



Reference No: 14/3/1/A6/7/0529/21

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Dear Sir,

APPEAL LODGED IN TERMS OF SECTION 43(2) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT NO. 107 OF 1998) AGAINST THE GRANTING OF THE ENVIRONMENTAL AUTHORISATION FOR THE REDEVELOPMENT OF RESIDENTIAL AND RECREATIONAL FACILITIES ON ERVEN 242 AND 212, BISHOPSCOURT (PROTEA VILLAGE COMMUNITY LAND CLAIM, PHASE 1)

1. The appeal lodged in terms of section Section 43(2) of the *National Environmental Management Act, 1998 (Act No. 107 of 1998)* ("NEMA") and Regulation 4 of the *National Appeal Regulations, 2014* (Government Notice No. R. 993 of 8 December 2014) against the Environmental Authorisation ("EA") issued by the Director: Development Management ("Delegated Competent Authority") authorising the redevelopment of residential and recreational facilities on Erven 242 and 212, Bishops Court (Protea Village Community Land Claim, Phase 1), refers.
2. After careful consideration of the grounds of appeal, as well as supporting documentation received, I have decided to **dismiss** the appeal and **confirm** the decision of the delegated competent authority.
3. The reasons for the confirmation of the aforementioned decision of the delegated officer are listed below and includes responses to the issues you have raised.
4. **REASONS FOR THE DECISION**
The following are reasons, inclusive of those contained in the EA, to confirm the Environmental Authorisation issued by the Delegated Competent Authority:
 - 4.1 **APPEAL GROUND 1: COMPROMISED STANDARDS OF ECOLOGICAL SUSTAINABILITY**
To give effect to the general objectives of integrated environmental management, the impacts of the authorised listed activities on the environment have been considered, investigated, assessed and reported on in the BAR.

The Environmental Authorisation does not fail to uphold and protect the environmental rights of present and future generations and indeed considered the NEMA principles. The Basic Assessment Report ("BAR") does not unduly compromise acceptable standards of ecological sustainability in terms of the NEMA, since the BAR complies with Appendix 1 of the EIA Regulations, 2014.

The freshwater specialist report by Freshwater Consulting cc conducted during the Basic Assessment process meet the requirements of Appendix 6 of the EIA Regulations, 2014.

The impact on biodiversity as it pertains to the aquatic system on site has been considered and the impacts adequately assessed.

A General Authorisation was issued by the Department of Water and Sanitation on 24 October 2019 for the purpose of ground stabilisation to develop a residential development on Erf 242. A Water Use License Application has also been lodged for the proposed development and dewatering activities on Erf 212.

The freshwater specialist report by Freshwater Consulting cc is deemed as adequate and has addresses all the potential significant impacts.

A thorough study of the on-site watercourses has been conducted by Freshwater Consulting CC and as such no additional expert advice is required.

4.2 **APPEAL GROUND 2: FUNDAMENTAL BREACH OF THE LAND CLAIM SETTLEMENT AGREEMENT**

While the Land Claim Settlement Agreement guides the process in terms of which development of the subject erven is to occur and the and the relationship between the parties, the contents of the Agreement are not material to the EIA process.

The purpose of the EIA Regulations is to regulate the procedure and criteria relating to the preparation, evaluation, submission, processing and consideration of, and decision on applications for environmental authorisation for the commencement of activities, subjected to EIA's, to avoid or mitigate detrimental impacts on the environment and to optimise positive environmental impacts.

In terms of the EIA Regulations, 2014, an applicant must provide the competent authority with all information that reasonably has or may have the potential of influencing any decision with regard to an application. In this regard, the land claim award was not deemed as essential by the competent authority during the EIA process since the information contained therein was not considered crucial to the decision-making process. The land claim award in itself does not require any assessments and the information is not fundamental to the outcome of the EIA process. The background to the land claim and associated legislation has been summarised in the BAR, which also explains that the land claim serves as a point of departure and no alternative sites should be considered.

The Basic Assessment process took into account the most recent information thereby considering and weighing up the needs of the Protea Village community, current environmental baseline, and present status of the market.

The project team has however utilised the previous 2004 NMA conceptual report as a point of departure for the proposed development.

According to the information contained on page 97 of the BAR, "The "project informants" of the Freshwater Assessment undertaken by Dr. Day are clearly stated (per Appendix G(c)) of the final BAR and make specific reference to the 2003 baseline study conducted by Ms Kate Snaddon (under the NMA study). The conclusions of the Freshwater Assessment undertaken by Dr Day are in keeping with the Terms of Reference stipulated at the outset of this assessment. Furthermore, the report and the site were discussed between specialists within the same company, as Freshwater Consulting Group did the initial baseline assessment."

The proposed leasehold and freehold residential opportunities are not a deviation from the land claim award. In terms of the *Restitution of Land Rights Act, 1994 (Act No. 22 of 1994)*, the Minister of Rural Development and Land Reform is required to formally consent to any alienation of land where a land claim has been awarded. Application to the Minister for the required consent is underway in accordance with the business plan.

4.3 **APPEAL GROUND 3: FAILURE TO DISCLOSE THE LAND CLAIM SETTLEMENT AGREEMENT**

A copy of the Land Claim Settlement Agreement was not deemed as essential by the delegated competent authority during the EIA process since the information contained therein was not considered crucial to the decision-making process. The land claim award in itself does not require any assessments and the information is not fundamental to the outcome of the EIA process. Whilst the land claim is related to the consideration of the need for the development on the Erven 212 and 242, the impacts associated with the proposed development have been assessed as part of the EIA process. Further, the Land Claim Settlement Agreement is not pertinent to the information requirements for an EIA application.

The background to the land claim and associated legislation has been summarised in the BAR. The Reference Number and date of the Land Claim awarded have been included in the BAR along with the dates the claim was lodged and awarded.

The fact that the Land Claim Settlement Agreement was not included in the public participation process is thus not deemed as a material non-disclosure of information nor a fatal flaw in the EIA process.

4.4 **APPEAL GROUND 4: INCREMENTAL DECISION-MAKING**

Although Phase 2 initially formed part of the proposed development, Phases 1 and 2 are stand-alone developments and as such, Phase 2 will be proceeded with at a later stage, with its own set of legal requirements to be met.

Phase 1 comprises not only development on Erf 242 (the 86 units), but also a portion of the units allocated for freehold and leasehold on Erf 212. Phase 2 comprises only 10 units, as well as a small sewage pump on the southwestern corner of Erf 212 to service the proposed 10 plots, when developed.

Although the impacts of Phase 2 have been assessed, there are certain aspects which require further input and investigation by specialists. This further investigation will result in further delays and unnecessarily hamper the return of the Claimants to their ancestral land.

The success of Phase 1 is not dependent on the implementation of Phase 2, since Phase 1 will still be economically viable from funds generated by the units allocated for freehold and leasehold on Erf 212.

Significant engagement with the Protea Village Claimant Community, the City of Cape Town and the Department of Rural Development and Land Reform has occurred to ensure that the development concept meets the requirements of the 86 families.

4.5 **APPEAL GROUND 5: FRESHWATER REPORT DOES NOT COMPLY WITH THE EIA REGULATIONS**

Regulation 13 of the EIA Regulations, 2014 sets out the general requirements for Environmental Assessment Practitioners and specialists and Appendices 1 and 6 of the EIA Regulations, 2014 sets out the content requirements for the BAR and freshwater specialist report. Both reports comply with Appendices 1 and 6, respectively of the EIA Regulations, 2014.

The freshwater specialist report has not and cannot be construed as the BAR since the format of the BAR has been determined by the competent authority. This issue has never been raised during the EIA process.

The freshwater specialist never confirmed that the freshwater specialist report is the BAR. In fact, the report Dr Day referred to in Annexure A4 was indeed the BAR, which was informed by an initial constraints analysis. The assertion that the freshwater specialist report is the BAR was quoted out of context.

4.6 **APPEAL GROUND 6: FAILURE TO CONSIDER THE NM&A ALTERNATIVE**

Alternatives, in relation to a proposed activity, means different means of meeting the general purpose and requirements of the activity, which may include alternatives to the-

- (a) property on which or location where the activity is proposed to be undertaken;
 - (b) type of activity to be undertaken;
 - (c) design or layout of the activity;
 - (d) technology to be used in the activity; or
 - (e) operational aspects of the activity;
- and includes the option of not implementing the activity.

As is apparent from the above, the investigation of alternatives permits a degree of discretion and does not prescribe to the proponent which form the investigation of alternatives should take.

Section 24O (1)(b)(iv) of NEMA requires that the competent authority must take into account "*where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application...*"

The authorised alternative is considered the Best Practicable Environmental Option ("BPEO") for the site. According to NEMA the "BPEO" means the "*option that provides the most benefit and causes the least damage to the environment as a whole, at a cost acceptable to society, in the long term as well as in the short term*".

There has been ample and reasonable attempt to amend the layout of the development in order to address, amongst others, the concerns of Interested and Affected Parties. The competent authority has considered the layout alternatives as assessed and deemed the authorised alternative to be reasonable and feasible.

The authorised layout constitutes the sound application of the BPEO. The consideration of alternatives is thus considered to be adequate. The competent authority is satisfied that the alternatives that were considered and assessed as part of the EIA process meets the requirements of the EIA Regulations, 2014.

Regarding the viability of alternatives, the BAR indicates that the business plan has been extensively workshopped and improved upon in collaboration with the Department of Agriculture, Land Reform and Rural Development, the City of Cape Town, Bethel Partners, the professional team and the Protea Village Community and their independent advisors, over a 4-year iterative process.

While the layout in Annexure A7 depicts a layout that would be "*likely to result in overall low levels of significance to aquatic ecosystems*" it was deemed unsustainable from a socio-economic and restitution perspective. Sustainable development must balance environmental, social and economic considerations. there is no obligation on the Applicant to assess any particular alternative.

There is also no obligation on the Applicant to assess or implement the NM & Associates layout under the EIA Regulations, 2014.

4.7 **APPEAL GROUND 7: FAILURE TO DISCLOSE THE BUSINESS PLAN**

It is not standard practice for a proponent to disclose their business plan to the department as part of the EIA process.

Clause 2.2.2.2. of the Land Claim Settlement Agreement provides that a business plan will be drawn up as part of the community development and asset management plan described in clause 2.2.3.3 thereof, to establish feasibility and affordability of restoration and development. Information pertaining to the business plan was included in the BAR and is attached to the Responding Statement as "RS 5" which was provided in the FBAR in response to I&AP queries and dealt with the feasibility and affordability of the development of Erf 212 and Erf 242.

The Applicant stipulated that the information which was excluded from the final BAR relates to the detailed financial workings of the development, which are "*confidential to the project and the Protea Village Community and will not be shared. Sufficient information has been presented in this process and in this report to provide detail on the sustainability of the proposal.*"

5. **EXCLUSIONS / AMENDMENTS / INCLUSIONS:**

5.1 Section F of the abovementioned EA is excluded from this authorisation.

5.2 The following condition of the EA are substituted and must be complied with:

Condition E3:

The holder must commence with, and conclude, the listed activities within the stipulated validity period which this Appeal Environmental Authorisation is granted for, or this Environmental Authorisation shall lapse and a new application for Environmental Authorisation must be submitted to the competent authority.

This Appeal Environmental Authorisation is granted for –

- (a) A period of five (5) years, from the date of issue of this decision, during which period the holder must commence with the authorised listed activities; and
- (b) A period of ten (10) years, from the date the holder commenced with an authorised listed activity, during which period the authorised listed activities for the construction phase must be concluded.

Condition E6:

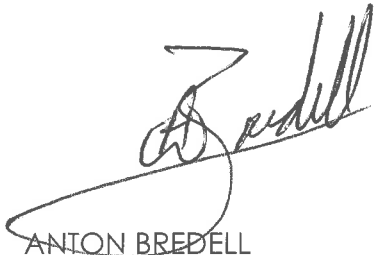
The holder of the authorisation must in writing, within 14 (fourteen) calendar days of the date of this appeal decision notify all registered Interested and Affected Parties ("I&APs") of –

- 6.1. The outcome of the appeal;
- 6.2. The reasons for the decision;
- 6.3. The date of the decision.

6. 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: 9/11/2021

Copied to:
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