



**REFERENCE: 14/3/1/A2/30/0408/19**

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Attention: Mr. Richard Summers

Dear Mr Summers

**APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE REFUSAL OF THE PROPOSED MIXED USE DEVELOPMENT AND ASSOCIATED INFRASTRUCTURE ON CAPE FARM 738 & 767, PHILIPPI**

1. Appeal lodged in terms of section 43(2) of the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* ("NEMA") against the Refusal Environmental Authorisation ("EA") issued by the Department of Environmental Affairs and Development Planning's Director: Development Management (Region 1) for the proposed mixed use development and associated infrastructure on Cape Farm 738 & 767, Philippi ("the property") has reference.
2. After careful consideration of the appeal, responding statement, and supporting documentation received, I have decided to confirm the decision of the delegated competent authority and to dismiss the appeal.
3. The reasons for the confirmation of the aforementioned decision of the delegated officer are listed below and includes responses to the appeal issues.
4. **REASONS FOR THE DECISION**  
The following are reasons to confirm the Environmental Authorisation issued by the Delegated Competent Authority:
  - 4.1. In the *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007 (6) SA 4(CC)* the

- Constitutional Court had occasion to consider the provisions of section 24 of the Constitution along with the provisions of NEMA. The court noted that one of the declared purposes of NEMA is to establish principles that will guide organs of state in making decisions that may affect the environment. One of these principles requires environmental authorities to consider social, economic and environmental impacts of the proposed activity including its disadvantages and benefits.
- 4.2. The judgement states that: *"The need for development must now be determined by its impact on the environment, sustainable development and social and economic interests. The duty of environmental authorities is to integrate these factors into decision-making and make decisions that are informed by these considerations. This process requires a decision-maker to consider the impact of the proposed development on the environment and socio-economic conditions."*
  - 4.3. Cabinet had endorsed the Philippi Horticultural Area: Socio-Economic Agricultural Plan, referred to as the Indego Report, and agreed to adhere thereto in the spirit of intergovernmental co-operation. The decision to refuse the EA in adherence with Cabinet's decision cannot be considered to be arbitrary if the contents of the Indego Report is taken into account.
  - 4.4. In *Johannesburg Liquor Licensing Board v Kuhn 1963 4 SA 666 (A) 671*, Holmes JA held that arbitrariness connotes caprice, or the exercise of the will instead of reason or principle, without a consideration of the merits. Cabinet and the decision-maker took cognisance of the content of the Indego Report. The decision to refuse the EA resulted from considering the information furnished by the applicant and the content of the Indego Report. The proposed development has been considered in the context of the empowering legislation, NEMA, and with due regard to all relevant guidelines and policies. Having considered the socio-economic and environmental impacts of the proposed development, including its advantages and benefits; integrating those considerations into his decision; and making a decision informed by them, it was determined that no development amounted to the best practicable environment option.
  - 4.5. The case of *MEC for Environmental Affairs and Development Planning v Clairison's CC 2013 (6) SA 235 (SCA) para 22* held that the law remains that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as far he acts in good faith (and reasonably and rationally) a court of law cannot interfere. The weight attached to the Indego Report is therefore a discretion exercised by the decision-maker and does not connote an arbitrary decision.
  - 4.6. The environmental significance of the Philippi Horticultural Area ("PHA"), as stated in the Indego Report, *"is attributable to its location over the portion of the Cape Flats Aquifer with the greatest groundwater potential and some of the best water quality. This results in a network of vleis and dams across the production area...The PHA is an important natural recharge area for the Cape Flats Aquifer. The protection of the Cape Flats Aquifer will increase the climate change resilience and food security of the City."*
  - 4.7. Water has been identified as the biggest limiting factor to agricultural production within the Western Cape. Over time a greater share of water is being allocated to urban use with the result that less water is being made available for farming.
  - 4.8. The Indego Report emphasises that any decision regarding the future of the PHA must be considered within the context of *"climate change and the massive challenges facing the agricultural sector – especially in terms of water and land*

availability- and its proven climate change resilience and contribution to food security."

- 4.9. A portion of the site had been farmed as recently as 2017, arguments that the site is not viable for agricultural production are therefore questionable.

#### **Need and Desirability**

- 4.10. The proposed mixed use development meets the principles of the Provincial Spatial Development Framework ("PSDF") as it will actively assist with mixed use densification that will establish the more efficient usage of the site, better using municipal services, create employment for local residents and achieve spatial intensification.
- 4.11. Cape Farms 738 and 767 are both indicated as Consolidated Areas and Incremental Growth Areas, on the City of Cape Town's ("CoCT") Spatial Development Framework Plan, 2018. Incremental Growth and Consolidated Areas are areas where the CoCT is committed to servicing existing communities and new development areas subject to infrastructure capacity. It is considered that the proposed development will actively promote the intensification and densification of activities/land uses within the urban area and the proposed development is therefore aligned with the Municipal SDF ("MSDF").
- 4.12. The designation in terms of the Spatial Development Plan ("SDF") for the Cape Flats District of 2014 is "*Agricultural areas of significant value*" given (1) existing use, (2) potential and emerging agricultural use due to new cultivation technology, availability of irrigation water, new varieties of crop types and the realization of terroir qualities, and (3) food security. Although both properties are included in the demarcated PHA according to the Cape Flats District Plan, this categorization is not consistent with the categorization contained in the Cape Town SDF, which identifies the application site as urban consolidation areas. The Cape Flats District Plan is in the process of being reviewed in a manner which will interpret and also reflect the reviewed MSDF and its related policies. In view of the fact that both properties are not located within that part of the PHA which is considered to be 'an agricultural area of significant value' but falls inside an area which is considered to be rural, outside the PHA core, the proposed mixed use development proposal is considered appropriate (DEA&DP Spatial Planning).
- 4.13. CoCT: The application is not generally consistent with CTSDP (2012), Cape Flats District Plan (2012), Urban Design Policy (2013) and Design and Management Guidelines for a Safer City (2014).
- 4.14. Although much confusion exists in respect of what is referred to as "Core PHA" and "Greater PHA", the Indego Report defines the Core PHA as a minimum footprint for horticultural and allied activities. The site in question falls within the area described as Core PHA.
- 4.15. The district plans are currently under revision.

#### **Impact on Agricultural Land:**

- 4.16. The site which is approximately 36.24ha in extent has been lying fallow for many years, largely as a result of continued theft of livestock, produce, infrastructure and equipment. This has negatively impacted upon the farming viability of the site.
- 4.17. Up until 2017, only 3ha of land had been cultivated. The proposed development that at least 13.47ha of the site is set aside for the sole purpose of agricultural activity.
- 4.18. The applicant argues that the site is of poor soil and water quality but it does not preclude the site being farmed or used in line with its agricultural zoning.

- 4.19. The change of land use is not supported by the Department of Agriculture. It was further indicated that land in question has agricultural value and had previously been cultivated.

**Heritage / Visual Impacts:**

- 4.20. The CoCT Heritage Resources section is of the view that the current proposal does not respond to the identified design information sufficiently and will have a considerable negative impact on the heritage resources on the site as well as the larger PHA as a whole
- 4.21. The Heritage Assessment confirms that the PHA is a distinctive farming landscape that is unique within the city and that it forms a "green lung" within the dense urban environment.
- 4.22. In terms of social significance the wider PHA produces significant quantities of vegetables and flowers for local consumption. Farming activities provide employment for almost 4000 workers. Neither of the subject farms however still engage in active agriculture.
- 4.23. While the subject sites occupy an edge location within the farming area, the Helderberg Range on the eastern side of the flats completes the whole and is the dominant edge to the viewshed, and a unique sense of place is achieved in this location, which is of high scenic significance. The subject sites are particularly important as they create a "visual gateway" into the horticultural area.
- 4.24. Cultural Landscape Significance, is the aspect with the highest degree of heritage significance. The subject sites are deserving of being included in the heritage area for the PHA. They possess all the characteristics of the cultural landscape, but on a local level have a heightened role to play in terms of their location at a "gateway space" into the horticultural area and the associated physical and visual degree of access this implies. The Jobsvlei Farm has heightened environmental significance, having a continuous wetland within its extent and the Ohloff Farm has considerable aesthetic and social significance, being a unique example of a largely intact early 1877 settler farm.
- 4.25. The subject farms making up the site are deserving of a Grade IIIA level of significance within the broader proposed Philippi heritage area. Grade IIIA resources are noted by Heritage Western Cape ("HWC") to be "buildings and sites that have sufficient intrinsic significance to be regarded as local heritage resources; and are significant enough to warrant that any alteration is regulated. Such buildings and sites may be representative, being excellent examples of their kind or may be rare. In either case, they should receive maximum protection at local level."
- 4.26. The site affords uninterrupted views from Strandfontein Road across the site to the distant mountain ranges, enabling an appreciation of the viewers' location within the Cape Flats and enhancing the site's sense of place. The site situates the viewer within the broader agricultural landscape, it therefore has both a contextual and agricultural visual significance.
- 4.27. The area of the site has visual significance as it embraces agricultural, heritage, contextual and ecological components enabling views that embody all these elements.
- 4.28. The agricultural elements on the site, namely the Aloe wind breaks, wetlands, swales and dams have agricultural, heritage and ecological significance which contributes to the reading of the landscape as agricultural even when the fields are fallow. They are signifiers of the Cape Flats agrarian landscape.
- 4.29. HWC did not support the proposal as it was considered to be urban in nature, involves a rezoning from Agricultural Zone, displaces viable farmland and further

- erodes the identified edge of the PHA, which is a heritage resource of regional significance.
- 4.30. The Indego Report indicates that the PHA's heritage is directly linked to agricultural production and the significance of this heritage has been recognised by the CoCT through the imposition of a heritage overlay over the PHA in the MSDF 2018.

**Receiving Environment:**

- 4.31. A number of wetland areas, dams and irrigation channels occur within the site as confirmed in the Freshwater Assessment of January 2017, prepared by BlueScience.
- 4.32. Due to the amount of high density residential development within the Zeekoe/Lotus River catchment, the water quality as well as ecosystem health of this system is poor to very poor.
- 4.33. There are two wetland features on the site. A large wetland area that is still present in the southern portion of the site while the other wetland in the north eastern part of the site has largely been lost as a result of infilling and only a remnant wetland area remains.
- 4.34. The large wetland in the south of the site is approximately 4ha in extent. It has been modified as a result of excavation within the wetland to create small dams within the more permanently wet portion of the wetland, while seasonally wet areas have been subjected to cultivation and comprise of largely exotic grasses such as *Polypogon viridis*.
- 4.35. The open areas provide a habitat to waterbirds such as redknobbed coot (*Fulica cristata*), yellowbilled duck (*Anas undulata*), Cape shoveller (*A. smithii*) and African snipe (*Gallinago nigripennis*). There are also five amphibian species known to occur in the area, including the eastern-most population of the endangered Western Leopard Toad (*Amietophrynus pantherinus*).
- 4.36. Artificially created wetlands within the site consist largely of kikuyu grass and bulrush (*T. capensis*), water lilies (*Nymphae spp.*), arum lilies (*Zantedeschia aethiopica*) and small patches of sedges.
- 4.37. The large wetland to the south of the site is moderately modified and is considered to be of a moderate to high ecological importance and the other wetland areas within the site are in a largely modified ecological state and are of low to marginal importance and sensitivity.
- 4.38. All of the natural wetland features within the site have been mapped as aquatic Critical Ecological Support Areas and all the artificial wetlands as Other Ecological Support Areas in the CoCT BioNet.
- 4.39. A development setback buffer of at least 50m as measured from the outer delineated edge of the wetland area for the wetland to the south of the site is recommended.

**Alternatives:**

- 4.40. The three alternatives proposed are very similar, with reduced development areas in the south near the wetland for Alternative C.
- 4.41. Whereas Alternative A, proposed 1275 residential units, a retail component and associated infrastructure with a footprint of 14.87ha and 13.47ha set aside for agriculture, Alternative B, proposes 1274 residential units, also has a footprint of 14.87ha with 13.47ha set aside for agriculture.
- 4.42. Alternative C, proposes 750 residential units a retail component and associated infrastructure with a slightly reduced footprint of 11.9ha and 15.42ha set aside for agriculture.

**Comments from Organs of State:**

- 4.43. The Department of Agriculture does not support the proposed development as the land in question has agricultural value and had previously been cultivated.
- 4.44. CoCT Spatial Planning and Heritage Resources section does not support the proposed development. CoCT Spatial Planning is of the view that the proposal does not align with relevant planning policy and guidelines and CoCT Heritage Resources are of the view that the proposed development will have a considerable negative impact on the heritage resources on the site as well as the larger PHA as a whole.
- 4.45. HWC did not support the proposal as it was considered to be urban in nature, involves a rezoning from Agricultural Zone, displaces viable farmland and further erodes the identified edge of the PHA, which is a heritage resource of regional significance.

Since I have discharged my decision-making powers when making the decision I am *functus officio* in this regard. My decision is final and your only recourse, should you still be aggrieved by my decision, is to apply to the Western Cape High Court to review my decision.

Your interest in the future of our environment is appreciated.

Yours faithfully,



ANTON BREDELL

**WESTERN CAPE MINISTER OF LOCAL GOVERNMENT,  
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING**

DATE: 19/6/2020



**REFERENCE: 14/3/1/A2/30/0408/19**

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Dear Ms Coleman

**APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE REFUSAL OF THE PROPOSED MIXED USE DEVELOPMENT AND ASSOCIATED INFRASTRUCTURE ON CAPE FARM 738 & 767, PHILIPPI**

Your responding statement submitted against the Appeal lodged in terms of section 43(2) of the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* ("NEMA") against the Refusal Environmental Authorisation ("EA") issued by the Department of Environmental Affairs and Development Planning's Director: Development Management (Region 1) for the proposed mixed use development and associated infrastructure on Cape Farm 738 & 767, Philippi ("the property") has reference.

After careful consideration of the appeal, your responding statement, as well as supporting documentation received, I have decided in terms of section 43(6) of the NEMA to dismiss the appeals and confirm the decision of the delegated competent authority.

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

Your interest in the future of our environment is appreciated.

Yours faithfully,

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

DATE: 19/6/2020