APPLICATION FOR ENVIRONMENTAL AUTHORISATION IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AND THE ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS, 2014 (AS AMENDED): THE PROPOSED RESIDENTIAL DEVELOPMENT ON A PORTION OF THE REMAINDER OF THE FARM NO. 757 AND THE FARM NO. 758, SOMERSET WEST

Included:

APPLICATION FOR ENVIRONMENTAL AUTHORISATION IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AND THE ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS, 2014 (AS AMENDED): THE PROPOSED RESIDENTIAL DEVELOPMENT ON A PORTION OF THE REMAINDER OF THE FARM NO. 757, SOMERSET WEST

Excluded:

The holder is herein authorised to undertake the following alternative that includes the listed activities relating to the development:

The development proposal entails the establishment of a residential estate comprising of approximately 46 residential erven with a density of approximately 6.7 units per ha (gross) and associated infrastructure on a portion of the Remainder of the Farm No. 757 with a development footprint of approximately 6.7ha and a stormwater detention facility of approximately 3900m³ on the Farm No. 758, Somerset West.

Included:

The holder is herein authorised to undertake the following alternative that includes the listed activities relating to the development:

The development proposal entails the establishment of a residential estate comprising of approximately 46 residential erven with a density of approximately 6.7 units per ha (gross) and associated infrastructure with a development footprint of approximately 6.7ha and a stormwater detention facility of approximately 3900m³ on a portion of the Remainder of the Farm No. 757, Somerset West.

Excluded:

C. SITE DESCRIPTION AND LOCATION

The listed activities will be undertaken on a Portion of the Remainder of the Farm No. 757 and the Farm No. 758, Somerset West. The site is located adjacent to the northern suburbs of Somerset West, which includes Helderberg. The Farm No. 757, Somerset West is located east of the R44 Regional Road. The site is located in the north-west of the property.

The SG 26 digit code is: C0670000000007570000000000

The co-ordinates for the midpoint of each property are given below:

Proposed Site	Latitude (S)	Longitude (E)
Midpoint of Portion of the Remainder of the Farm No. 757, Somerset West	34° 02' 50.44" South	18° 50' 30.80" East
Midpoint of Portion of the Farm No. 758, Somerset West	34° 03' 02.37" South	18° 50' 27.13" East

Included:

C. SITE DESCRIPTION AND LOCATION

The listed activities will be undertaken on a Portion of the Remainder of the Farm No. 757, Somerset West. The site is located adjacent to the northern suburbs of Somerset West, which includes Helderberg. The Farm No. 757, Somerset West is located east of the R44 Regional Road. The site is located in the north-west of the property.

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The co-ordinates for the midpoint of each property are given below:

Proposed Site	Latitude (S)	Longitude (E)
Midpoint of Portion of the Remainder of the Farm No. 757, Somerset West	34° 02' 50.44" South	18° 50' 30.80" East

7. REASONS FOR THE DECISION

The following are reasons to confirm the EA issued by the Delegated Competent Authority and to dismiss the Appeals:

7.1. Public Participation Process ("PPP"):

7.1.1. The PPP in this matter complied with regulations 41-44 of the NEMA EIA Regulations, 2014 (Government Notice No. R. 982 of 4 December 2014 as amended by Government Notice No. R. 326 of 7 April 2017), in that the following was undertaken by the EAP:

- The identification of and engagement with Interested and Affected Parties ("I&APs");
 - Fixing a notice board at the entrance of the site where the listed activities are to be undertaken;
 - Identification of potential I&APs;
 - An advertisement of the availability of the BAR for consultation was placed in the 'District Mail' on 18 January 2018;
 - A copy of the revised BAR for consultation was placed at the Somerset West Public Library;
 - Written notification to registered I&APs and State Departments of the availability of the BAR for consultation between 22 January 2018 and 21 February 2018;
 - Written notification to adjacent land owners and State Departments of the availability of the revised BAR for consultation between 09 May 2018 and 08 June 2018;
 - The BAR for consultation and revised BAR for consultation were made available for a commenting period of 30 days; and
 - Written notification to adjacent landowners and State Departments of the availability of the BAR for consultation and revised BAR for consultation for a commenting period of 30 days.
- 7.1.2. With respect to the comments from FOHE that comments were not responded to or not to the satisfaction of the organisation, it should be noted that the appellants' comment referred to the negative impacts of the proposed development including *inter alia* the increased number of construction vehicles posing a threat to the safety of residents; residents being exposed to a potential increase in theft and break-ins during the construction phase; residents health will suffer as they will not be able to take walks; and stress levels will increase due to the increase in traffic. The construction vehicles will increase traffic during the construction phase of the development, but this will be temporary. The EAP cannot reasonably be expected to provide a satisfactory response as it relates to the mental and physical well-being of residents nor is it a fact that the construction phase will result in an increase in break-ins.
- 7.1.3. The proposed higher density development does not mean that the entire area and its surroundings will be changed thereby resulting in a long-term negative impact on the enjoyment of the peaceful location and scenic views by residents.
- 7.1.4. In *Clark v Faraday and Another (Cape of Good Hope Provincial Division Case No: 8532/03)* the court found that the fact that someone built a house first does not afford him more rights than his neighbour who builds a house thereafter impacting on the first owner. Residents of Helderberg Estate are not entitled to deprive the holder of developing his property in order that they may continue the enjoyment of their surrounds in the manner they have become accustomed to.
- 7.1.5. The PPP requires that the EAP responds to issues arising from the EIA process, there is no requirement for the EAP to respond to issues raised in respect of processes that form part of the broader authorisation process for a development, for example the land use planning application process.
- 7.1.6. It is clear from the responding statement that the holder had made a concerted effort to obtain contact information for I&AP's, utilising Windeed and the CoCT database of residents, and the necessary steps had been taken to inform/notify the relevant parties. As confirmed by the responding statement, Mr Booyen had nominated FOHE as a delivery address for him. FOHE had been kept informed throughout the PPP.

7.2. **Biodiversity Impact:**

- 7.2.1. The wording contained in the botanical specialist statement compiled by Bergwind Botanical Surveys & Tours CC dated 04 August 2017 indicated that a proposed residential development was being considered on approximated 6.5ha of Portion of Farm 757, Somerset West and that a site visit of the affected portion of the property was undertaken. In addition, the erroneous identification of Farm 758 as the location of the stormwater detention facility resulted in the assertion by the appellants that the Director could not have properly considered or applied his mind to the decision in respect of the biodiversity impacts with the effect that the decision is flawed.
- 7.2.2. Bergwind Botanical Surveys & Tours CC supplemented their botanical specialist statement in correspondence dated 21 September 2018, in which it was confirmed the portion of the site earmarked for the detention ponds is transformed from the original condition and not restorable to the original vegetation type and would not involve the removal of any indigenous vegetation. It further indicated that the development site is firmly supported from a botanical perspective. As pointed out by the appellants this submission was after the EA had already been issued. CapeNature's comment in respect of the biodiversity impact is however very clear.
- 7.2.3. Comment furnished by CapeNature on the draft BAR stated that *"a botanical scan was undertaken which confirms that there is no natural vegetation remaining on the property with only locally indigenous species consisting of pioneer, weedy species, which verifies the desktop mapping...there is no natural vegetation remaining on site."*
- 7.2.4. It should be noted that all documentation contained in the final BAR and all reports contained therein clearly indicate Portion of Farm 757, Somerset West as the site for the proposed development. Any confusion in respect to the property on which the detention ponds would be located did not stem from the BAR.
- 7.2.5. Based on the above information it is clear that the proposed development would not have a significant biodiversity impact.
- 7.2.6. It is argued on the one hand by the appellants that the existing trees are not waterwise and that they are a fire risk and also that they be retained particularly if it will result in a reduction in the size of the proposed development. The Landscape Plan was prepared by professionals and though the appellant may be of the view that the recommended tree type may not grow, it is his opinion.

7.3. **Stormwater Impact:**

- 7.3.1. The detention pond is designed to detain water in quantities equivalent to likely stormwater discharges caused by a 1:100-year flood event. The detention pond is large enough to contain that amount of water, where the water will filter into the soil. This then allows a minimal amount of water to be discharged into the stream. The detention pond will also filter water to minimise pollution impacts. Erosion measures will be installed where the outlet structure discharges into the stream. These measures will reduce the stream flow of the water to be discharged. The stormwater detention facility will not negatively impact on the health, safety or integrity of infrastructure.
- 7.3.2. The assertion that the ponds are simply soakaways that will result in downstream flooding is unfounded.

7.4. **Visual Impact:**

- 7.4.1. The visual impact of the proposed development was considered by Cindy Postlethwayt as part of a HIA dated September 2016.
- 7.4.2. Viewpoints from the N2, from Winery Road, Yonder Hills Winery (R44), and Bottlery Hills (R310, Polkadraai Road) were considered.
- 7.4.3. Her findings were as follows:

- The northern site boundary, at the ridgeline, is sheltered from view from the Helderberg-Stellenosch agricultural landscape and the distant R44 by an existing tree line. Only the northern row of proposed houses are on the ridgeline and these will be obscured in the same way that development further west along the ridgeline is obscured. Distance further minimises visibility to a significant extent.
- The site reads as part of the enveloping urban area on the Somerset West side of the Helderberg ridgeline. Moreover, it is situated at a lower elevation than development on the adjoining ridgeline.
- Along the northern edge, it is proposed that the existing palisade fence be retained, and a hedgerow planted alongside it, inside the property boundary, thus reinforcing visual screening. The existing tree line obscures this interface from the neighbouring rural properties.
- The proposed development emulates patterns of the adjoining residential area and the 5 properties along the western interface are excluded from the security estate and engage directly with properties across the road. That the Design Intent specifies no architectural typology ensures that development will integrate seamlessly into the adjoining residential area.

Maintenance of high levels of visual absorption is proposed through:

- The requirement for a landscaping plan for all public areas and road reserves before the commencement of construction. Existing trees are to be retained as far as possible.
- A new tree line behind the existing treeline in the north is to be established to supplement and reinforce the existing screening of the site.
- Exterior walls are to be finished in an approved colour palette which, with predominantly darker colours, will blend more effectively with the backdrop of mountain and trees.

In summary, the impact upon the urban-rural interface and the Stellenbosch-Helderberg Foothills Cultural Landscape and the significance thereof is rated as low and the land uses are contextually appropriate. The proposed addresses the indicators appropriately.

In respect to its cumulative impact, it is suggested that the development appears visually as infill, as would development on the lower campus. This follows current development trends. It is only if additional development breaks the ridgeline or extends above the 300m contour line that the cumulative impact of the development would be negative in respect of identified heritage resources.

The proposed layout and mitigation measures as laid out in the Design Intent appropriately and responsibly address the heritage concerns."

7.4.4. The development proposal will remain below the 300m contour line and will have minimal visual impact during the operational phase. Additionally, the visual impact of the site can be adequately mitigated through the implementation of mitigation measures contained in the EMPr.

7.4.4.1. A landscape master plan for the public areas and road reserves must be prepared to the satisfaction of the City of Cape Town Environmental and Heritage Management Branch.

7.4.4.2. The establishment of a new tree line, behind the existing trees on the boundary of the property to the north.

7.4.4.3. The exterior walls of all homes must be finished in a colour palette that minimises reflection of light and blends in with the tree and mountain backdrop.

7.4.5. The Heritage Impact Assessment ("HIA") did not deal with visual impact from Strand and Somerset West, which is concerning to the appellants and it is argued that a specialist VIA would have comprehensively dealt with this aspect. It should be noted however that the proposed development is surrounded by existing residential developments and the College and the treeline screens the development from the Stellenbosch side.

7.4.6. As has been stated, this development is an infill development within an existing residential area.

7.5. **Traffic Impact:**

7.5.1. The concerns around the time at which the Traffic Impact Assessment ("TIA") was undertaken have been expressed by the appellants. It should however be noted that at the time the TIA was undertaken, school holidays had not yet started and the EAP is not required to ascertain from residents the time of year they travel abroad.

7.5.2. The site inspection conducted for the purpose of this appeal was conducted during the 7am morning peak, and although the route to the Somerset West CBD and toward the R44 were busy, it was free-flowing and no vehicles were encountered along Harewood Road, Helderspruit Road or Waveren Road on arrival or departure from the site.

7.5.3. The TIA confirms that the residential roads via which access to the proposed development will be obtained have sufficient carrying capacity to accommodate traffic from the proposed development.

7.5.4. The development will have minor impacts on traffic in the area during the operational phase. Minor upgrades will be required to the traffic network to accommodate the development proposal as recommended in the TIA.

7.5.5. With respect to utilizing access through the College, as stated by the holder the paved "roads" referred to are quite steep and not suitable to carry significant volumes of traffic. Should a formal road be constructed to municipal standards, the gradient would not be acceptable. Furthermore, the intention is to sell off the proposed development and it would not make sense to provide access to a private development through the grounds of Helderberg College...The easiest access to the site is from the west. Apart from the technical considerations the College also does not wish to provide access through College grounds, as that obviously creates security issues, where a residential development will be accessed through a private education institution."

7.5.6. The appellant also argued that in a 2005 comment the CoCT roads department was not in favour of utilising Helderspruit Road for construction vehicles and cannot see why it would be viewed differently now. All matters are considered on the merits of the application and conditions do change over time. The aforesaid comment was provided by a municipal official in a municipal process and it is outside of my mandate to make a determination as to the reasoning for the decision or why a similar comment was not submitted in the EIA process for the proposed development.

7.6. **Need & Desirability:**

7.6.1. The delegated competent authority has complied with the obligation set out in terms of the Needs and Desirability guideline to consider both the environmental and planning context. -The Department applied the triple bottom line test of sustainability as prescribed in NEMA, and concluded that all identified impacts and cumulative

impacts, have been found to be capable of adequate mitigation and to have adequate regard to the socio-economic and environmental benefits.

- 7.6.2. The appellants have taken the position that due to the many other high-end developments that have become available in the area, a need for yet another development on Farm 757, Somerset West does not exist. The Need & Desirability Guideline is clear that whilst the *"financial viability considerations of the private developer might indicate if a development is "do-able", the "need and desirability" will be determined by considering the broader community's needs and interests as reflected in a credible IDP, SDF and EMF for the area, and as determined by the EIA."*
- 7.6.3. Need and desirability can be equated to wise use of land. As the proposed development falls within an existing residential area, it is in line with surrounding uses.
- 7.6.4. As indicated by the holder, with respect to the demand and financial viability of the project, the holder takes the commercial risk and financial liability of the development. The fact of other developments in the area does not derogate from the ecological and socio-economic sustainability of the proposed development on Remainder Farm 757.

7.7. **Socio-Economic Impact:**

- 7.7.1. The appellants have misconstrued socio-economic impact with financial viability. The existence of other developments within a 5km radius of the proposed development which still have unsold properties cannot be used as a determining factor as to the financial viability of the proposed development.
- 7.7.2. The holder has indicated that the proposed development is aimed at middle-income buyers. Many of the surrounding estates are luxury upmarket developments and cannot be used as a barometer as to the likelihood of the proposed development being financially viable.
- 7.7.3. The development proposal will allow for the creation of some temporary employment opportunities during the development phase as well as skills acquisition. The development proposal will also provide employment opportunities during the operational phase.

7.8. **Agricultural Potential:**

- 7.8.1. Appellants have indicated that the proposed site had been farmed until approximately 1990 and could successfully be farmed.
- 7.8.2. The property is not zoned for agriculture and the fact that it can be farmed does not mean that it is the best use of the land.
- 7.8.3. Having considered both the environmental and planning context in terms of the existing land use rights, granting the EA was determined to be the Best Practicable Environmental Alternative, despite the property at the time being outside the urban edge.

7.9. **Urban Edge:**

- 7.9.1. The property is situated directly proximate to the edge of the adjacent built-up area and is considered as infill development. Infill development is the process of developing vacant or under-used parcels within existing urban areas that are already largely developed. Infill development encourages a more efficient investment in infrastructure because it encourages growth in designated areas where there is existing infrastructure already in place and is in line with the CoCT's densification policy.
- 7.9.2. The MSDF published in 2017 and as such the currently applicable MSDF, no longer references the urban edge. The application area can therefore properly be

described as an urban infill development area and is therefore located inside the relevant urban area.

7.9.3. The granting of an EA for the proposed development which at the time of issue of the EA was considered outside of the urban edge but viewed as infill development was based on the merits of the application.

7.10. **Servitude Road Access:**

7.10.1. Appellant, Mr Booyesen, has indicated that he refused to have his access moved and that the condition imposed in 27.3 of the EA is therefore not implementable.

7.10.2. The condition imposed does not in any way deny the appellant or any other users of the existing road access to the property. Traffic from that road is being redirected across the proposed development, per the recommendations of the TIA with the relevant right of way servitudes across the subject property in favour of the adjacent property.

7.10.3. The matter of *Linvestment CC v Hammersly* (643/2006[[2008]ZASCA 1(28 February 2008) provides some guidance. The issue related to whether the owner of a servient tenement can, of his own volition, change the route of a defined right of way registered against the title deed of his property. In this matter the respondent also refused to have his existing route changed in any way.

The court found that servitudes are by their nature of the creation of preceding generations devised in another time to serve ends which must now be satisfied in a different environment. The order of court declared "*that if the owner of the servient tenement offers a relocation of an existing defined servitude right of way the dominant owner is obliged to accept such relocation provided that:*

- (a) the servient owner is or will be materially inconvenienced in the use of his property by the maintenance of the status quo ante;
- (b) the relocation occurs on the servient tenement;
- (c) the relocation will not prejudice the owner of the dominant tenement;
- (d) the servient owner pays the costs attendant upon such relocation including those costs involved in amending the registration of title deeds of the servient tenement (and, if applicable, the dominant tenement)."

7.10.4. Based on the above judgement and the many attempts made by the holder to address and accommodate the concerns raised by the appellant in respect of the existing road, a reasonable, alternative, which deviates from the existing route was offered to the appellant in part due to the concerns raised in respect of the difficulties in accessing and exiting the existing road raised by the appellant.

7.10.5. The appellant is not being denied access and is therefore not being prejudiced by having a slight deviation of his current access.

7.10.6. A servitude across the holders property will be registered thus ensuring the right of way across the subject property in favour of the appellant.

7.11. **Approval Process:**

7.11.1. Appellants have raised concerns about the fact that the holder was granted a meeting with senior management and inferred that this was an indication of bias in favour of the holder.

7.11.2. Appellants are aware of the aforesaid engagement as minutes of the meeting are on file and the outcomes indicated therein for the purpose of transparency.

7.11.3. There are situations which arise when the case officer is not in a position to provide the required answers/undertaking and a request may be made to meet with someone more senior. It in no way indicates a position of support for the development.

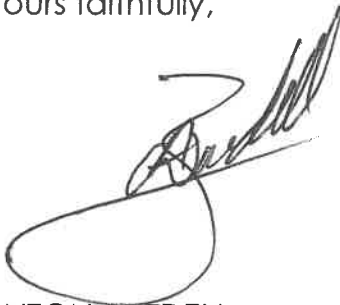
7.11.4. Having had view of the draft BAR and inputs prior to the submission of the final BAR, unless substantive changes have been made to the proposal, the decision-maker is not looking at the documentation for the first time. As such, the decision-maker did not have to consider 1403 pages within a period of 35 days in order to apply his mind to the issue of the EA.

7.11.5. It should also be noted that the EMP contained in the final BAR and approved, makes no reference to chicken houses or Paarl.

7.12. **HIA:**

7.12.1. Concerns around the HIA process and approval have not been dealt with in this appeal as it falls outside the purview of this Department, and within the HWC mandate. The holder is required to obtain all relevant authorisations from the responsible departments. Processes followed are determined by the relevant authorities and concerns around these processes are to be dealt with by the said authorities.

Yours faithfully,



ANTON BREDELE

**PROVINCIAL MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING**

DATE: 10/9/2020

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Dear Mr Bock

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ON A PORTION OF THE REMAINDER OF THE FARM 757, SOMERSET WEST**

Your appeal lodged against the Environmental Authorisation ("EA") granted 31 July 2018 for the above proposed development, refers.

After careful consideration of all the appeals, as well as supporting documentation received, I have decided in terms of section 43(6) of the *National Environmental Management Act, 1998*, ("NEMA") to confirm the decision of the competent authority granted on 31 July and dismiss the appeals.

Attached herewith please find a copy of my letter addressed to the applicant containing the the reasons for my appeal decision.

Yours faithfully,

ANTON BREDELL
MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

DATE: 10/9/2020



REFERENCE: 14/3/1/A3/54/0367/18

Mr Leon Booysen
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Email: astirlingroberts@aol.com

Attention: Ann Stirling Roberts

Dear Sir

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