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Mr B Hayward
Municipal Manager
Cape Agulhas Municipality
P O Box 51
BREDASDORP
7180

Dear Mr Hayward

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE PROPOSED HOUSING PROJECT ON ERF 857, STRUISBAAI

The appeal lodged against the Environmental Authorisation ("EA") for the proposed housing project on Erf No 857, Struisbaai ("the property") refers.

After careful consideration of the appeal, as well as supporting documentation received, I have decided to confirm the decision of the delegated competent authority and to dismiss the appeal. The original Environmental Authorisation granted on 20 September 2017 and the conditions under which the authorisation was granted are still valid, however Conditions E2 and E3 and section F are removed and Condition E1 is amended to read as follows:-

Condition E1

This environmental authorisation is valid for a period of five years from the date of this appeal decision. The holder must commence with the listed activities within the said period or this environmental authorisation lapses and a new application for environmental authorisation must be submitted to the competent authority. If the holder wishes to extend the validity period of the environmental authorisation, an application for amendment in this regard must be made to the competent authority prior to the expiry date of this appeal environmental authorisation.

REASONS FOR THE DECISION

The following are reasons for confirming the Environmental Authorisation issued by the Delegated Authority:

- (i) The reasons contained in the Environmental Authorisation dated 20 September 2017.
- (ii) **The delegated competent authority could not consider the application of the Municipality in view of the fact that the environmental application has lapsed, in terms of Regulation 67, which prescribes that "67(1) an application in terms of these Regulations lapses if the applicant, after having submitted the application fails, for a period of six months, to comply with a requirement in terms of these Regulations. 67(2) Sub-regulation (1) does not apply where reasons for failure have been communicated to the competent authority in writing and accepted by the competent authority."**

The lapsing of an application in terms of Regulation 67 is in legal parlance referred to as an absolute lapse, which cannot be cured by any subsequent extension granted by the competent authority. For this reason alone the appeal should be upheld and the Applicant directed to apply afresh for environmental authorisation.

The application did not lapse as the applicant communicated reasons for the failure to meet the timeframes to the competent authority in writing. Those reasons were accepted by the competent authority and the requested extensions were granted in accordance with *sub-regulation 67(2) of Government Notice No R543 of 18 June 2010* the NEMA.

Hereunder a chronology of the requests for extension:

- On 2 April 2015, the EAP advised that during the commenting period, Heritage Western Cape ("HWC") had requested that various heritage studies be undertaken. As the specialist studies would take some time to finalise and would have to be included in the final Basic Assessment Report ("final BAR"), a request was made for an extension of the application process.
- On 22 April 2015, the Department granted a six (6) month extension of the time in which to submit the final BAR.
- On 23 June 2015, correspondence was sent to the Cape Agulhas Municipality advising of the promulgation of the EIA Regulations 2014 and to advise that the Final BAR is due by 30 September 2015.
- On 27 August 2015, the EAP requested a further six (6) month extension.
- On 6 October 2015, the Department granted extension till 31 March 2016.
- On 7 March 2016, the final Draft Basic Assessment Report was submitted to the Department, with the 21 day public review and commenting period running until 4 April 2016.

- On 29 March 2016, due to the requirements of HWC a further request for the extension of timeframes was submitted by the EAP.
- On 7 April 2016, an extension of the timeframe was granted till 29 September 2016.
- On 18 August 2016, the final BAR was submitted to the Department.
- On 30 September 2016, the final BAR was rejected.
- On 26 January 2017, correspondence was sent to Cape Agulhas Municipality advising that the final BAR is due by 30 March 2017.
- On 15 March 2017, the EAP provided a status report in terms of the Department's requirements set out in the correspondence rejecting the final BAR. Due to a number of outstanding items, an extension until 31 July 2017 was requested.
- On 17 March 2017, an extension was granted till 15 September 2017.
- On 10 May 2017, the amended BAR for the Public Participation was received.
- On 12 July 2017, the Department received the amended final BAR dated June 2017, which was accepted per correspondence dated 25 August 2017.

(iii) **The Environmental Assessment Practitioner ("EAP") has not provided any written proof of appointment to act on behalf of the Applicant and there is no proof that the Council or any delegated official has authorised the application process.**

This Department accepts that the EAP submitted the application on behalf of the client and acted per their instruction and as the duly authorised representative. At no point during the application process did the municipality indicate that the EAP was acting on his own volition or without a mandate.

The application was completed and signed by Mr PPA Hayward, authorised by the Cape Agulhas Municipality. Correspondence was at all times addressed to the Municipal Manager throughout the application process. Any concerns regarding Council and municipal procurement processes have to be addressed by the municipality, utilising the relevant municipal procedures.

(iv) **The Appellant submits that the Minister should request the EAP to provide Councils Resolution to authorise the application process and the official appointment of the EAP and the procurement process followed.**

My office accepts the EAP's *bona fides* and therefore does not require the EAP to provide supplementary documentation to confirm that he was duly appointed and authorised to submit the application on behalf of the municipality.

- (v) **In terms of Regulation 21, it was incumbent on the Applicant or the EAP to submit the application before conducting the basic assessment. The draft BAR was made available before the commenting period for the application had expired.**

A draft version of the BAR was made available within the commenting period for application. The applicant/EAP is not precluded from undertaking studies and processes that it deems necessary for the purpose of an application and making such information available for comment or consideration. The final Draft Basic Assessment Report was submitted to the Department on 7 March 2016, with a 21day public review and commenting period running until 4 April 2016.

Regulation 21(2)(d) of Government Notice No R543 of 18 June 2010 stipulates that after having submitted an application, the EAP managing the application must – prepare a basic assessment report in accordance with regulation 22. Regulation 22 requires the EAP to include *inter alia* any comments received in connection with the application or basic assessment report and any responses by the EAP to those representations, comments and views. Mr Gerrie Claasen submitted such comment on behalf of Zero Plus Trading (Pty) Ltd, and these are included with responses on pages 42-49 of the draft Basic Assessment Report.

On 18 August 2016, the final BAR was submitted to the Department. The final BAR was rejected as the number of units had been reduced in relation to the original application without explanation and other requirements had to be addressed.

On 10 May 2017, the amended BAR was made available for Public Participation. On 12 July 2017, the Department received the amended final BAR dated June 2017.

- (vi) **Regulation 54(2) specifically provides that notice of the application must be given to all potential I&AP's. This in practical terms can only be done by means of public notice. The EAP failed to comply with the Guidelines.**

Regulation 54(2) stipulates that "*The person conducting a public participation process must take into account any guidelines applicable to public participation as contemplated' in section 24J of the Act and must give notice to all potential interested and affected parties of the application which is subjected to public participation by-*

(a) *fixing a notice board at a place conspicuous to the public at the boundary or on the fence of-*

(i) *the site where the activity to which the application relates is or is to be undertaken; and*

(ii) any alternative site mentioned in the application;

(b) giving written notice to-

(i) the owner or person in control of that land if the applicant is not the owner or person in control of the land;

(ii) the occupiers of the site where the activity is or is to be undertaken or to any alternative site where the activity is to be undertaken;

(iii) owners and occupiers of land adjacent to the site where the activity is or is to be undertaken or to any alternative site where the activity is to be undertaken;

(iv) the municipal councillor of the ward in which the site or alternative site is situated and any organisation of ratepayers that represent the community in the area;

(v) the municipality which has jurisdiction in the area;

(vi) any organ of state having jurisdiction in respect of any aspect of the activity; and

(vii) any other party as required by the competent authority;

(c) placing an advertisement in-

(i) one local newspaper; or

(ii) any official Gazette that is published specifically for the purpose of providing public notice of applications or other submissions made in terms of these Regulations..."

The EAP complied with the PPP requirements as set out in Regulation 54 of Government Notice No R543 of 18 June 2010 above in that site notices had been affixed at the site where the activity is to be undertaken on 2 October 2014, potential I&AP's, relevant Departments and Organs of State received initial notification of the proposed development on 15 October 2014, an advertisement was placed in the "Die Suidernuus" local newspaper on 3 October 2014 and both the final BAR and amended final BAR were distributed for comment from 7 March 2016 and 8 May 2017 respectively.

(vii) **The development proposal advertised at the beginning of the Public Participation Process ("PPP") ie. October 2014, is substantially different to the final development proposal and**

alternatives thereto, which formed part of the final BAR and was approved in terms of the EA.

The difference between the original development proposal and the proposal in the final BAR were noted by officials in the Department. Accordingly, the final BAR was rejected in order that the EAP could address these changes to the development proposal and address additional factors the Department required clarification on. The amended final BAR was submitted for Public Participation and was subsequently submitted to the Department on 12 July 2017. The difference in the proposal related mainly to a reduction in the number of proposed units.

- (viii) **Regulation 54(2) specifically provides that notice of the application must be given to all potential I&AP's. This in practical terms can only be done by means of public notice particularly because the final development proposal differed so much from the original proposal, the EAP was obliged to advertise the final BAR again.**

Regulation 56(2) states that "*Before the EAP managing an application for environmental authorisation submits a final report complied in terms of these Regulations to the competent authority, the EAP must give registered interested and affected parties access to, and an opportunity to comment on the report in writing.*"

- (ix) **The PPP is further flawed as the notice of commencement of the PPP only refers to the applicable listed activities at the time in terms of the 2010 Regulations whereas the EA also authorises a number of activities in terms of the 2014 EIA Regulations. The scope of the relevant 2014 listed activities authorised exceeds the 2010 listed activities in material respects. For this reason the EAP was obligated to publish a further public notice.**

Regulation 53(3) of Government Notice No. R982 of 4 December 2014, the NEMA EIA Regulations 2014, stipulates that "*Where an application submitted in terms of the previous NEMA regulations, is pending in relation to an activity of which a component of the same activity was not identified under the previous NEMA notices, but is now identified in terms of section 24(2) of the Act, the competent authority must dispense of such application in terms of the previous NEMA regulations and may authorise the activity identified in terms of section 24(2) as if it was applied for, on condition that all impacts of the newly identified activity and requirements of these Regulations have also been considered and adequately assessed.*"

- (x) **Although the listed activities authorised in terms of the EA are collectively described as a 'subsidiary housing development', the applicant is legally obliged to comply with the**

applicable provisions of the NEMA and the Regulations in respect of each activity applied for. The BAR must contain a description of the proposed activities and the BAR does not comply with this requirement.

The site notice, advert in the Suidernuus as well as the notices to the neighbours listed the relevant listed activities applicable to the development and are included in the draft Basic Assessment Report. Both the 2010 and 2014 listed activities are included in the amended final BAR under "Section A: Activity Information" together with a project description as it relates to the applicable listed activity. The information is contained on pages 39-42 of the said report.

- (xi) **The Applicant is obliged to not only describe each and every activity applied for in detail, but also to describe in detail the environment that may be affected by each and every activity and furthermore the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by each and every of the proposed activities**

A description and assessment of the significance of impacts prior to and after mitigation in relation to the geographical, physical, biological, social, economic and cultural aspects are discussed on pages 66 – 90 of the amended final BAR. Specialist reports and inputs further address the potential impacts of the proposed activities on the receiving environment.

- (xii) **Besides the preferred alternative which is described in great detail, the EAP deals with other alternatives in minimalistic terms. The manner of dealing with alternatives is materially flawed. The preferred alternative authorised merely constitutes a continuation of past spatial planning and land use practices characteristic of the apartheid era. The Appellant submits that it is not only unsustainable but discriminatory to have this kind of residential development immediately adjacent to a landfill site.**

The preferred alternative was approved for the following reasons:

- The location promotes socio-economic integration as it will link Struisbaai North (Molshoop) to Struisbaai South;
- The proposed rezoning and subdivision of the property is in line with the policy guidelines for the area, which earmarks the property for GAP housing and state subsidised residential development
- The location of the proposed erven within the area earmarked for residential development grants the opportunity for fill in an area between Struisbaai North and Struisbaai, an objective identified in the Cape Agulhas Municipality's SDF;

- The site is well located with regards to proximity to the Struisbaai central business district, community and public facilities in both Struisbaai and Struisbaai North.
- The site is well positioned for employment opportunities with respect to industrial areas in the immediate vicinity;
- Existing infrastructure can be upgraded to accommodate the proposed development.
- The indigenous vegetation on site is considered to have a low conservation value due to previous site disturbance and transformation related to Eskom infrastructure, as well as dense alien vegetation encroachment.

The alternatives were considered and were not discussed in the same detail as upon assessment of the alternatives they were not considered suitable.

- Location Alternative 2 was not considered suitable as according to the Cape Agulhas Municipality's SDF the site is earmarked for community tourism development purposes only.
- Location Alternative 3 is privately owned and the site has been categorised as a Critical Biodiversity Area.
- Location Alternative 4 has been identified for industrial and retail development in the Cape Agulhas Municipality's SDF and is also currently privately owned.
- Location Alternative 5 which constitutes 81ha of vacant municipal land, covering an area of undulating vegetated dunes comprising indigenous vegetation and portions categorised as Critical Biodiversity Areas. Although the area has been identified for future development in the Cape Agulhas Municipality's SDF, the site has moderate to good conservation value indigenous vegetation remnants in good condition as well as viable populations of species of conservation concern.
- Location Alternative 6 falls within close proximity to the Struisbaai Waste Water Treatment Works.

The Socio-economic Impact Assessment was limited to the preferred alternative and no-go alternative. Alternatives 2-6 were not assessed based on the reasons stipulated above.

(xiii)

A concern repeatedly raised during the PPP is the water shortage in Struisbaai and the requirement to drill new boreholes. From the engineering report of SRK Consulting dated 10 June 2010, it is confirmed that a full licence application to the Minister of Water and Sanitation was required to abstract ground water from underground resources. It is unclear whether such water licence was obtained. The absence of the water licence is not explained in the application.

The SRK Consulting report dated 10 June 2010, indicates that sufficient water supply exists to supply 3366 erven. In the Motivation Report for the housing project, prepared by Town and Country it states "*Struisbaai is supplied with water from 6 boreholes. Additional yield available from developed sources not in production amounts to 27 l/s (2339 kl/d) sufficient water sourced exists to develop 437 low cost erven.*

The total storage capacity currently required, including the proposed development, is 2,858 MI vs. available 4,3 MI. Sufficient storage capacity therefore exists to develop the proposed 437 low cost erven"

The Draft Services Report for Civil Engineering Services on a Portion of Erf 857, Struisbaai prepared by Hessequa Consulting Engineers (June 2015) indicates that "*the total storage capacity currently required, including the proposed development, is 2,858 MI vs. available 4,3 MI. Sufficient storage capacity therefore exists to develop the proposed 437 low cost erven.*"

Correspondence submitted by Cape Agulhas Municipality dated 16 November 2016, confirms that sufficient bulk services capacity is available to service the proposed mixed use housing development on Erf 857, Struisbaai in terms of **water**, sewerage, storm water, solid waste removal and electricity.

Acquisition of a water licence falls within the mandate of the Department of Water Affairs and Sanitation. The EA does not preclude the Applicant from obtaining all other relevant authorisations.

- (xiv) **The BAR does not deal with the servitudes required for engineering infrastructure and the impacts on the property rights of the affected owners**

The BAR does not deal with the servitudes required for engineering infrastructure and the impacts on the property rights of the affected owners as this is a Land Use Planning matter and is beyond the scope of the NEMA.

- (xv) **The 200m buffer applicable to a drop off facility is not appropriate as the waste disposal site is not a drop off facility but a class of land fill site requiring a much larger buffer zone.**

The applicant obtained a permit to operate the waste drop-off facility from the national Department of Environment and Tourism on 3 September 2008.

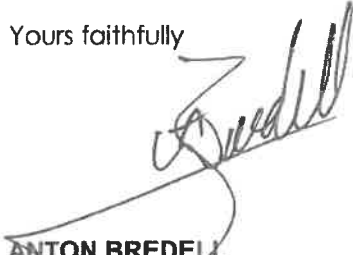
The Applicant further obtained a Waste Management Licence in terms of the Waste Act 2008 (Act No. 59 of 2008) for the closure of the Struisbaai waste disposal facility on a Portion of Erf No. 857, Struisbaai dated 7 November 2014.

The 200m buffer applicable to a drop off facility is considered appropriate. Condition 15 of the Waste Licence which deals with the condition of operations until closure states that, "The facility must be managed and operated:-

In such a manner that no nuisance conditions such as odour or health hazards occur..."

The site will not pose a risk to residents of the development.

Yours faithfully



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

DATE: 25/6/2018

cc. Mr H Fortuin Director: Development Management Region 2

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