



**SPECIAL MEETING OF THE MAYORAL
COMMITTEE**

**SPESIALE VERGADERING VAN DIE
BURGEMEESTERSKOMITEE**

**INTLANGANISO EKHETHEKILEYO YEKOMITI
KASODOLOPHU**

A G E N D A

I-AJENDA

**DATE / DATUM / UMHLA : 10 JANUARY / JANUARIE /
JANYUWARI 2022**

**VENUE / PLEK / INDAWO : MAYORAL COMMITTEE
BOARDROOM**

**CIVIC CENTRE / BURGERSENTRUM / IZIKO LOLUNTU
HERMANUS**

TIME / TYD / IXESHA : 10:00

MUNICIPALITY / MUNISIPALITEIT / UMASIPALA WE-OVERSTRAND

Office of the Municipal
Manager
Municipal Offices
HERMANUS

17 December 2021

NOTICE TO MAYORAL COMMITTEE MEMBERS

NOTICE IS HEREBY GIVEN that a **SPECIAL MEETING** of the **MAYORAL COMMITTEE** will be held in the **MAYORAL COMMITTEE BOARDROOM, CIVIC CENTRE, HERMANUS** on **MONDAY, 10 JANUARY 2022** at **10:00** to consider the business set forth in the subjoined agenda.

D O'NEILL
MUNICIPAL MANAGER

17 Desember 2021

KENNISGEWING AAN BURGEMEESTERSKOMITEE-LEDE

KENNIS WORD HIERMEE GEGEE dat **SPESIALE VERGADERING** van die **BURGEMEESTERSKOMITEE** gehou sal word in die **BURGEMEESTERSKOMITEEKAMER, BURGERSENTRUM, HERMANUS** op **MAANDAG, 10 JANUARIE 2022 om 10:00** om die sake op meegaande sakelys te bespreek.

D O'NEILL
MUNISIPALE BESTUURDER

17 Desember 2021

ISAZISO ESIYA KUMALUNGU E-KOMITI KASODOLOPHU

OKU KUKWAZISA ukuba intlanganiso **YESIQHELO yeKOMITI KASODOLOPHU**, iza kuba se **I-IGUMBI LE KOMITI KA SODOLOPHU, kwiZiko, eHERMANUS UMUVULO UMHLA, 10 JANYUWARI 2022** ngeye-**10:00** ukuqwalasela imicimbi ekule ajenda iqhotyoshelwe apha.

D O'NEILL
UMPHATHI KAMASIPALA

AGENDA/...

4.

FUTURE OF DE MOND CARAVAN PARK AND ADJACENT LAND : PORTIONS OF ERVEN 4831 & 5327, HERMANUS

4831 & 5327 HVK

R Kuchar

Senior Manager : Town & Spatial Planning

8 November 2021

(028) 313 - 8087

1. Executive Summary

To submit an item to Council setting out the detailed information of De Mond properties. Further giving information and background of the process followed for outsourcing De Mond and to discuss the reasons and the terms for the outsourcing.

2. Service Delivery and Budget Implementation Plan - IGNITE

Infrastructure and Planning
Town Planning

3. Compliance with Strategic Priorities

Infrastructure investment and development

4. Delegated Authority

None

5. Legal Requirements

Municipal Finance Management Act, 2003
Administration of Immovable Property Policy of Overstrand Municipality, as amended

6. Property Information/Background/Discussion**6.1 PROPERTY INFORMATION****6.1.1. Erf sizes**

ERF NUMBER	EXTENT	LEASE AREA
5327	1,247 ha	0,76 ha
4831	234,65 ha	10,5 ha
Total lease area applicable ±11,26 ha.		

(Locality & Lease Area maps are attached as Annexure A.)

6.1.2 Title Deed Conditions**ERF 5327**

The Fishery B is the site of the Cape Nature Conservation Office. When Trunk Road 28 was reconstructed, the Hermanus Council took transfer of the remainder of Erf 5327, over which the road is constructed, in exchange for another portion of land identified as erf 5326 being a portion of erf 4833. As this was purely an exchange of land of equal size, no purchase price was between the Trunk Road to Stanford and the manager's cottage at De Mond caravan camp.

Although not subject to the same limitations as applicable to The Fishery, (refer below) it may not be alienated without the consent of the State, or as stated in the Agreement of Sale, the consent of the Minister of Agriculture.

The following clause also appears in the Deed of Sale:

“That the State shall have the right at all times, of resuming for public purposes, such portion or portions of the land hereby granted, as may not have been alienated by the Municipality. In the event of resumption as aforesaid, no compensation shall be payable by the State, except in respect of substantial improvements of a permanent nature, erected or made on the land resumed, whether by the Municipality or by any person or body acting under the express authority of the said Municipality.”

Attached as Annexure B – “Grondbrief”.

ERF 4831

Erf 4831 became Council property by way of Crown Grant dating back to 1942. This grant was made in terms of the Crown Lands Disposal Act No. 15 of 1887 – Cape. (Copy of Crown Grant No 110/42 attached as Annexure C.)

The grant is subject to the following conditions:

- That in terms of a resolution of Parliament of 1934, it may only be used as a public resort.
- That government shall at all times have free rights to use any portion of the land for obtaining access to the Klein River Lagoon.
- Reversionary clause in favour of the State should the property no longer be used as a public resort.

6.1.3 Zoning

Resort Zone : Holiday Resorts (RZ)

Primary Use (Vested)

Conservation Use, Holiday Accommodation, Private Open Space, Private Road, Tourist Accommodation, Additional Dwelling Units for Staff Accommodation, Conference Facilities, Holiday Housing, Place of Assembly, Place of Entertainment, Recreational Facilities, Restaurant, Tourist Facilities

Consent Uses (Application)

Hotel, Rooftop Base Station, Transmission Tower, any other use determined by Council

6.2 BACKGROUND

6.2.1 Historical use



Erven 4831 and 5327 was used as a public resort from the early 1940's. From the early 1990's portions of the property were let to various lessees who operated different public facilities on the land. Some of the facilities became permanently occupied with public being excluded from accessing it.

6.2.2 Investigation into future use

Greater Hermanus Municipality in 1999 commissioned Advocate Werner Zybrands Consultus (Pty) Ltd to investigate "Possible Municipal Partnership for Caravan Parks". (Advocate Zybrands' report attached as Annexure D.)

De Mond, Onrustrivier and Hawston caravan parks were investigated.

Public meetings were held and in 2000 the report made the following findings regarding De Mond, and the following options were identified :

- ❖ **Retaining status quo by extending the present lease.**
 - This alternative is not recommended.
- ❖ **Full privatisation by selling the property.**
 - This alternative is not recommended.
- ❖ **Council operation of the resort.**
 - This only as a short-term option.
- ❖ **Operation by a community-based organisation.**
 - This only as an interim measure.
- ❖ **Granting a concession.**
 - This alternative is recommended although not as an immediate solution.
 - That request for proposal documents be drafted.

6.2.3 Progress for Proposal Call***PROPOSAL CALL 1 – MARCH 2007***

A proposal call was advertised March 2007 and a total of four (4) tenders were received. The tender was awarded to Atterbury Western Cape and an agreement was entered into. Atterbury Western Cape's agreement was cancelled in 2010 citing that this transaction they felt was a Public Private Partnership in terms of Section 120(4) of the Municipal Finance Management Act, 2003, No 56 of 2003.

At the time of the tender the property was still occupied by ±210 structures of the lessees.

Council at its meeting 24 November 2010 took the following resolution:

"that the Municipal Manager of Overstrand Municipality hereby be authorised and directed to conduct the Feasibility Study required by Section 120(4) of the Municipal Finance Management Act, 2003, No. 56 of 2003 and comply with all applicable statutory and regulatory requirements, including the Public Private Partnership Regulations, and to report the finding of said Feasibility

Study and comments thereon to the Council in order that it be able to take a reasoned, deliberate decision in principle on whether to proceed with a proposed Public Private Partnership Agreement.”

Mr. J du Plessis Attorney and Ms. A. Botha of PAMS as specialist consultant on PPP's were appointed to conduct the study in terms of Section 120 of the Municipal Finance Management Act 2003, No. 56 of 2003.

Public comments were invited on feasibility study on 1 December 2011.

Four (4) comments were received :

- De Mond Caravan Park Association
- Hermanus Lagoon Property Owners Association
- Kleinrivier Park Owners Association
- Vogelgat Private Nature Reserve

It must also be stated before finalizing the feasibility study the National and Provincial Treasury confirmed that according to them the leasing of De Mond does not constitute a Public Private Partnership, but rather a long-term lease that can be disposed according to the Council Fixed Asset Management Policy. (Feasibility Study is attached as Annexure E.)

Eviction Order

As the property was previously occupied by ±210 structures, Overstrand Municipality when the lease expired gave notice to the occupants to vacate the property and remove their structures. However, a few of the people who resided on the property permanently refused to vacate the property. Overstrand Municipality applied for an eviction order which was granted on 10 December 2012. (Attached as Annexure F.) The remaining people vacated the premises, and the property now could be put to tender as it was unoccupied.

Council at its meeting 27 February 2013 took the following resolution:

- “1. that the comments received on the feasibility study **be noted** and the authors be advised of the Council's decision.*
- 2. that the findings of the feasibility study **be noted** and accepted, and*
- 3. that the municipal properties concerned be made available on a long-term lease basis for development of primarily a public resort in a manner that will secure ecologically sustainable development, promote more equitable access for members of the broader public to municipal resources, socio economic development and optimum use of municipal land in the best interest of the local community.”*

PREPARATION OF PROPOSAL CALL DOCUMENTATION

Lyners Consulting Engineers was appointed to assist with compilation of the proposal call documentation.

Ms A Botha of PAMS, with assistance of Adv W Zybrands, were included as sub consultants to assist with compilation of proposal call documentation.

The proposal call documentation was informed by all relevant legislation, policy documents, etc.

In addition to the above the following technical reports were also compiled:

- Bulk services department – GLS Consulting
- Standard for Civil Engineering Services – Overstrand Municipality
- Planning Reports – Urban Dynamics
- Environmental Report – Withers Environmental Consultants

These reports served as information to the proposal call documentation and as information to prospective tenderers.

PROPOSAL CALL 2 – 28 March 2014

No tenders were received.

PROPOSAL CALL 3 – 2 October 2014

When the proposal call was advertised only one (1) tender was received. This tender was however non-responsive, and the tender was cancelled.

PROPOSAL CALL 4 – 31 JULY 2015

This proposal call consisted of a 2-stage bidding process with the first stage being where interested parties could register and only the registered parties will partake in the second stage, which was the tender proposal.

Registration phase

- Eleven (11) parties registered.
- Of the eleven (11) parties nine (9) remained after compulsory site visit and briefing session.

Proposal call phase – 12 February 2016**Three (3) companies submitted proposals:**

- *Greystone Trading 945 (Pty) Ltd*
- *Hermanus ECO Village (Pty) Ltd*
- *The Crown Grant JV (Pohl Group)*

Out of the three (3) only two (2) tenderers were responsive and qualified. The tender was awarded to Crown Grant JV (Pohl Group).

A lease agreement was entered into on 7 March 2018 between Overstrand Municipality and Pohl Group for a period of 45 years after the tender was successfully awarded to them. The agreement entered into was for the development and lease of municipal property, being a portion of Erf 4831 Hermanus (approximately 10,5 ha in extent) and a portion of Erf 5327 Hermanus (approximately 0,76ha in extent) and in total approximately 11,26 ha in extent (hereinafter jointly referred to as "the property"), also known as "De Mond" for the purpose of developing and operating a Holiday Resort.

The Pohl Group failed to fulfil the suspensive conditions contained in the lease agreement by 1 July 2019. This had the effect that the lease agreement lapsed on 1 July 2019, which the Pohl Group placed in dispute. The matter was subsequently referred for mediation and subsequently arbitration (as the mediation was unsuccessful). The arbitration was instituted by the Pohl Group in terms of the lease agreement.

The outcome of the arbitration was that the lease has lapsed on 1 July 2019 and the property is again available to the Municipality to utilize.

DISCUSSION

Why put De Mond to tender?

As it was the conclusion in Adv Zybrands' report for a long-term solution, it would be best to outsource the development and operation of the De Mond resort.

This will relief the Municipality from the financial cost of developing and operating a resort. It is also not the expertise of the Municipality running resorts.

Why make the property available on a lease?

In terms of the Crown Grant and the "Grondbrief" it is evident that the Municipality may not sell the properties. The only option is that the Municipality remain the owner of the properties and therefore a lease is the only available option.

Why a resort development?

The Crown Grant stipulate that the site may only be used for purpose of a public resort.

Why a long-term lease?

The proposal call determined a 45-year lease period. The cost of upgrading of services was estimated at ±R11,5 million (excl. VAT) in 2014. This cost with escalation would most probably be between R15 – R20 million (excl. VAT).

In addition to this cost the cost of the development of a resort would probably amount to a further capital cost of R50 million depending on which type of facility is developed. However, if even with a low-key resort developed the cost will be running into millions as the site is covered with blue gum that needs to be removed and the site be landscaped. Services would need replacement and upgrade.

In order for a developer to recoup their capital they would require a long-term lease of at least 20 years. However, the Municipality cannot enter into a lease with an option to renew in terms of its Fixed Asset Management Policy. Therefore, a longer lease would most likely receive more favourable consideration by prospective developers and operators.

Why a tender and not out of hand?

In terms of Council's Fixed Asset Management Policy, a property such as De Mond entailing a commercial enterprise should be disposed of on a competitive basis and through a public tender should be called for. The opinion from Property Administration is attached as Annexure G.

Where does the project stand at this stage?

Currently there are two short-term leases on the properties concerned being with Kleinrivier Lagoon Park and De Vette Mossel.

Their leases will be cancelled as soon as the future of the area is decided upon.

Various enquiries have been received from prospective developers in the last year. Some are locals and some from other parts of the country. There is thus definite interest in developing De Mond as a resort.

In view of the above tender documentation has been reviewed and updated. The department is at the stage to request the Tender Specification Meeting to finalize the specifications and the tender documentation.

After the approval of the tender documentation and if Council so decide the Municipality could go out to tender.

Conclusion

Council, after consideration of the documentation, need to decide how to deal with the properties going forward.

7. Financial Implications

N/A

8. Staff Implications

N/A

9. Comments from other Departments, Divisions and Administrations

N/A

10. Annexures

- Annexure A: Locality & Lease Area Maps
- Annexure B: Copy of "Grondbrief" – Erf 5327
- Annexure C: Copy of Crown Grant No 110/42 – Erf 4831
- Annexure D: Advocate Zybrands' report
- Annexure E: Feasibility Study
- Annexure F: Eviction Order
- Annexure G: Opinion from Property Administration

RECOMMENDATION TO THE COUNCIL:

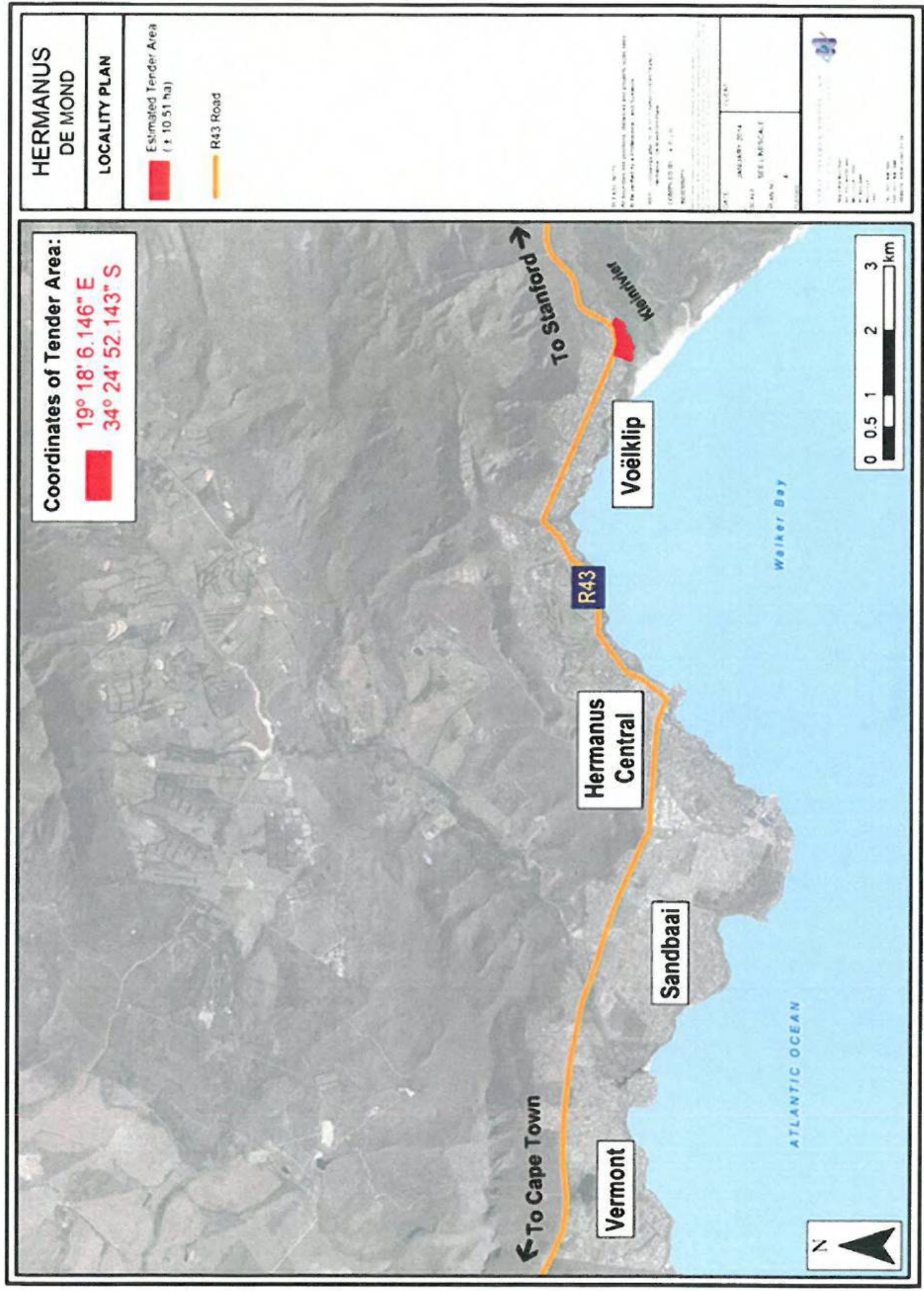
that Council consider the future of De Mond Caravan Park.




RESPONSIBLE OFFICIAL :

R KUCHAR

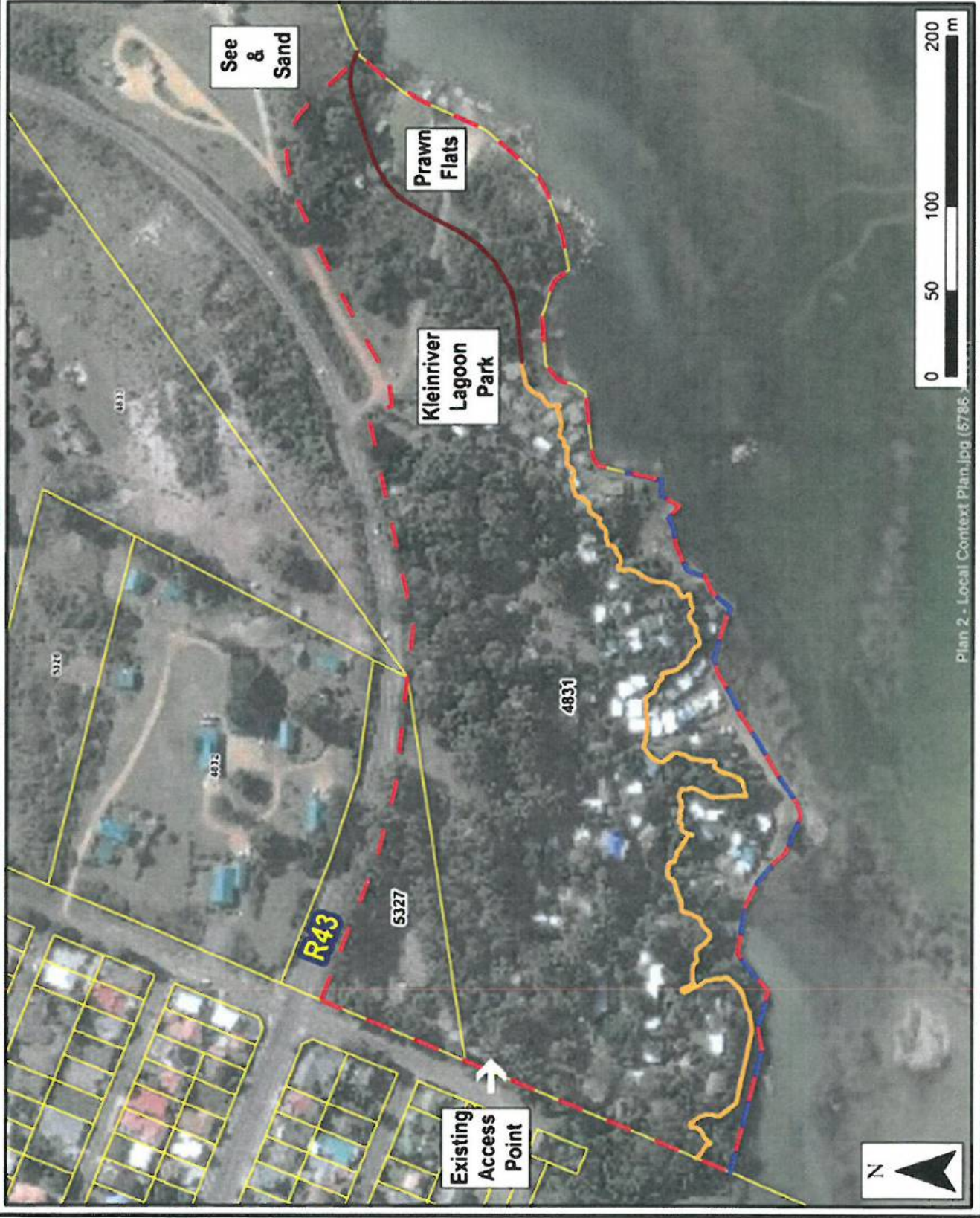
TARGET DATE FOR IMPLEMENTATION :

TO BE NOTED



HERMANUS DE MOND	
LOCAL CONTEXT	
	Estimated Tender Area (± 10.51 ha)
	Cadastral Boundary
	High Water Mark
	5m Contour Line (Surveyed)
	Estimated 5m Contour Line (Not Surveyed)

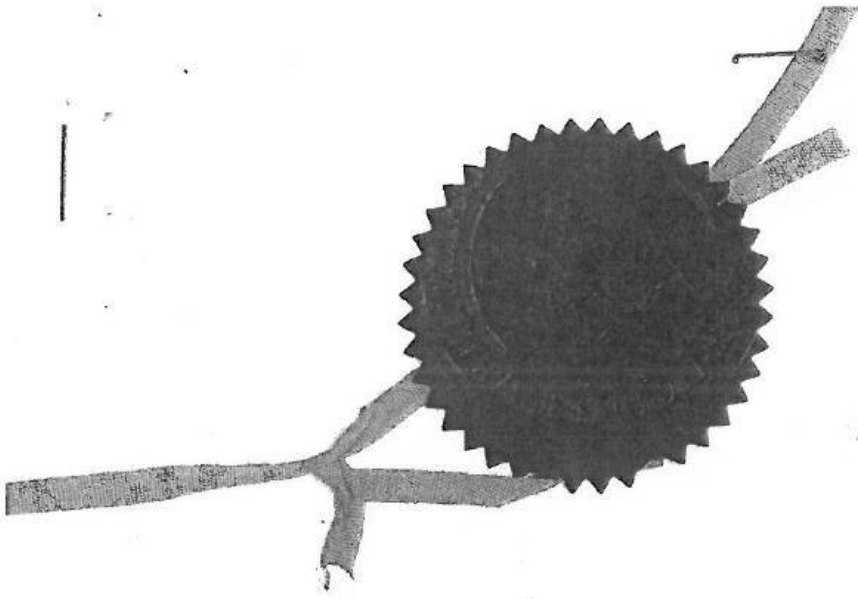
DATE: 04/05/2014
 SCALE: SEE LARGESCALE
 DRAWN BY: [Name]
 CHECKED BY: [Name]
 PROJECT: [Name]
 CLIENT: [Name]
 PROJECT NO: [Number]
 DRAWING NO: [Number]



Plan 2 - Local Context Plan.jpg (6786)

Annexure B 1/7

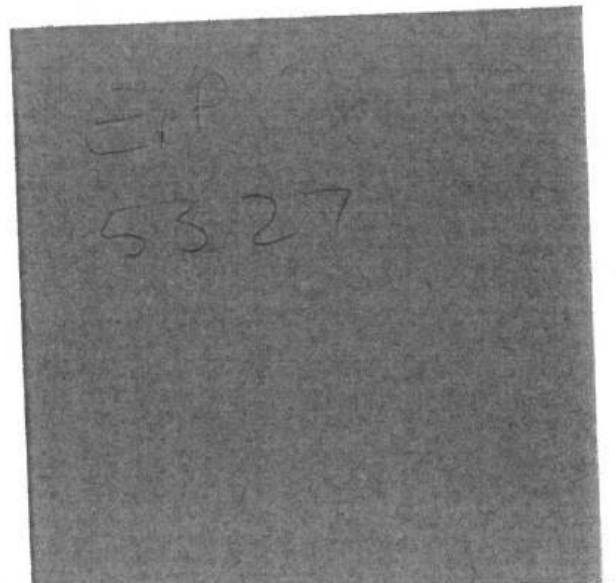
267



267

GRONDBRIEF Nr.

1971



DEPARTEMENT VAN
LANDBOUKREDIET EN GRONDBESIT
PRIVAATSAK 118
PRETORIA

C 556 367
 5-73
 24-9-70
 Return Date
 J.M. Nel

Sekretaris van Landbouer- en Oorlofsake
 Secretary for Agriculture and Land Affairs

G.D. 3228/53.

Wet op die Beskikking oor
 Staatsgrond 1961.
 (Ruil)

REPUBLIEK VAN SUID-AFRIKA
GRONDBRIEF NO.

NADEMAAL kragtens Goedkeuring gedateer
 23 April 1970, magtiging verleen is vir die uitreiking van
 n grondbrief aan die

MUNISIPALITEIT VAN HERMANUS

ten opsigte van Erf 5327 n gedeelte van Erf 4832 Hermanus
 geleë in die munisipaliteit van Hermanus, administratiewe

distrik /

Handwritten mark

SIDES Cape Feet		ANGLES OF DIRECTION		CO-ORDINATES System Lo. 19°	
				Y	X
		<i>Constant</i>		- 80 000.00	+ 12 090 000.00
AB	243.83	291°	48' 30"	A - 7752.25	+ 8363.11
BC	170.00	288.	2. 0	B - 7978.63	+ 8453.71
CD	218.13	277.	16. 10	C - 8140.34	+ 8506.34
DE	72.00	27.	14. 30	D - 8356.72	+ 8533.94
EF	724.30	81.	22. 30	E - 8323.77	+ 8597.96
FA	372.66	202.	43. 50	F - 7607.66	+ 8706.58
AG	469.70	202.	43. 50	G - 7934.50	+ 7930.21
DH	501.27	207.	14. 30	H - 8586.18	+ 8084.27
JE	4.00	207.	14. 30	J - 8321.94	+ 8601.51
KA	50.00	111.	48. 30	K - 7780.10	+ 8374.25
AL	30.00	202.	43. 50	L - 7763.89	+ 8335.46

METRIC AREA
12470 HECTARE

The figure **ABCDEF**

represents **1.4559 morgen** of land, being

ERF 5327 A PORTION OF ERF 4832 HERMANUS

situate in **Municipality of Hermanus** Administrative District

of **Caledon** Province of Cape of Good Hope.

Surveyed in **February 1968**

by me,

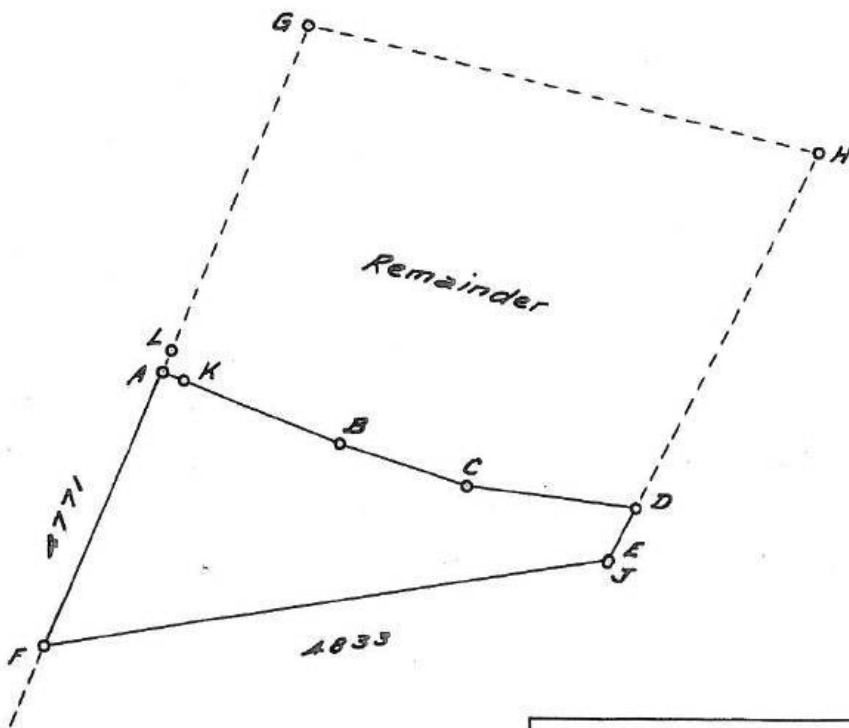
[Signature]
Land Surveyor

This diagram is annexed to <i>Deed of Grant</i> No. dated 29-12-1971 i.f.o. <i>Municipality of Hermanus</i> Registrar of Deeds	The original diagram is No. 6677/1938 annexed to Transfer/Grant No. 99A/1939	File No. S/2479/62 S.R. No. E 571/68 Comp. A1-3DA/X33
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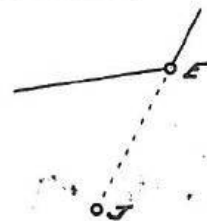
J. Staur
 J. Surveyor-Genl
 3-6-1968

BEACONS.

- A - 3" plumber's nail in tarred drive.
- B, L - 3/4" iron pipe proj. 3".
- C - 1/2" x 15" iron peg driven through wooden fence anchor post.
- D - section iron standard proj. 6".
- E - not beaconsed.
- F, G, H - round hole centre top concrete monolith 8"x5", proj. 6"
- J - 1/2" x 18" iron peg in tarred surface old road.
- K - section iron standard proj. 3".



INSET.



Scale: 1/60.

Scale: 1/3,000.

- 2 -

distrik Caledon, die eiendom van die Republiek van Suid-Afrika kragtens Sertifikaat van Geregistreeerde Staatstitel No. 7200/1939 gedateer 10 Julie 1939, watter eiendom toegeken is aan die genoemde

MUNISIPALITEIT VAN HERMANUS

in ruil vir die gelyktydige oordrag aan die Republiek van Suid-Afrika ^{op 'n gelyke basis} deur die genoemde

MUNISIPALITEIT VAN HERMANUS

van

Erf 5326 'n gedeelte van Erf 4833 Hermanus, geleë in die munisipaliteit van Hermanus, administratiewe distrik Caledon, groot 1.2471 hektaar.

SO GETUIG hierdie Akte dat behoudens die bepalings van die Wet op die Beskikking oor Staatsgrond, 1961, en behoudens die regte van die Staat die Republiek van Suid-Afrika hierby aan die genoemde

MUNISIPALITEIT VAN HERMANUS

die se opvolgers in titel of regverkrygendes, toeken, afstaan en transporteer:

Erf 5327 'n gedeelte van Erf 4833 Hermanus, geleë in die munisipaliteit van Hermanus, administratiewe distrik Caledon, gehou deur die Republiek van Suid-Afrika kragtens Sertifikaat van Geregistreeerde Staatstitel no. 7200/1939 gedateer 10 Julie 1939;

Groot een desimaal twee vier sewe nul (1.2470) hektaar, soos voorgestel en omskryf op die hieraan-gehegte kaart S.G. No. 1682/68.

A. ONDERWORPE /

WHITE GROUP
BLANKE GROEP

~~A. ONDERWORPE aan die voorwaardes vermeld of waarna verwys word in voormelde Sertifikaat van Geregi-
streerde Staatstitel No. 7200/1939 gedateer 10 Julie 1939.~~

~~B. EN VERDER ONDERWORPE~~ aan die volgende voor-
waardes:

- (a) "all rights to minerals, mineral products, mineral oils, coal, base or precious stones in or under the land are reserved to the State;
- (b) That the State shall have the right at all times of resuming for public purposes such portion or portions of the land hereby granted as may not have been alienated by the Municipality. In the event of resumption as aforesaid, no compensation shall be payable by the State except in respect of substantial improvements of a permanent nature erected or made on the land resumed, whether by the Municipality or by any person or body acting under the express authority of the said Municipality; and
- (c) That the land hereby granted, or any portion thereof, shall not be alienated without the consent of the Minister of Agriculture"

ALDUS GEDOEN en ONDERTEKEN deur die Admini-
stratiewe Beheerbeampte, Departement van Landboukrediet en
Grondbesit, Pretoria, op hierdie 23^{de} dag van
..... September 1970, behoorlik daartoe gemagtig
deur die Wet op die Beskikking oor Staatsgrond, 1961.

.....
ADMINISTRATIEWE BEHEERBEAMPTIE.
DEPARTEMENT VAN LANDBOUKREDIET
EN GRONDBESIT.
Volmag No. 241/69 Item 15(a)(ii)

GEREGISTREER /

GEREGISTREER in die register van Hermanus
erwe, gehou te KAAPSTAD.

BOEK FOLIO 5327

op die 29 dag van Desember,

Een duisend nege honderd en sewentig (1970).

ASSISTANT

REGISTRATEUR VAN AKTES

KLERK:

[Handwritten signature]

Crown Grant No 110/42.

T H E
F I S H E R Y



NS



A copy of title to land No. 110/42 has been submitted to the Registrar of Deeds, Cape Town, for registration. The title is in the name of the Council of the Municipality of Hermanus, and is subject to the provisions of the Mineral Rights Act, 1917, and the provisions of the Mineral Rights Regulations, 1917, and the provisions of the Mineral Rights Act, 1917, and the provisions of the Mineral Rights Regulations, 1917.

.....
 ASST. REGISTRATEUR VAN AKTIE
 CAPE TOWN
 11. 11. 1942

REGISTRATION OF SERVITUDE
 By Not. Deed No. 1 Dated 28/10/42 the Council of the Municipality of Hermanus do hereby acquire the right to construct and/or erect certain sewers and undertakes as indicated by the said Notarial Deed, with certain other rights ancillary thereto, subject to conditions set out in the said Notarial Deed, and the said Council do hereby consent to the registration of the said servitude as will more fully appear in reference to the said Not. Deed, vide copy appended hereto.

15/1/47

D.L. 98.

Reference No. C. 3609/3.

FOR FURTHER ENDORSEMENTS SEE
 VIA VERDERE ENDOSSEMENTE SIEN

CROWN GRANT No. 110/42

In the name and on behalf of His Majesty GEORGE THE SIXTH by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

WHEREAS THE COUNCIL OF THE MUNICIPALITY OF HERMANUS has applied for the issue to it of a Crown Grant in terms of Section 10 of the "Crown Lands Disposal Act, 1887" (No. 15 of 1887) Cape, in respect of a certain piece of land,



CROWN GRANT No. 110/42

THE FISHERY,

situate in the Municipality of Hermanus, Division of Galedon, Province of the Cape of Good Hope:

AND WHEREAS under and by virtue of Executive Council Minute No. 2386 of the 13th August, 1942, authority has been granted for the issue of a Crown Grant in respect of the said land in favour of the said Council:

NOW, THEREFORE, THESE PRESENTS WITNESS that there is hereby granted, ceded and transferred by the Governor-General of the Union of South Africa unto the said

THE *MA*

WHITE GROUP
BLANKE GROEP

233-8352
8115

234-6447

THE COUNCIL OF THE MUNICIPALITY OF HERMANUS,
its successors-in-title or assigns, with full power and
authority henceforth to possess the same in perpetuity,
the said piece of land,

THE FISHERY,

situate in the Municipality of Hermanus,
Division of Caledon, measuring two hundred and
seventy-three decimal nine four seven four
(273.9474) morgen, and represented and des-
cribed in the diagram (No. B 705/1873) hereunto
annexed.

Subject, however, to the following conditions imposed by
and in favour of the Government of the Union of South
Africa :-

(1) The land hereby granted shall
be used, in terms of a
resolution of Parliament,
dated 16th and 23rd March,
1934, only as a place of pub-
lic resort.

(2) The Government shall at all
times have the free right to
use any portion of the land
hereby granted for the pur-
pose of obtaining access to
the Klein River Lake.

(3) Subject to the provisions of
the Reserved Minerals
Development Act, 1926, and
of the Precious Stones Act,
1927, as amended, all rights
to all minerals, mineral
products, mineral oils, coal,
base or precious metals or
precious stones in or under
the land are reserved to the
Government.

THUS DONE AND SIGNED by the Provincial Represen-
tative, Department of Lands, at Cape Town, on the Third
day of November, 1942, duly authorised thereto in
that

that behalf by the Governor-General, in terms of the Crown Land Disposal (Execution of Deeds) Act, 1911.

J. M. Kouda

PROVINCIAL REPRESENTATIVE:
DEPARTMENT OF LANDS: CAPE;

Exd: *RSH*

Registered in the F2 Register
of Caledon
Book F2 1960
Date: 11. 11. 1943

CANCELLED
SEE IN ENDORSEMENT
SIEN NUMMER 19

M. J. M. Kouda
REGISTRAR OF DEEDS.

DIE GROOJTJE VAN BINNEGEMEIDE EIENDOM
THE EXTENT OF THE WITHINMENTIONED PROP.
OMSKEP IN METRIEKE MATE IS
234.644
HEKTAAR / METERS
ASST. REGISTRATEUR VAN AKTES.
ASST. REGISTRAR OF DEEDS.
WAAR NODIG / DELETE WHERE NECESSARY.

5.9196 morgen = leased area

VERHUUR aan *John Omega*
LEASED to *John Omega*
vir *a company to be formed*
for *10 years*
deur *huurkontrak gedateer 19.5.1967*
by Deed of Lease dated *19.5.1967*
weggelê
Registered as *167*
Geregistreer op *167* dag van
Registered in *167* day of
.....19
AKTANTOOR
DEEDS REGISTRY
KAAPTAD
CAPE TOWN.
ASST. REGISTRATEUR
ASST. REGISTRAR.

lease area = 5.9196 morgen

VERHUUR *KETTLE POINT DEVELOPMENT*
LEASED *to Kettle Point Development (Pty) Ltd.*
vir *10 years* FKOM *19-5-1967*
deur *Huileur* *to Kettle Point*
by Deed of Lease dated *19-5-1967*
weggelê
Registered as *167*
Geregistreer op *167* dag van
Registered in *167* day of
.....19
AKTANTOOR
DEEDS REGISTRY
KAAPTAD
CAPE TOWN.
ASST. REGISTRATEUR
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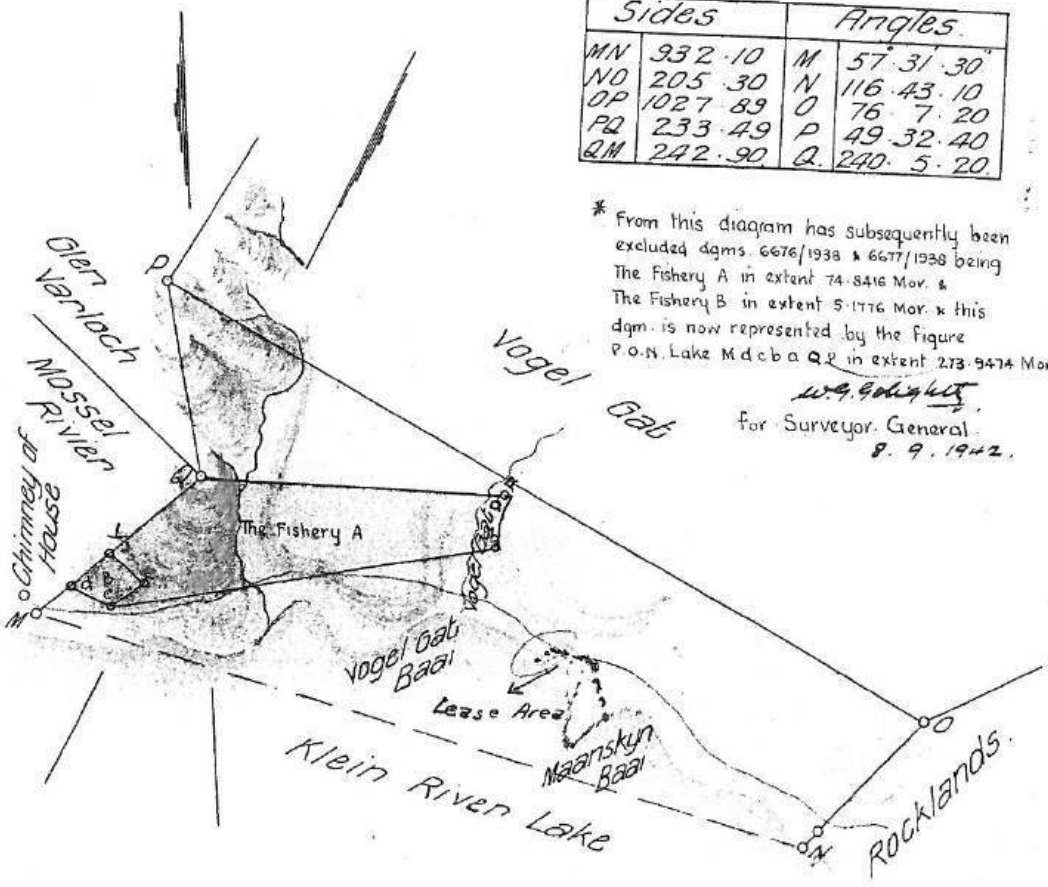
for 10 years period of 10 years each

CANCELLED
SEE IN ENDORSEMENT
SIEN NUMMER 19

The numerical data of this diagram are sufficiently consistent.
 No^B 705, 1873.
 (Sgd) T. Risler
 Acb. Ex.

5/8

Sides		Angles	
MN	932.10	M	57.31.30
NO	205.30	N	116.43.10
OP	1027.89	O	76.7.20
PQ	233.49	P	49.32.40
QM	242.90	Q	240.5.20



* From this diagram has subsequently been excluded dqms. 6676/1938 & 6677/1938 being The Fishery A in extent 74.846 Mor. & The Fishery B in extent 5.1776 Mor. & this dqm. is now represented by the figure P.O.N. Lake M d c b a Q P in extent 273.9474 Morgen.
 W.G. G. G. G.
 For Surveyor General
 8. 9. 1942.

The above diagram *MNO PQ represents *353 Morgen and 580 Square roads. (749.185 Acres) of ground situate in the division of Caledon field-Coronetcy of "Uilen Kraal," being the Fishery at Klein Rivier Lake,

Bounded N wds. by Lot called "Vogel Gati,"
 E wds. by Lot named "Rock Lands,"
 S wds. by edge of Lake and
 W wds. by the farm Mossel Rivier & Glen Varlooch.

Surveyed &c. by me April 1873.
 (Sgd) J.A. Kuys
 S.G.S.

Beacons pointed out to Mr. field Corneet
 G.E. Moore and Mr. Surveyor Jno. Geo. Muller

Copied from Diagram No 705/1873.
 filed in the Surveyor General's Office.

W.G. Hardwick
 for Surveyor General.
 3/9/1942

This diagram is annexed to Comm Grant No. 110 dated 3rd November, 1942 in favour of the Council of the Municipality of Harmond.

5.5109/4



6/8

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STUKKE SURVY BELONGS	KANT NO. OFA. NO.	DESCRIPTION	DATE OF INTIALS
E 934/66	333/66	Lease Area	9/68

WHITE

~~2779/62~~

~~50. HILL~~

~~attached hereto.~~

~~Survey General.~~

S. 5709/4

B 705 / 1873

* From this diagram has subsequently been excluded diagrams 6676/1938 & 6677/1938 being The Fishery A in extent 74.8415 Morgen & The Fishery B in extent 5.1776 Morgen & this diagram is now represented by the figure P.O.N. Lake M.d.c.b.a Q.P. in extent 273.9474 Morgen.

W.A. 9014 let
of Surveyor General
16.6.1942.

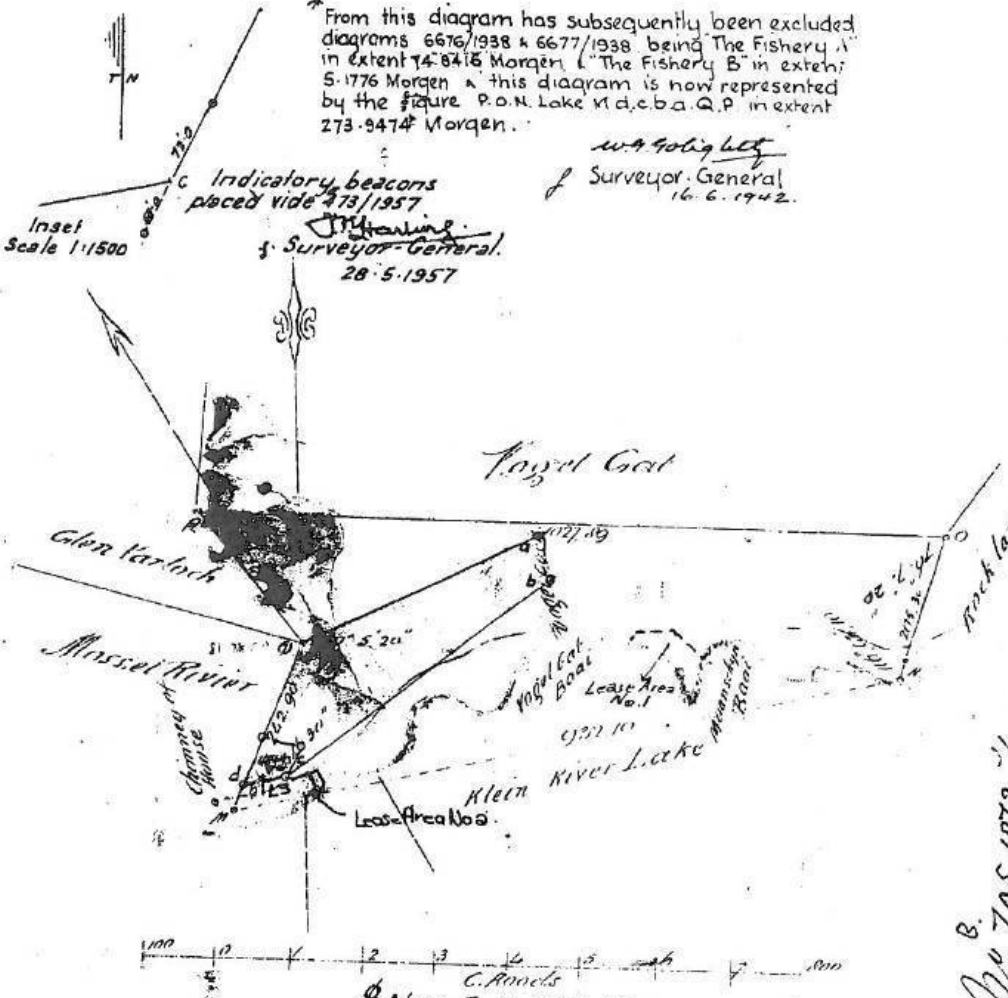


Diagram are differently combined
 W.A. 9014 let
 of Surveyor General
 16.6.1942.
 No. 705.1873 in number of 1. diagram are differently combined

Now Erf 4831 Hermanus.

The above diagram *MNOPQ represents *353 Morgen and 580 = 749.105 Acres. Square rods of ground situate in the division of Caledon field Cornalty of "Velen Kraal", being the Fishery, at Klein River Lake bounded N.wds by Lk called "Loyal Gait" E.wds by Plot named Rock Sands, S.wds by Lake and N.wds by the farm Mussel-Rivier & Glen Karloch

Surveyed & by me April 1879
G. E. Moore and Mr Surveyor Geo. G. Muller

THIS DIAGRAM IS ANNEXED TO CROWN GRANT NO 110 DATED 3RD NOVEMBER, 1942 IN FAVOUR OF THE COUNCIL OF THE MUNICIPALITY OF HERMANUS.

J. N. HEYDERYLH
FOR PROVINCIAL REPRESENTATIVE THE LANDS DEPT.

Gr 110/1942

S. 2479/62

Sh. A13DA/X33(410)C

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FOR ENCLOSURES
SEE BACK OF DGM.

On May 68
Feb. 51.

B S

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(Pty) Ltd**MUNICIPAL CONSULTANTS - MUNISIPALE KONSULTANTE**P.O. Box 485, Florida Hills 1716 ☎ (011) 674-4122 Fax/Faks (011) 672-8646 Cell/Sel: 083 631 0667 ✉ wernerzy@iafrica.com
V.A. E.B.T.W. Reg. No. 4370172092***GREATER******HERMANUS******MUNICIPALITY******POSSIBLE MUNICIPAL******SERVICE PARTNERSHIP******FOR CARAVAN PARKS****A report prepared by****WERNER ZYBRANDS***

GREATER HERMANUS MUNICIPALITY

POSSIBLE MUNICIPAL SERVICE PARTNERSHIP FOR CARAVAN PARKS

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POSSIBLE MUNICIPAL SERVICE PARTNERSHIP FOR CARAVAN PARKS

GREATER HERMANUS MUNICIPALITY

1. INTRODUCTION

The concept of municipal partnerships is still relatively new in South Africa, but its acceptance as a concept that could ease the burden on municipal service delivery is rapidly gaining momentum. Due to various reasons municipalities throughout South Africa are forced to rethink the scope of service delivery and in this process to weed out the so-called non-core functions, thereby increasing its capacity to concentrate on its core functions:

The purpose of this report is to provide background information on the various options available in terms of Public Private Partnerships (PPPs), to report on an investigation into the three municipal-owned caravan parks and to convey the results of public participation exercises.

2. CONSULTANT'S BRIEF

During a meeting held in December 1999, Council resolved that Consultant be appointed to assist the Council in the following matters:

1. To hold a workshop with the Councillors, the CEO, heads of departments and trade union representatives in regard to PPPs.
2. To hold public participation workshops in the Hawston, De Mond and Onrus caravan parks during December 1999/January 2000 and in the process to maximise the attendance and involvement of these specific stakeholders.
3. To compile a report on the *status quo* in regard to these parks, to draft a policy, to summarise the participation exercises and to evaluate and propose options for possible partnerships.
4. To assist the Council in the submission of applications to the Municipal Infrastructure Investment Unit (MIIU) for funding of other projects as identified by Council for public/private partnerships.

3. METHODOLOGY FOLLOWED

A wide range of background documentation was placed at Consultant's disposal for prior study. Thereafter a workshop with the Councillors and Council employees was held on 21 December 1999.

Public meetings took place as follows.

HAWSTON	-	27 December 1999
DE MOND	-	28 December 1999
ONRUS	-	29 December 1999

As more information became necessary, this was obtained either by way of documentation or by way of personal discussions with relevant employees.

As a result of these public participation exercises, steering committees from the De Mond and Onrus caravan park stakeholders were elected, which committees thereafter, on various occasions interacted with Consultant.

4. DIFFICULTIES ENCOUNTERED

Thanks to excellent co-operation received from Council employees and members of the public alike, very few difficulties were encountered. The main problem was that certain documents were difficult to obtain and, in a few cases, unobtainable. This was mainly due to the long history of some of these caravan parks.

Another problem was that, especially the stakeholders in respect of the Onrus and De Mond caravan parks (and very specifically the latter) felt threatened by the possibility of any form of PPP. This is understandable, especially in view of the fact that these stakeholders have either been visiting these caravan parks on a regular basis for decades and, in many cases, also invested significant amounts of money in the form of infrastructure.

Fortunately in both cases, a steering committee was elected to liaise between all these stakeholders and Consultant. Such liaison promoted public participation and consultation and also transparency, but on the downside obviously required more attention and therefore also more time. The value of using these steering committees was that a more rational instead of an emotional approach could be used and, no matter what the final decision of the Council may be, it should continue to make use of these established structures.

5. BACKGROUND INFORMATION

In Section 152 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution), it is *inter alia* stated that the objects of local government are to

- ensure the provision of services to communities in a sustainable manner;
- promote social and economic development;
- encourage the involvement of communities and community organisations in the matters of local government;
- achieve these objects within a municipality's financial and administrative capacity.

In terms of Section 153 a municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community.

The question of what constitutes basic needs can, for all practical purposes, be equated with core functions.

Section 195 of the Constitution charges all spheres of government including therefore local government, to

- use resources efficiently, economically and effectively
- be developmental oriented

- > to provide services impartially, fairly, equitably and without bias;
- > peoples' needs must be responded to and the public must be encouraged to participate in policymaking.

Furthermore, public administration must be accountable. Transparency must be fostered by providing the public with timely, accessible and accurate information.

The White Paper on Local Government as published in Government Gazette No 18739 of 13 March 1989 envisages new approaches to service delivery. The White Paper, being an official policy document of the government, gives clear guidelines on mechanisms which municipalities could consider in providing services. These include

- > building on a municipality's existing capacity;
- > the corporatisation of service delivery units - this could lead to the ring-fencing of an account which will then be managed as an operationally autonomous unit;
- > public partnerships, an example of which is the payment of municipal accounts at Post Offices;
- > partnerships with CBOs and NGOs - examples of which are adult basic education and training programmes as presented by NGOs and the involvement of the civil community in the removal of refuse;
- > contracting out of services - a practice which has prevailed for many decades e.g the rendering of professional services or the construction of infrastructure;
- > leases and concessions which are real public/private partnerships - such leases or concessions are normally for a long period of time and where the contractor takes charge of the assets and infrastructure, invests in them and eventually transfers it back to the municipality concerned;
- > the transfer of ownership which constitutes full privatisation - an example which would be the recent selling off of the Rand Airport by the Johannesburg Metropolitan Council.

In pursuance of the White Paper guidelines the government has now published the Local Government : Municipal Systems Bill (Systems Bill) where in Chapter 3 the issue of service provision is dealt with in detail. It, to a large extent echoes what was stated in the White Paper, but obviously providing more specific definitions and guidelines including the manner in which service delivery agreements should be concluded.

It is at this stage not deemed necessary to give full particulars thereof, due to the fact that

- > the Systems Bill is only in draft form and will, in all probability, be amended in many respects during the current parliamentary session, and
- > it might amount to unnecessary conjecture until such time as the Council has, in principle, decided on a route to be followed.

The MIU was established as a Section 21 company in terms of the Companies Act of 1973 to promote Public Private Partnerships in municipal service provisioning. It is funded by the Department of Constitutional Development (presently Provincial and Local Government Affairs) and operates from the offices of the Development Bank of Southern Africa (DBSA).

The MIU's definitions of some of the key concepts are reflected in Annexure 1. The status of the three-caravan units will be dealt with individually below.

NOTE:

The Schulphoek caravan park was excluded from Consultant's brief.

6. COUNCIL WORKSHOP

The Council workshop that took place on 21 December 1999 was attended by a few Councillors, most of the departmental heads and/or representatives from senior management and representatives of the different trade unions.

Documents pertaining to the undermentioned matters were also provided to workshop participants.

- > Relevant extract from the Municipal Systems Bill;
- > A chapter from a course developed by the Consultant in regard to the 25 most raised objections to privatisation.

It was emphasised that no Council should embark on any form of PPP without having formulated a policy in conjunction with its trade unions. As part of the workshop the participants developed the following policy framework.

NOTE:

This policy framework does not purport to be comprehensive and obviously still has to be finalised between the Council and the trade unions.

1. The service involved must be clearly identified or be identifiable e.g. refuse removal is inadequate – does it for instance include
 - domestic refuse,
 - business and industrial refuse,
 - garden refuse,
 - street cleaning,
 - hazardous waste, etc.
2. There must be a benefit for the Council and therefore for the community as a whole. Such a benefit could be financial, whether by way of saving on costs or by improving revenue. Other benefits could be
 - increased employment opportunities for the community,
 - other community benefits e.g. receiving a service that the Council previously could not provide,
 - obtaining expertise, especially expertise which the Council cannot afford to employ on a full-time basis,
 - meeting legal requirements where the Council would otherwise be unable to do so. A typical example in a municipality would be the contractual appointment of a person holding a government certificate of competence to be in charge of the electrical network,
 - to improve service quality
3. In the event of capital assets being sold, it should be subject to one or even both the undermentioned pre-conditions:
 - the amount realised by the sale of the asset to be used to reduce the Council's external loan commitments,
 - the amount realised to be used to create a new capital asset

4. No retrenchments of municipal staff should take place as part of a PPP process. Should the Council deem it necessary to retrench staff due to operational requirements, it should be done in accordance with established labour law and not for the purpose of a PPP.
5. Wherever possible, employees should be granted the first opportunity to become service providers to the Council in their private capacities – thus a form of a management buy-out.
6. Should employees be transferred to a private sector service provider, there should be no loss of benefits and the protection currently afforded by their conditions of service, should be retained.

During the workshop the Framework for Restructuring of Municipal Service Provision as agreed to by the South African Local Government Association (SALGA) and the Congress of South African Trade Unions (COSATU) also came under discussion.

This document, which is in the Council's possession and therefore need not be attached to this report, to a large extent defines the parameters within which municipal service delivery could be restructured in order to attain the full benefits of PPPs.

During the workshop it emerged that there was some doubt as to whether the Independent Municipal Allied and Trade Union (IMATU) was bound by this framework agreement or not. This matter needs to be clarified.

RECOMMENDED:

1. That cognisance be taken of the workshop conducted on 21 December 1999.
2. That the policy framework as set out in this report be used as a departure point to develop a final policy framework between the Council and the various trade unions.
3. That the issue whether IMATU is bound by the Framework for Restructuring of Municipal Service Provision Agreement or not, be clarified.

7. HAWSTON CARAVAN PARK

7.1 Title Deed Particulars

This is one of the cases where the background information was rather difficult to come by. According to available documentation the area originally known as portion 1 of the farm Middelvlei and subsequently indicated being portion 3 (a portion of portion 2 of the farm Middelvlei) was transferred to the then Divisional Council of Caledon during 1962. It was originally almost 300 morgen in extent. In terms of this title deed the ground could be used solely as a camping site and beach resort for non-whites and such other public uses as approved by the President.

The possibility that the property could be transferred to a successor-in-title of the Divisional Council of Caledon was provided for, and it is presumably along this route that it eventually landed under the control of the Greater Haverdine Municipality.

One of the provisions is that the State retains the right to repossess the property for either governmental and/or public uses without having to compensate the then titleholder except in so far as permanent improvements have been erected.

The beneficiary of this grant was obliged to maintain the area, especially in terms of vegetation and drift sands. Later in this title deed, it is again referred to that the State has the right to repossess the property should it not be used as a public camping site and beach resort for non-whites.

Although references to non-whites have been excluded in terms of subsequent legislation, it is contended that the essence of this title deed is that it should be retained as a camping site or beach resort, failing which the property will revert back to the State.

7.2 Standard of Facilities

It is a fairly well developed caravan camping area with clearly marked caravan sites and three well-maintained ablution facilities. Adjacent to the entrance is an Olympic size swimming pool with the necessary ancillary facilities. This is the only public swimming pool in the whole of the Greater Hermanus area. The swimming pool is accessible to both patrons of the camping area as well as non-users of the caravan park.

The grassed area is in a reasonable condition, but the whole camping site lacks larger trees. It is relatively close to the ocean, being separated only by a dune ridge. Unfortunately the boardwalk providing access over this dune ridge was apparently constructed in an incorrect place and is now to a large extent covered by drift sands.

7.3 Current Use

According to all available information the site is only fully utilised over the Christmas/New Year period and during the Easter Week-end. During the remainder of the year, the use is of a periodic nature and at a very low key.

Other than the December/January holiday season the swimming pool receives only a degree of support, mainly from Hawston residents.

7.4 Report on Public Meetings

Although not a large number of people attended the public meeting a lively discussion took place.

The meeting was clearly divided into two groups - the first group maintaining that the *status quo* should be retained in spite of the facility being operated at a loss. It was argued that this was the only facility available to Coloured people in general and the farm workers of the area specifically. Many of these people could only go on holiday over the Christmas/New Year period and furthermore were financially disadvantaged.

It was argued that should the facility be privatised these people would be deprived of a facility that they had been patronising for decades. That in the

form of the original facility which was closer to the main road and where the current library is situated.

The other group contended that a degree of privatisation should be allowed in the sense that certain areas of land could be made available to local entrepreneurs to erect chalets or similar permanent structures, so as to provide accommodation facilities for those patrons who did not own a caravan or who were not keen on camping.

Although the first group maintained that this would not be viable in view of a perceived low occupancy rate and the high risks involved in operating and maintaining and securing such a facility, the second group was nevertheless adamant that they should be given the opportunity to carry out such a development.

7.5 Evaluation

Three main possibilities present themselves although other permutations thereof are possible. These will be discussed individually.

7.5.1 Retaining the *status quo*

Advantages:

1. The ground will not revert back to the State.
2. A facility will be provided to promote local tourism for that segment of the population that is unable to go to other facilities further afield.
3. An improved marketing drive could result in better use being made of the facility throughout the year.

Disadvantages:

1. It is highly unlikely that a marketing campaign will have a dramatic impact on the number of visitors.
2. The Council will continue to heavily subsidise this facility – the entrance fees to the swimming pool hardly covers the cost of the chemicals only.
3. With a patronage restricted to less than two weeks in a year, it is unlikely that a future larger municipality will be able to continue to subsidise this facility.

7.5.2 Full Privatisation

In terms of this option the total asset will be sold but to be used for its earmarked purposes.

Advantages:

1. If this were to succeed the Council will no longer be obliged to subsidise the facility, thereby effecting necessary savings.
2. Once privatised, the private sector operator could endeavour to attract patrons in a more innovative manner.

Disadvantages:

1. It is highly unlikely that, given the proven support base and the various other problems that exist at this facility, a private sector enterprise would be interested in acquiring it.
2. The legalities of such a disposal would have to be very carefully analysed in view of the limitations imposed by the title deed.
3. The failure of the Meerensee facility, which operated on a very similar basis and within the same area, should serve as a warning.
4. Due to municipal employees currently employed at this park, resistance from trade unions can be expected.

7.5.3 Public Private Partnership

In terms of this option, the private sector could be invited to submit proposals and more specifically to build, own and operate chalets or similar permanent residential structures for their own account and risk. It could, in theory, also extend to being involved in the promotion of the facility and also exercising access control.

Advantages:

1. This proposal affords the opportunity to entrepreneurs who perceive this as an opportunity to provide facilities which, if proven to be a correct decision, will in turn provide holiday accommodation for non-caravaners.
2. This could, if proven to be successful, be viewed as promoting small, medium and micro enterprises and at the same time empowering members of a previously disadvantaged community to operate an activity for their own account.

Disadvantages:

1. There may be town planning and other legal obstacles. (To be investigated).
2. The bidding process may, in spite of its objectivity be perceived to be unfair – especially if those aspiring to obtain the development rights have their bids rejected.
3. The exercise could conceivably become a failure and the developers thereafter seeking recourse to the Council – even if they were warned in advance that it would be at their own risk.

7.6 Recommendations

1. That full privatisation be not further pursued.
2. That development proposals be called from members of the community with a view to allowing successful bidders to develop a portion or portions of the site for permanent holiday accommodation structures and for such other services as the bidders may deem expedient.
3. That, should Council decide on recommendation 2, then the necessary pre-bidding investigations and procedures be pursued.
4. That in the event of the calling of development proposals not succeeding, the status quo be retained, but that the use of the facility

throughout the year be promoted, whilst at the same time efforts be made to reduce the cost of operating the facility.

8. DE MOND CARAVAN PARK

8.1 Title Deed Particulars

Once again not all particulars were comprehensively available. The present caravan park consists of two components, one being an area previously known as The Fishery and approximately 274 morgen in extent, also known as erf 4833, and the second being known as a portion of The Fishery B, also known as portion of erf 5327.

The Fishery B is the site of the Cape Nature Conservation Office. When Trunk Road 28 was reconstructed, the Hermanus Council took transfer of the remainder of Erf 5327, over which the road is constructed, in exchange for another portion of land identified as erf 5326 being a portion of erf 4833. As this was purely an exchange of land of equal size, no purchase price was paid. This area of land is 1,2471 ha in extent and comprises the triangle between the Trunk Road to Stanford and the manager's cottage at De Mond caravan camp.

Although not subject to the same limitations as applicable to The Fishery, (refer below) it may not be alienated without the consent of the State, or as stated in the Agreement of Sale, the consent of the Minister of Agriculture. The following clause also appears in the Deed of Sale:

"That the State shall have the right at all times, of resuming for public purposes, such portion or portions of the land hereby granted, as may not have been alienated by the Municipality. In the event of resumption as aforesaid, no compensation shall be payable by the State, except in respect of substantial improvements of a permanent nature, erected or made on the land resumed, whether by the Municipality or by any person or body acting under the express authority of the said Municipality."

As regards the major portion of the land known as The Fishery, it became Council property by way of a Crown Grant dating back to 1942. This grant was made in terms of the Crown Lands Disposal Act, No 15 of 1887 - Cape. This grant is subject to *inter alia* the following:

1. That, in terms of a resolution of Parliament of 1934, it may only be used as a place of public resort.
2. That the government shall at all times have the free right to use any portion of the land for the purpose of obtaining access to the Klein River Lake.

The question of what constitutes a 'public resort' will, depending on the Council decisions in this regard, in all probability have to be further investigated in order to get legal clarity in this regard.

For the purpose of this report, it might suffice to state that a 'resort' is a place visited by people for entertainment and/or recreational purposes, whilst

"public" denotes a right of the general public to gain access to and use of the caravan park, whether by way of payment of an admittance fee or not.

It should furthermore be noted that a Notarial Deed of Lease was entered into between the Municipality and the Klein River Lagoon Park Body Corporate in terms of which an area known as lease area number 2 over erf 4831, Hermanus, measuring 6 279 ²m was leased by the Council for a period of 15 (fifteen) years reckoned from 1 May 1994, with the option of renewal for a further period of 5 (five) years. The area thus leased may only be used as a site for mobile park homes.

The Lessee is not entitled to assign its rights under the lease, nor shall it sublet the land whether in whole or in part.

The Lessee is responsible for all rates and taxes on both the land and the improvements thereon. Although provision is made that, with the consent of the Council, improvements may be made on the land, there is no provision for the Council to compensate the Lessee at the expiration of the lease period. It can therefore be assumed that the normal legal principle, that any improvements made on the land becoming Council property by way of attachment, will apply.

There are 20 (twenty) mobile homes on the leased property.

Apparently See-en-Sand have a short term lease over a portion of the property known as The Fishery.

8.2 Standard of Facilities

The caravan park has a dated impression with varying degrees of neglect. Although there are many trees on the property, thereby creating a green and tranquil ambience, it should be noted that many of these trees are exotics and also constitute a potential danger (e.g bluegums).

The internal road system is in need of maintenance whilst the ablution and washing facilities do not meet modern requirements.

8.3 Current use

It is quite clear that all sites are occupied by way of structures of a permanent or semi-permanent appearance. A survey revealed the following:

- 23 x A-frame wooden houses,
- 6 permanent wooden houses,
- 25 permanent "Plattenberg" mobile homes,
- 44 caravans, and
- 100 plastic constructions

All these sites are sub-let on an annual or even a more permanent basis thereby effectively excluding any incidental tourist or caravaner.

NOTE:

This use automatically raises the question whether the resort is still a "public" one or whether it has obtained a "private" character.

The caravan/camping park area, in extent 9.3 ha is currently leased for the purpose of conducting the business of a caravan/camping park thereon. The current lease is for a period of 7 (seven) years, which expires on 31 July 2000. It is clearly stated (clause 4) that it be used for a caravan and camping park only and for no other purpose whatsoever, save with the Lessor's prior written consent.

Reference is made to patrons, customers and visitors and that it should be maintained at a level comparable to those of other caravan parks (clause 4).

There is an obligation on the Lessee to satisfy himself that he may lawfully use the park for purposes contemplated by the lease (clause 7).

Clause 8 deals with the condition of the park, the maintenance obligations of the Lessee and the fact that, at the expiry of the agreement, the Lessee must hand over the park in good order and condition.

Clause 10 clearly states that any structural alterations require the prior written consent of the Council including the approval of plans, and then at its own cost and expense. It is clearly stated that alterations or additions become the property of the Lessor without any liability on the Lessor to compensate the Lessee in any way.

Such alterations or additions may however, at the Lessor's option, be removed upon termination and the premises restored to its previous condition.

The Lessee may not sublet nor part with possession of the park nor any portion thereof, without the written prior consent of the Lessor, nor shall it purport to cede or assign this lease without such written prior consent. (Clause 12).

There are various legal aspects that require further attention (some of which are addressed in par 7.5) and have a significant impact on the available alternatives.

8.4 Report on Public Meeting

This meeting, which took place on 28 December, was extremely well attended and the De Mond hall was packed to capacity.

It was clear that many of the people were highly agitated and concerned. Their concerns mainly revolved around the following issues:

- ✓ the high rentals paid.
- ✓ the inadequate maintenance of the infrastructure,
- ✓ the run-down appearance of the park,
- ✓ the fear that, at the expiry of the lease period, their tenure may be terminated,
- ✓ the doubts regarding their "rights" in respect of some of the more "permanent" structures and the possible resultant loss of (in many cases) quite significant investments.
- ✓ the fear that full privatisation may lead to the character of the park being changed and the detrimental effect this could have on holiday makers.

Although a few individuals made some rash statements, the general spirit was one of genuine concern and a willingness to seek mutually beneficial solutions. This resulted in a steering committee being elected after the official meeting was concluded.

This steering committee was given a mandate by the audience to act in the best interest and on behalf of the current sub-lessees (tenants). The steering committee members are of various disciplines and subsequent to the meeting gave valuable inputs to the Consultant and also maintained close liaison. Appreciation for this and for the responsible attitude continuously displayed, is hereby expressed.

8.5 Legal Aspects

There are various legal aspect that have a bearing on this whole matter e.g

8.5.1 The reversionary clause in favour of the State:

This matter hinges on the exact meaning of the words "public resort". Consultant's brief does not allow for a detailed legal opinion, but suffice to say that the present use may be contested in that it may not be "public" any more. This contention is supported by the access being restricted to tenants (sub lessees) and no day or casual visitors being able to use the resort.

Any future use should also be in the nature of a (public) resort. Should this not be the case, there is the distinct possibility that the State will not only exercise its latent ownership rights, but may also decide to use it for governmental purposes - which could virtually include any use. This is not an idle threat - as two incidents in another town will indicate.

In the one case police headquarters (a 5-storey building) was erected in a well-established, quiet, middle/higher income residential area. This building also housed the morgue, the district riot squad and police cells.

In the other case the Government re-erected 20-year old pre-fabricated buildings in an upmarket residential area and for more than a year refused to even repaint the badly damaged and soiled exterior of the buildings.

The other threat is that the State, once it has repossessed the property, will only part with it on payment of the current market value that, due to its excellent locality, may be quite significant. Furthermore the Council may encounter excessive delays due to the notorious red tape procedures which are often so typical of Government.

Any future use should only be considered with due regard to the abovementioned aspects

8.5.2 The rights of existing tenants (sub-lessees)

It is common cause that the current lease expires on 31 July 2000. It therefore follows that the rights of all tenants should

in principle also expire. This is in accordance with the maxim *nemo plus iuris ad alium transferre potest quam ipse habet* which, simply stated, means that you cannot grant more rights than you yourself have.

Strictly speaking all improvements made by tenants will, at the expiration of the lease, become Council property as fixtures/erected or improvements of a permanent nature made attach to the land - which is owned by the Council.

Some tenants have argued that the following clauses in the lease agreement accord them certain "rights".

CARAVAN SITES

20. *The Lessee shall be entitled to allow Thirty-one (31) mobile home sites.*

PERMANENT RESIDENTS

21. *The Lessee shall be entitled to allow any or all of the caravan sites to be set aside for the use of permanent residents. However it is expressly agreed between the Lessor and the Lessee that the Lessor may in its absolute discretion withdraw this right at any time.*

Consultant is however of the opinion that the two sections must be read in conjunction with one another as a result of which the reference in clause 21 to permanent residents, should not be interpreted to mean all caravan sites, but only the 31 mobile home sites referred to in clause 20. The proviso contained in clause 21 in any event nullifies these perceived "rights."

8.5.3 Tacit or express approval by the Council:

The argument was raised that the Council by

- allowing the Lessee to sublet the sites on an annual "permanent" basis
- allowing certain improvements (i.e the so-called plastic structures),
- allowing the erection of structures of a more permanent nature e.g the A-Frame structures,
- approving building plans and levying building plan fees therefor,
- imposing property tax on certain sites having so-called permanent structures.

either specifically or tacitly approved the current state of affairs and that, in the process, the tenants had acquired certain rights.

On 8 August 1994 Council resolved that additions to caravans be permitted on condition that each application be accompanied by a locality plan and that no deviation from the approved plan has approved by the Overberg District Council will be allowed.

Although many such additions were made no formal applications for locality plans could be found in the Council's records.

Similarly no approved buildings or evidence of building plan approval fees having been paid, could be found.

The Council does not impose property tax on any individual tenant but in terms of the lessee's lease rights, a property tax of R17 081,50 per annum is levied on a land value of R2m and an improvement value of R1 750 000. This tax is apparently recovered from certain individual tenants – presumably those with improvements of a more permanent nature. This state of affairs, however, does not create any "rights" to the tenants as it could be equated to a type of levy or merely part of the tenant's rental.

In the light of the comments under 8.5.2 this argument should, strictly speaking, not be upheld. On the other hand it would appear to be grossly unreasonable to simply terminate all tenancies on the date of the expiry of the main lease agreement.

A market in the selling of tenancies has even developed with such "rights" being sold for many thousands of Rand.

8.5.4 Evaluation of the legal aspects

The brief given to Consultant does not allow for an authoritative legal opinion in this regard, but it is submitted that the Council will have to tread warily as it may venture into a minefield of perceived "rights" the "owners" of which may, due to the investments made, find it worth the financial risk to litigate against the Council. Such litigation whether successful or not, will firstly impact on the time-frames of the Council and conceivably also on the options available to the Council.

Consultant is of the opinion that different categories of "rights" should be identified and that the Council should structure its options around these "rights". To this end the following departure points are suggested:

1. The Council is the rightful owner of all the land on which the caravan park is situated.
2. No tenant owns any portion of the land nor does such a tenant have a legal option to acquire his/her site.
3. In principle all tenancies lapse when the main lease expires.
4. Strictly speaking all improvements of a permanent nature have, through attachment to the land, become the property of the Council.
5. All improvements of a non-permanent nature belong to the person who erected it and it may be removed by the owner thereof, provided no damage is caused to the Council's property.
6. Reasonable notice should be given to tenants what the Council envisages the future use of the property will be to enable

- tenants to reduce their "losses" and to remove their non-permanent improvements.
7. An authoritative legal opinion should be obtained to confirm the above points and also to evaluate the perceived "rights".
 8. In view of the possible time required to finalise any alternative arrangement to the existing one, viz the letting of the whole property as it is to a lessee, it may be possible to work out a compromise that could prevent litigation but also allow the Council the widest possible range of options. The suggested compromise could be as follows:
 - (a) All tenants of the sites on which temporary "plastic" structures have been erected and who have paid their "leases" until the end of January 2001 will be allowed the use of the site until end January 2001 but subject
 - > to their being given notice that they must vacate the land and remove all their improvements by not later than 1 February 2001.
 - (b) All tenants occupying so-called "permanent" structures including A-Frame homes and mobile homes on the identified permanent sites, be advised that the Council is investigating alternative uses, but that no final decision will be taken without further consultation and that in principle Council is prepared, in the event of their having to vacate the sites to give
 - > notice of at least one year in respect of mobile homes,
 - > notice of at least one year in respect of permanent sites and that some form of reasonable compensation will be paid for the improvements erected or, as an alternative, notice of say 3 (three) years will be given, but that no compensation will be payable for the improvements made.

NOTE:

The above suggestions are not firm proposals but merely to have something on the table that could be further discussed.

3.6 Evaluation of Possible Options

3.6.1 Retaining the status quo by extending the contract with the present Lessee

Advantages

- 1 It is a simple procedure and will afford the Council more time to properly consider other alternatives

2. The tenants will have time in which to properly consider their own positions.

Disadvantages

1. There are certain legal obstacles which would have to be overcome e.g. contracting with a Councillor; not calling for tenders, etc.
2. There is a significant difference between the rental paid to the Council and the gross income earned, which constitutes a loss to the Council, especially as limited amounts of the gross income have been spent on the upgrading and maintenance of the caravan park.
3. The current Lessee is apparently not keen to have the contract extended.

This alternative is not recommended.

8.6.2 Full privatisation by selling off the property

This would imply the calling of tenders and making the caravan park available to a private sector entrepreneur.

Advantages

1. It could result in the private sector entrepreneur investing a lot of money in upgrading the whole facility, which the Council at this stage cannot afford to do.
2. Due to its prime locality, the Council can anticipate to obtain a major capital injection in terms of the selling price.
3. Property tax could be imposed and services could be sold at business tariffs.

Disadvantages

1. The comments made under paragraph 8.5.1 should be borne in mind, which for all practical purposes rules out this possibility at this stage. Only by way of lengthy procedures would the Council be able to sell off the land.
2. There is inadequate time to prepare tender documents and resolve the issue of the current tenants before tenders can be asked.
3. There is a real danger that the land will revert to the State without the Council regaining ownership thereof.

This alternative is not recommended.

8.6.3 Council operation of the caravan park

This would mean that the Council would operate the caravan park very much in the same manner as the lessee currently manages the caravan park.

Advantages

1. Council will gain access to all the funds generated and this could either be used to upgrade the facilities and / or it could supplement the Council's general income.
2. It would give the Council adequate time to sort out all the problems related to the current use.

Disadvantages

1. Operating caravan parks is not a core function of municipalities.
2. Although more income could be generated, it would in all probability be drained into the upgrading of the caravan park which would not necessarily result in an ideal end solution.
3. By operating it as a true caravan park, that is with no annual rentals for the bulk of the sites, it could result in a reduced income and an increased administration cost.

Except as a short term expedient e.g 6 - 12 months, this route is not recommended.

8.6.4 Operation by a Community Based Organisation

Such a community based organisation (CBO) could be a company or trust or any other legal entity consisting of current stakeholders in the caravan park e.g "owners" of A-Frame houses and tenants in respect of the 31 "permanent" sites, or it could even be a Ratepayers Association.

Advantages

1. The CBO, having a dedicated single focus and direct involvement, could be very effective both from a cost and an administrative point of view.
2. Because it is operated by the tenants themselves (albeit through an elected body) the complaints could probably be reduced.
3. The Council's income could increase.

Disadvantages

1. There is currently no such CBO other than the steering committee which has a very limited power base and is not really a representative legal entity.
2. There is no guarantee that the optimum potential of the caravan park will be realised in this process.
3. Council could be criticised for granting rights to an already determined privileged few people without having received fair compensation.

This alternative should only be considered as a partial interim measure. However refer to 8.7 below.

8.6.5 Granting of a concession

A concession is usually for a long period e.g 30 years during which period the asset of the Municipality is made available to a concessionaire, who is then able to develop the caravan park and operate it for its own benefit during that period of time, whereafter the property, together with all improvements thereon, is returned to the Council. The Council in turn receives certain benefits e.g by way of rental, royalties, sale of services, property tax, reduction in its own administrative costs, etc

Advantages

1. The income of the Council can be significantly increased.
2. The administrative costs of the Council can likewise be significantly decreased.
3. The Council is no longer involved in a non-core function.
4. If the right concessionaire is found the park could still be developed as a public resort, but of a much higher order.

Disadvantages

1. Should the development be of a higher order, it could lead to certain current users being excluded therefrom (this argument should be countered by the fact that currently only approximately 200 privileged families have access to this area).
2. There may be resistance from segments of the community and more specifically from Council employees (Other than an ideological objection by a trade union, there could be no real significant objections as no Council employees are currently involved in the operation of the caravan park).

This alternative is highly recommended, but not as an immediate solution.

It is essential that in order to achieve the best benefit for the Council and also for the community, all existing perceived rights should first be sorted out. Furthermore proper request for proposals documentation must be prepared, which will take a considerable time

8.7 Recommendations

1. That as an interim measure the Council, in close co-operation with the steering committee, take over the operation and management of the De Mond caravan park on 1 August 2000 in logical short term cycles.
2. That a legal definition of what constitutes a "public resort" be obtained and furthermore that all perceived rights of the current tenants be clarified, preferably on the basis as set out in paragraph 8.5.4 above.
3. That the Council favourably consider the concession option as it overcomes virtually all the problems, whilst at the same time creating a tremendous development opportunity, but along carefully managed principles and guidelines including a proper environmental impact assessment, thereby ensuring that any future development harmonises with all the surrounding developed and undeveloped areas.
4. That a request-for-proposals document be prepared with a view to soliciting proposals from prospective developers in this regard, which could include a company formed by the present stakeholders, who could also submit a bid in this regard.
5. That, in the request-for-proposals document, the dealing with any permanent structures also be addressed and that the bidders should indicate how they are going to accommodate those permanent structures and by retaining them a new development is possible by

payment for improvements made, or by giving preference to such tenants in respect of the new development.

9. ONRUS CARAVAN PARK

9.1 Title Deed Particulars

The caravan park is part of an area known as the remaining extent of the farms Onrust Rivier and Rheeziqt, originally 214 morgen in extent, which land was transferred to the then Local Board of Onrustrivier, after having paid the required purchase price of one thousand five hundred and eighty pounds. The transfer took place on 30 December 1941.

This title deed information contradicts a statement made by the Onrus Ratepayers Association namely that the property was acquired in 1937 by the Onrus Village Management Board by way of public contributions. The often kept notion that the park is "owned" by the Onrus residents is therefore fallacious.

Over the years this area of land was reduced by way of the establishment of various erven and the current remainder was, in terms of Proclamation 71/1994 transferred to the Greater Hermanus Transitional Local Council, when the municipalities of Onrus and Hermanus amalgamated.

Other than certain servitudes, mainly in regard to grazing and water rights, there are no serious impediments on the use of the land.

9.2 Standard of Facilities

The first impression is that the caravan park is on a reasonable standard - an impression which is enhanced due to its locality on Harder Bay and the large number of indigenous Milkwood trees. On closer inspection the inadequate maintenance of facilities and infrastructure becomes more apparent.

9.3 Current Use

There are 254 sites of which 118 are semi-permanent sites having a uniform appearance consisting of a concrete slab with shade net. Five "chalets" were at one stage also erected. In addition to an annual rental of R3 800,00 the holders of these semi-permanent rights who required an electrical connection from ESKOM had to pay R1 350,00 for such connection.

The remainder of the sites are available to casual campers. As in the past, bookings could have been done up to a year in advance, the custom developed that campers returned to the same site year after year (even up to 40 years) thereby creating a degree of 'permanence'. This sense of permanence led to those campers improving the various sites e.g. by levelling the area and planting grass and trees.

A bone of contention is that currently instead of letting the same site to the regular occupant of a site, the site is now let to the person who books it for the longest period in order to achieve maximum occupation and income for the Council. The person to whom the booking is awarded however not necessarily occupies the site for the full period and allegedly does not care for it in the same way that the regular caravaner cared for it in the past.

According to available information, the caravan park was at some stage in the past made available to a private sector operator, which according to all accounts, was not a successful venture, as this operator allegedly failed to maintain the facilities and infrastructure of the caravan park. This has led to a great degree of resistance from the regulars who fear that, should privatisation take place again, history might repeat itself.

9.4 Report on Public Meeting

This meeting took place on 29 December in the De Wet hall and was well-attended, with the hall filled to capacity. The issues raised could be summarised as follows:

- ✓ complaints regarding the lack of maintenance of the infrastructure (lists of clearly identified complaints were made available);
- ✓ the alleged relatively high cost of the annual rental paid by semi-permanent caravaners (there was a drastic increase on the then relatively low tariff as from 1 July 1998);
- ✓ the inadequate security as some of the campers had suffered damage due to theft - an occurrence which rarely happened in the past;
- ✓ the dilapidated state of the perimeter fence;
- ✓ the fear that if the park were to be sold, it would develop into a highly commercialised park, which could result in the character of the park being lost;
- ✓ the fear that a private sector operator would fail to maintain the facilities and pocket exorbitant profits to the detriment of the campers.

The Onrus Ratepayers Association which appears to be well-organised and representative of the community, conducted various surveys in the past and also issues a regular newsletter. According to these surveys the overwhelming majority of ratepayers are opposed to any permanent structures in the park.

The Association is firmly of the opinion that as a citizen-based organisation it should be given an opportunity to operate the park on behalf of the Council. In terms of the Local Government Municipal Systems Bill such an eventuality is quite possible and even existing legislation allows therefor.

9.5 Evaluation of possible options.

9.5.1 Retaining the status quo

Advantages

1. The Council remains in control of the caravan park and, as a result also of the income generated.
2. The fears associated with privatisation will be dispelled.

Disadvantages

1. This would defeat the object of the exercise, namely to find an alternative to the existing arrangement.
2. The Council will continue to be subjected to criticism.
3. The maintenance and general upkeep of the park may suffer as a result of other priorities within the municipal area (and even more so with an enlarged municipal area), requiring attention.
4. Operating caravan parks is not a core function of a municipality.
5. The Council will not obtain a capital income by selling off the land.

This alternative is not recommended.

9.5.2 Full privatisation by selling off the property

This would imply the calling of tenders and making the caravan park available to a private sector entrepreneur.

Advantages

1. It could result in such entrepreneur investing a considerable amount of money in upgrading the facility.
2. Its development potential could realise a significant purchase price.
3. Municipal income could be boosted by way of property tax, sale of services, etc.

Disadvantages

1. For reasons set out under paragraph 9.4 above, the Council can expect to be subjected to the continued criticism from the residents of Onrus and also of caravaners.
2. The nature of the development could have a negative impact on the open space area within Onrus which at this stage is already very limited.
3. An environmental impact assessment would, in all probability, have to be made in terms of the Environment Conservation Act, No 73 of 1989.
4. Should the De Mond privatisation, in whatever form, proceed, it could result in the Onrus caravan park becoming a less attractive option for the private sector, and as a result, a purchase price being realised, which does not fully reflect the inherent value of the site.

This alternative is, for reasons that will become evident under par 9.5.3 below, not favoured at this stage, but should the

recommendations under 9.5.3 prove to be unsuccessful, then this option should be reconsidered.

9.5.3 Operation by a Community Based Organisation

Such a CBO, whatever the nature of its juristic persona, could consist of current stakeholders who have already organised themselves such as the Onrus Campers Association and/or the Onrus Ratepayers Association.

Such a CBO could take over the effective control and management of the park, but will have to fulfil certain contractual obligations e.g

- > the day-to-day administration,
- > the maintenance and general upkeep of the park,
- > exercising access control,
- > dealing with complaints, and undertaking certain capital improvements within the immediate vicinity of the park.

It could be done on the basis that the Council receives a fixed all-inclusive income, escalated by a certain percentage per annum, whilst the rest of the money could be made available to the CBO - obviously on the basis that proper accounts, in audited form, should be submitted to the Council.

Advantages

1. The Council is relieved from its duty to administer and maintain the park.
2. The Council will receive a guaranteed income, which will grow annually, and which income could be utilised elsewhere within the Municipality.
3. The Council will no longer have to deal with complaints and other public criticisms.
4. The character of the park will be retained, especially in respect of it being part of an open space system accessible to the Onrus community in general.
5. Time will be "bought" to see whether the trial period is successful, and if not, there will be adequate time to seek alternative routes.

Disadvantages

1. In spite of the Onrus Campers Association and the Onrus Ratepayers Association's undertakings it may be unsuccessful as the continuous operation on a 365-days-a-year basis might become too onerous.
2. The Council will not obtain an income of a capital nature by selling off the land (this however is only of a temporary nature as the Council obviously will still own the land and could sell it at any future date - in all probability at a much higher price that would be the case at present).
3. The Council would still have to exercise some degree of control to ensure that its asset is properly operated and maintained (this need not be too onerous if we have in such a position, especially if it is operating

reasonably well, need only be carried out on an occasional basis).

This possibility is at this stage highly recommended as it will overcome most of the objections raised either in correspondence, or at the public meeting, whilst at the same time affording the Council the chance to evaluate its success by way of a trial period and still leaving all the other options open.

9.5.4 Rezoning the land and thereafter disposing of it

This would entail the rezoning of the land to say residential purposes, whether it be single dwelling units, cluster development, sectional title development or even multi-storey apartments.

Advantages

1. This would maximise the value of the land and a high nett yield could be realised through such an effort.
2. The Council would not be encumbered by the administration of a non-core function.
3. The Council would in future be able to obtain a permanent source of additional property tax and also income generated by the selling of services.

Disadvantages

1. Barring the purchaser of the site, whether the initial or the ultimate purchaser, the rest of the community will be up-in-arms and resisting / delaying all developments.
2. A valuable open space area would be lost (however, this could to a certain degree be offset by allowing only a limited coverage).
3. An environmental impact assessment will definitely have to be done and there is a strong possibility that this may delay the process for years.
4. Due to its low lying position the cost of the provision of sewerage services (which would be essential) may become very expensive. (This however could be countered by expected high selling prices).

This alternative is not recommended at this stage, but should the alternative mentioned under 9.5.3 be a failure, it could again be revisited either as a first choice or as an alternative to the possibility mentioned under 9.5.2 or 9.5.5.

9.5.5 Granting of a concession

The process would be similar as to the one mentioned under item 9.5.5 above. The advantages and disadvantages are essentially the same as mentioned under that paragraph. Furthermore, there is also the potential disadvantage of no income being obtained by selling of the land.

This alternative is not recommended for the immediate future, but could once again be revisited depending on the outcome of the recommended route.

9.6 Recommendations

1. That the Council in principle agree to the Onrus Ratepayers Association and the Onrus Campers Association operating the caravan park as a Community Based Organisation, but with its own specific juristic personality for a trial period of one year commencing on 1 July 2000 which trial period may be extended for a further trial period of two years, whereafter the whole matter should be revisited.
2. That the Onrus Campers Association and the Onrus Ratepayers Association be advised accordingly and on their acceptance thereof, an agreement be entered into as set out under recommendation 3 below and further subject to the said associations obtaining an acceptable juristic status.
3. That a proper agreement between the Council and such a juristic person be entered into dealing with aspects such as
 - ✓ duration,
 - ✓ extension of duration,
 - ✓ guaranteed income to the Council,
 - ✓ escalation of the said income,
 - ✓ the obligations and duties of the juristic person,
 - ✓ the detailing of specific obligations,
 - ✓ the compulsory investment of a percentage of the income in the upgrading of the park and its immediate environment,
 - ✓ breach or non-compliance,
 - ✓ suspension and/or cancellation of agreement etc.
4. That should this exercise fail the Council reserves the right to deal with the property as it deems fit including the possibilities mentioned under 9.5.2, 9.5.4 and 9.5.5 but that in such an eventuality the different options again be revisited and prioritised.

10. CONCLUSION

It is trusted that this report, in spite of its limitations, may assist the Council in arriving at meaningful decisions.

The Council has owned all three properties for many years and there is no need to rush into immediate and ill-considered decisions. Council is strongly advised to, where necessary, authorise further in-depth investigations and to implement the recommendations in a progressive manner.

11. WORD OF THANKS

Consultant wishes to express his gratitude to the Council for having entrusted this brief to the firm and to the Council employees involved and more specifically Mr James van der Linde, Mrs Rita La Cock and Mr Emile Magerman.

The positive attitude and valued inputs of the different stakeholders is also gratefully acknowledged.

ADV WERNER ZYBRANDS

/ssb
HERMANUS-CARAVANPARKS
14 MARCH 2000

AGREEMENT OF LEASE

made and entered into by and between

OVERSTRAND MUNICIPALITY

herein represented by **WERNER JACOBUS ZYBRANDS** in his capacity as Municipal Manager of the Overstrand Municipality and as such duly authorised to act herein on behalf of the said Municipality.

(hereinafter referred to as the "Lessor")

and


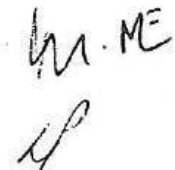
DE MOND CARAVAN PARK ASSOCIATION

Herein represented by **JOHAN DANIEL CILLIERS** in his capacity as Chairman of the De Mond Caravan Park Association and as such duly authorised to act herein on behalf of the said association by virtue of a resolution of the association dated 29 December 2003.

(hereinafter referred to as the "Lessee")

WHEREAS

- a) the Lessor's predecessor, the Municipality of Hermanus, had on 24 October 1994 entered into a lease agreement in respect of a certain piece of land being a portion of erf 4831 Hermanus, situated on the south eastern side of 17th Avenue, Hermanus, together with building improvements, fixtures and fittings, movables and equipment (hereinafter collectively denoted as "the Park").
- b) the aforesaid lease agreement was renewed from time to time until 31 July 2003;
- c) the Overstrand Municipality had authorised the assignment of the lease agreement by the former lessee (one Frans Marthinus Groenewald) to the De Mond Caravan Park Association with all his rights and obligations with effect from 1 August 2000;
- d) the Lessor, in terms of a resolution of its Executive Mayor dated 20 October 2003 leased the Park on an annual basis to the Lessee;
- e) an agreement of Lease had been entered into between the Parties on 14 February 2005.

  M. ME
4P

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-2-

- f) the effect of the said Agreement of Lease was suspended when the Lessor entered into a development agreement of the De Mond Caravan Park; and
- g) the said development agreement has lapsed

NOW THEREFORE the parties agree as follows:

1. LETTING AND HIRING

The Lessor hereby lets and the Lessee hereby hires the Park subject to all the terms and conditions as contained in the original lease agreement save for those amendments *infra*.

2. DURATION

The lease shall be effective from date of signature until 28 February 2011 whereafter same may be renewed by agreement between the Parties.

3. RENTAL

No rental shall be payable by the Lessee for the duration of the initial lease period ending on 28 February 2011.

4. CONTINUING DEPOSIT

The amount provided in terms of the former agreement between the parties will remain unaltered.

5. SURETYSHIP

~~The investment of the Lessee in the amount of R120 000,00 (One hundred and twenty thousand Rand only) and ceded to the Lessor as surety for the due payment by the Lessee of all sums of money which are or may hereafter become due and payable to the Lessor from any cause whatsoever in terms of and arising from this agreement of lease, shall remain in place.~~

ME
ME

6. MAINTENANCE

The Lessee will be responsible for the maintenance of the Park including all municipal infrastructure and improvements.

ME
ME

7. RESERVATION OF RIGHTS

This agreement does not vest any rights for the benefit of the Lessee or its members and the Lessor will not incur any liabilities of whatever nature as a result of or forthflowing from this agreement.

THUS DONE, SIGNED AND AGREED TO AT Asemanus
on this 15th day of July 2010.

AS WITNESSES:

- 1. [Signature]
- 2. Erasmus

[Signature]
Municipal Manager
o.b.o. Overstrand Municipality

THUS DONE, SIGNED AND AGREED TO AT Greyton
on this 10 day of July 2010.

AS WITNESSES:

- 1. _____
- 2. _____

[Signature]

FULL NAMES
Johan Daniel Cilliers
o.b.o. De Mond Caravan Park Association

OVERSTRAND MUNICIPALITY ADDENDUM TO LEASE - DE MOND CARAVAN PARK ASSOCIATION

ADDENDUM

Memorandum of Agreement

entered into between

OVERSTRAND MUNICIPALITY

herein represented by **WERNER JACOBUS ZYBRANDS** in his capacity
as Municipal Manager,
(hereinafter called the **LESSOR**)

and

DE MOND CARAVAN PARK ASSOCIATION

*Represented by JOHAN DANIEL CILLIERS,
in his capacity as CHAIRMAN*

(hereinafter called the, **LESSEE**)

WHEREAS the **LESSOR** and the **LESSEE** entered into a lease agreement dated 15 July 2010 in respect of Erf 4831, Hermanus (hereinafter referred to as "the land") for the purpose of managing the caravan park.

NOW THEREFORE The Parties to this Agreement agree that the lease agreement be renewed for a period of 12 (TWELVE) months upon the same terms and conditions as the agreement dated 15 July 2010. The lease period will commence on 1 March 2011 and expire on 29 February 2012.

Werner Jacobus Zybrands
Johan Daniel Cilliers
ME
DE MOND

OVERSTRAND MUNICIPALITY ADDENDUM TO LEASE - DE MOND CARAVAN PARK ASSOCIATION


THUS DONE, SIGNED AND AGREED TO AT HERMANUS

on 7 January 2011 (date).

AS WITNESSES:

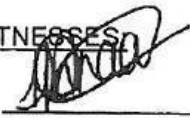
1. RE duPlooy

2. Meermanns




(LESSOR)
OVERSTRAND MUNICIPALITY

AS WITNESSES:

1. 

2. E. du Toit



(LESSEE)



**REPORT ON:
THE FEASIBILITY OF THE LEASING AND DEVELOPMENT OF
DE MOND CARAVAN PARK AND ADJACENT LAND**

**Submitted:
13 OCTOBER 2011**

Revised to include Comments:

TRANSACTION ADVISORS:

JOHAN DU PLESSIS

PROJECT MANAGEMENT & FACILITATION

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EXECUTIVE SUMMARY

The Overstrand Municipal Council (the "Council") is enjoined to secure ecologically sustainable development and to promote justifiable economic and social development of its community.¹ The Council is also charged with the duty to use municipal resources in the best interests of the local community² and to optimise the use thereof.³ With this in mind the municipal administration on an on-going basis reviews the uses to which municipal properties are put.

In the course of such a review it was established that the Hermanus Municipality during 1942 obtained the lion's share of the land on which De Mond Caravan Park is situated (also known as "The Fishery"), by way of a Crown Grant. The Crown Grant stipulated that the land must be used for purposes of a "public resort". Initially the property was used for that purpose, but over the years various lease agreements were concluded that eventually culminated in the members of the De Mond Caravan Park Association (the "DCPA") securing for them certain use rights to the exclusion of members of the broader public.

Towards the end of 1999 the Greater Hermanus Municipality commissioned Advocate Werner Zybrands to investigate and assess the possibility of developing three municipal caravan parks (including De Mond) by way of public-private partnerships (also referred to as a "PPP").⁴ Based on recommendations which he made at the time the Overstrand Municipality (the "Municipality") subsequently advertised a Request for Proposal ("RFP"), evaluated proposals received in response to the RFP and concluded an agreement with a developer for the development of the De Mond land. A number of factors impacted negatively on the ability of the developer to perform in terms of the development agreement, with the result that the relevant development agreement was terminated during April 2010.

Situated next to De Mond Caravan Park is municipal land on which Klein River Lagoon Park ("KRLP") was established and, next to that, the so-called "Prawn Flats". Municipal land that was made available to Walker Bay Adventures ("WBA") and to the National Sea-and-Sand Institute (the "Institute") on a lease basis is situated in close proximity.

The Council is not satisfied that the municipal land described above is used in the best interests of the local community or that the use thereof has sufficiently been optimised. It has therefore resolved in principle to make that land available to a developer on a long term PPP lease basis to develop same primarily as a public resort. The Council appointed a transaction advisor to undertake the required feasibility study⁵ and, if the Council should decide to implement the proposal, to act in an advisory capacity and to assist the Municipality with the preparation and procurement of a PPP agreement.

The transaction advisors undertook the required feasibility study inter alia to establish all the legal requirements with which the Council would have to comply, should it decide to go ahead with the proposal; whether the proposal is consistent with applicable plans, policies and strategies; to identify potential risks to the Municipality associated with the proposed project; to establish whether there are any impediments or constraints (legal,

¹ See section 152(1)(c) and 24(b)(iii) of the National Constitution (the "Constitution") and section 73(1)(b) of the Local Government: Municipal Systems Act, 32 of 2000 (the "MSA").

² See section 4(2)(a) of the MSA.

³ See section 3(1)(c)(iv) of the Development Facilitation Act, 67 of 1995 (the "DFA"). Section 195(1)(b) of the Constitution requires the public administration to promote the efficient, effective and economic use of resources.

⁴ A public-private partnership is a vehicle used to *inter alia* unlock the potential of municipal property and must comply with the provisions of section 120 of the Local Government: Municipal Finance Management Act, 56 of 2003 (the "MFMA") and the Municipal Public-Private Partnership Regulations, 2005 ("the PPP Regulations").

⁵ As contemplated in section 120(4) of the MFMA.

financial or otherwise) that may stand in the way of or would make the implementation of the proposal an unattractive option; to record and assess all the relevant information; to convey to the Council the findings and recommendations of the project advisors; and to lay a solid foundation for the Request for Interest/ Proposal process described under "Procurement" below.

This report provides a brief overview of some of the most important laws, plans, policies and strategies that were considered in the investigation and assessment of the feasibility of implementing the proposal. The findings and recommendations of the feasibility study are set out below.

FINDINGS

The main findings of this feasibility study report are the following:

1. As the law currently reads it is legally permissible to make the municipal land concerned available on a long term PPP lease basis for development primarily as a public resort.
 2. As the dense legislative environment within which planning and development must take place is in flux, it is advisable to monitor amendments made to legislation throughout the procurement and construction phases of the proposed project, to ensure lawful conduct.
 3. There is no legal basis for claims by the De Mond Caravan Park Association or any of its members resulting from the lapsing of the current lease agreement or improvements that they may have made to the De Mond land during the currency of lease agreements with the Municipality.
 4. In terms of the current lease agreements held by the Klein River Lagoon Park, the National Sea-and-Sand Institute and Walker Bay Adventures, these entities and their members do not have contractual rights to remain on the properties once these lease agreements lapse but a fair and equitable process going beyond the lease stipulations is called for. Premature cancellation of these lease agreements will necessitate compliance with the obligations stipulated.
 5. The Integrated Zoning Scheme (the "IZS") of Overstrand expected to be finalised before commencement of the development will allow scope for a diversified resort albeit subject to the Council granting a number of consent land uses, e.g. hotel and conference facilities. Any delays or other complications with the approval of the IZS by the province and uncertainty if consent land use applications will be approved by the Council hold definite risks for procurement of suitable developers and the successful development of a public resort.
 6. The duration of the planning and construction phase will be approximately four years given the time needed to complete an Environmental Impact Assessment ("EIA") and other prescribed studies, finalisation of consent use applications, the provision of required bulk infrastructure and installation of reticulation infrastructure. It should be expected that the development will take place in phases.
 7. The proposed resort requires no capital input and minimal operational expenditure from the Municipality while presenting a highly affordable growth and development opportunity that will result in a significant economic and financial benefit to the Municipality.
 8. The value of the land and the municipal revenue earned will increase considerably once new infrastructure has been installed, permanent improvements (such as buildings) have been constructed on the property and a public resort is operational.
 9. A flexible income-based approach to rental determination will be more aligned with fair and sustainable business principles and enhance the financial viability of the development than a land value-based approach.
 10. Market appetite will be good provided the composition of the development can bridge tourism seasonality by accommodating large groups for conferences and its usability as a venue for a wider range of events and occasions.
-

RECOMMENDATIONS

It is recommended that:

- 1. The findings of this study be noted and accepted.*
 - 2. The current lease agreements in respect of the municipal properties concerned not be renewed when they lapse (alternatively that they be terminated) in order that those properties will be available for redevelopment.*
 - 3. The municipal properties concerned be made available on a long term lease basis for development of primarily a public resort in a manner that will secure ecologically sustainable development, promote more equitable access for members of the broader public to municipal resources, socio economic development and optimum use of municipal land in the best interest of the local community.*
 - 4. The Feasibility Study Report be made available to the public for comments and representations and the views and recommendations of National Treasury and the Western Cape Provincial Treasury thereon be solicited before the Council takes a final decision to grant the use, control and management of the land to a private developer for the establishment of a public resort.*
 - 5. The procurement of a developer be done through a combined Request for Qualifications ("RFQ") and Request for Proposals ("RFP") process with the aim to appoint a preferred bidder and a reserve bidder with whom the Municipality may in its sole discretion negotiate should negotiations with the preferred bidder fail.*
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LIST OF APPENDICES

Appendix A	Council Resolution including Registration of Project with National Treasury
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LIST OF ACRONYMS

BBBEE	-	BROAD-BASED BLACK ECONOMIC EMPOWERMENT
COA	-	CAPE OUTSPANS ACT
COGTA	-	DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
DCPA	-	DE MOND CARAVAN PARK ASSOCIATION
DEA & DP	-	DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING
DIP	-	DEPARTMENT OF INFRASTRUCTURE AND PLANNING
DFA	-	DEVELOPMENT FACILITATION ACT
DSL	-	DEVELOPMENT SETBACK LINE
DU/H	-	DWELLING UNITS PER HECTARE
EIA	-	ENVIRONMENTAL IMPACT ASSESSMENT
ESTA	-	EXTENSION OF SECURITY OF TENURE ACT
HIA	-	HERITAGE IMPACT ASSESSMENT
ICMA	-	NATIONAL ENVIRONMENTAL MANAGEMENT: INTEGRATED COASTAL MANAGEMENT ACT
IDP	-	INTEGRATED DEVELOPMENT PLAN
IZS	-	INTEGRATED ZONING SCHEME
KREMP	-	KLEIN RIVER ESTUARINE MANAGEMENT PLAN
KRLP	-	KLEIN RIVER LAGOON PARK
LRA	-	LABOUR RELATIONS ACT
LUMS	-	LAND USE MANAGEMENT SYSTEM
LUPO	-	LAND USE PLANNING ORDINANCE
MAT	-	MUNICIPAL ASSET TRANSFER
MFMA	-	MUNICIPAL FINANCE MANAGEMENT ACT
MIG	-	MUNICIPAL INFRASTRUCTURE GRANT
MSA	-	MUNICIPAL SYSTEMS ACT
MSL	-	MEAN SEA LEVEL
NEMA	-	NATIONAL ENVIRONMENTAL MANAGEMENT ACT
NEMBA	-	NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT
NEMPAA	-	NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS ACT
NEMWA	-	NATIONAL ENVIRONMENTAL MANAGEMENT: WASTE ACT
NHRA	-	NATIONAL HERITAGE RESOURCES ACT
NT	-	NATIONAL TREASURY
NWA	-	NATIONAL WATER ACT
ODS	-	OVERSTRAND DENSIFICATION STRATEGY
OGMS	-	OVERSTRAND GROWTH MANAGEMENT STRATEGY
OHSA	-	OCCUPATIONAL HEALTH AND SAFETY ACT
OHSR	-	OVERSTRAND HERITAGE SURVEY REPORT
PAIA	-	PROMOTION OF ACCESS TO INFORMATION ACT
PAJA	-	PROMOTION OF ADMINISTRATIVE JUSTICE ACT
PPP	-	PUBLIC-PUBLIC / PUBLIC-PRIVATE PARTNERSHIP
PPPFA	-	PREFERENTIAL PROCUREMENT POLICY FRAMEWORK ACT
PSDF	-	PROVINCIAL SPATIAL DEVELOPMENT FRAMEWORK
RFP	-	REQUEST FOR PROPOSALS
RFQ	-	REQUEST FOR QUALIFICATIONS
RLRA	-	RESTITUTION OF LAND RIGHTS ACT
SANS	-	SOUTH AFRICAN NATIONAL STANDARDS
SCM	-	SUPPLY CHAIN MANAGEMENT
SDA	-	SERVICE DELIVERY AGREEMENT
SDF	-	SPATIAL DEVELOPMENT FRAMEWORK
WBA	-	WALKER BAY ADVENTURES

INTRODUCTION

1. PURPOSE OF THE STUDY

The town of Hermanus situated within the Overstrand Municipality is a very popular tourist destination due to the scenic beauty of the area and the facilities and opportunities that the town offers to all walks of life. The Council is, however, faced with the complex problems of providing for an expanding population and meeting demands for social justice. It is charged with the responsibility of advancing social and economic well-being for both present and future generations by utilising municipal resources in ways that are efficient, equitable and sustainable, whilst protecting the environment for the benefit of present and future generations.

The Council is required to use the De Mond land for purposes of a public resort. Public resorts such as camping and caravan parks are usually utilised on a seasonal basis for a relatively short period each year. As a result they are often not financially viable and do not represent optimal utilisation of scarce resources. It would appear, however, that if facilities were to be provided to accommodate for example large tourist groups or conferences, occupancy rates may be increased by a considerable margin throughout the year, holding many positive advantages for the broader local community. Combined, the land under discussion presents an excellent opportunity for the type of development needed to attract large tour and conference groups throughout the year.

The purpose of this study is to investigate the feasibility of establishing as a PPP exercise primarily a public resort on the land under discussion, as part of the Council's endeavour to secure ecologically sustainable development and to promote justifiable economic and social development of its community. If the project is found to be feasible, the Council will require the transaction advisors to assist it with the implementation of the project in supporting, advisory and managerial capacities.

2. PROCESS

The Council in compliance with the requirements of the MFMA commissioned a study to establish the feasibility of the proposal.⁶ During the period November 2010 to January 2011 the project was formalised and a pre-feasibility analysis was undertaken. The project was subsequently registered with National Treasury.

In terms of the Municipality's commitment to foster transparency, to encourage public participation and to be accountable, consultations were held with representatives of interest groups and the authorities. It included formal discussions during December 2010 between the two most prominent land lease stakeholders, municipal representatives and the transaction advisors, the purpose of which *inter alia* was to inform the stakeholders of the initiation of the feasibility study and the process to be followed.

During the period January to June 2011 information was collated, further technical legal and institutional analyses as well as financial modelling were undertaken.

This draft feasibility study report is now submitted to the Council for consideration and will be followed by a compulsory 60 day consultation period before the final feasibility study report is submitted to Council, the views and recommendations of National and Provincial Treasuries are sought and the general public is afforded the

⁶

See Appendix A.

opportunity to comment⁷. Once those comments, views and recommendations have been received and evaluated, appropriate amendments will be made to the report before it is submitted to Council for an in principle decision to proceed with a PPP.

If the Council resolves to proceed with a PPP, a process to procure a lease arrangement for the proposed development will be followed. Sensitive to the principles of legality and cost-effectiveness, National Treasury was requested to indicate the procurement process to be followed if the proposal was found to be feasible. It suggested that the process as set out in the Municipal Asset Transfer Regulations⁸ should be followed.

3. FORMAT AND CONTENT OF THE REPORT

Since the process prescribed in terms of the MAT Regulations is relatively vague in respect of the content of a feasibility study, the Municipality, on advice of its transaction advisors, agreed to incorporate components of the feasibility study report that are prescribed in the MFMA.⁹ The primary goal of a more comprehensive feasibility study is to provide the Council with adequate information to take an informed decision and to lay a solid foundation for the RFQ/RFP process, which is further expanded under "Section 6: Procurement Plan".

4. TRANSACTION ADVISORS

During 2010 the Municipality appointed Mr Johan du Plessis¹⁰ as the principal transaction advisor to undertake the required feasibility study¹¹ and, should Council decide to implement the proposal, to act in an advisory capacity and to assist the Municipality with the preparation and procurement of a PPP agreement. He is doing it in co-operation with Ms Anita Botha¹² and by Mr Riaan Kuchar,¹³ the latter who was appointed as the Project Officer.

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⁷ See sections 21 and 21A of the MSA.

⁸ See Chapter 4 of the Municipal Asset Transfer Regulations, 2008 (the "MAT Regulations").

⁹ See section 120(4) of the MFMA, as further expanded upon in the MFMA Municipal Public-Private Partnership Regulations, 2005.

¹⁰ An experienced practicing attorney with a local government and property development background, who specializes in environmental and land use matters and undertakes project management and facilitation.

¹¹ See section 120(4) of the MFMA.

¹² An experienced local government consultant who has been involved in the successful procurement of a number of PPP's in the local government sphere and in the subsequent contract management and monitoring of such PPP's. She trades under the style "Pro-Active Management Services: Local Government Consultancy", also known as "PAMS".

¹³ The Head of Town Planning and Property Administration of the Municipality.

SECTION 1: NEEDS ANALYSIS

1. ORIENTATION: LOCATION OF LAND

De Mond Caravan Park is situated on a portion of erf 4831 and a portion of erf 5327 in Hermanus and the KRLP, Prawn Flats and Sea and Sand are all situated on portions of erf 4831. The site is bounded on the north by the R43 where it enters Hermanus from the Stanford side and on the south by the Klein River Lagoon. There is a gravel access road to Prawn Flats, KRLP and Sea and Sand from the R43 and a tarred access road to De Mond off 17th Avenue. The De Mond site slopes in a southerly direction and has a cross-fall of approximately 20m. There are a few rocky outcrops on the site.

Figure 1.1: Contextual Overview of the Hermanus East Area including De Mond (Source: OGMS)

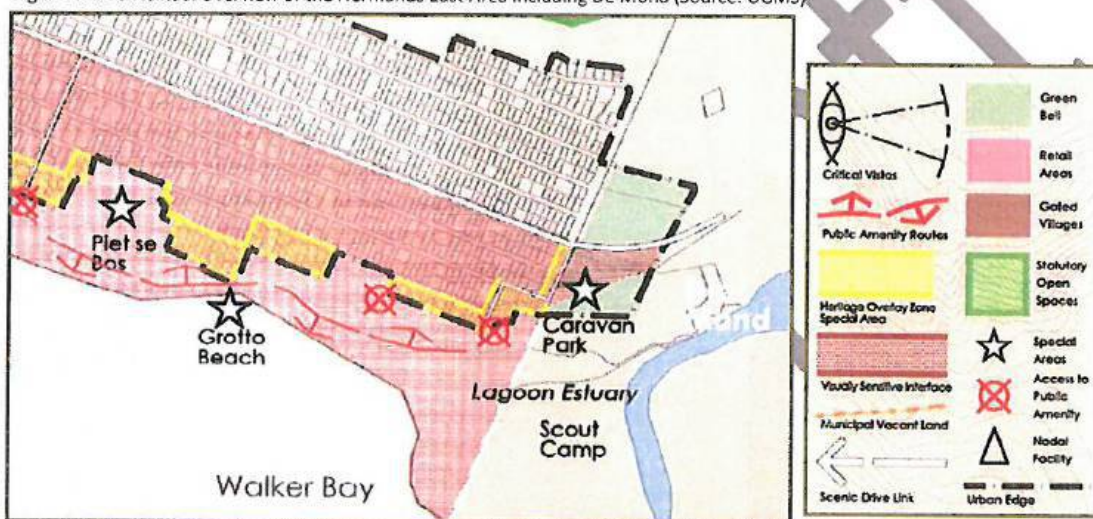
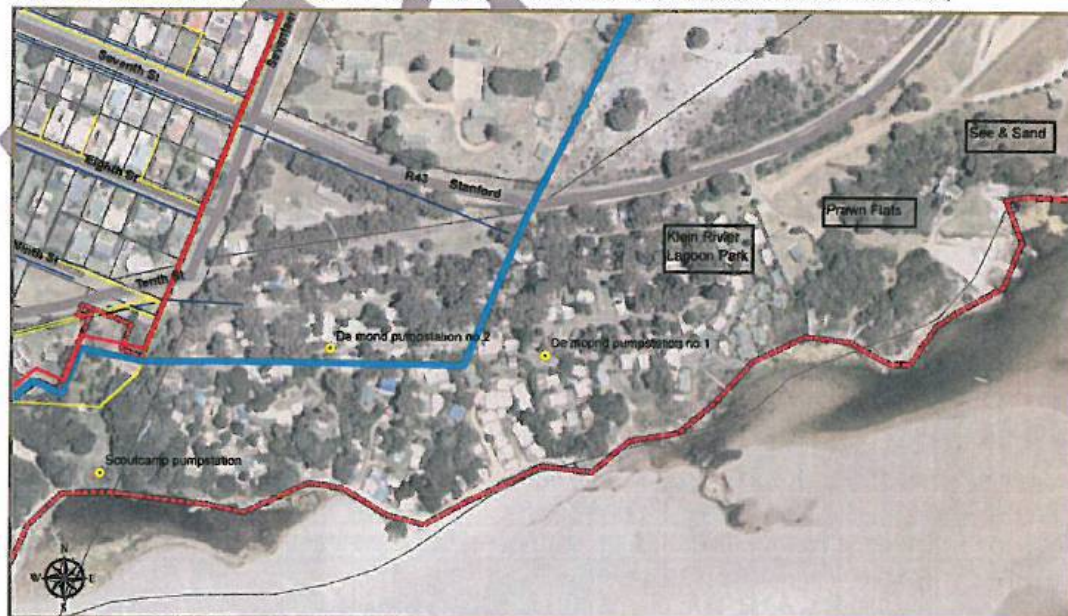


Figure 1.2: Aerial View of the De Mond and Adjacent Sites Earmarked for Development (Source: GIS, Overstrand)



2. RATIONALE

It is not in the best interests of the local community that the land concerned is not used in ways that are efficient, equitable and sustainable. It is also necessary to bring the use of the De Mond land in line with the conditions of the Crown Grant in terms of which it was made available to the Municipality.

There appears to be a real need for better integration and co-ordination of the usage of the said land, *inter alia* to control pollution, to order the activities along the shores of the lagoon, to enforce law and order and to undertake holistic planning and development that fully explores the potential of the land. This should be done in accordance with the objectives of environmental and other legislation, as well as the applicable plans, policies and strategies (e.g. the management plan of the Klein River Estuary).

The Council's financial resources are scarce relative to its obligations and must be managed. Management implies choice. The Council is charged with the notoriously difficult, albeit vital and necessary task to weigh economic, social and other factors, and to balance them against one another, when allocating funds. Given the extent of the Municipality's capital commitments in respect of basic service delivery and ensuring the adequate operation and maintenance of its water, sanitation, electricity and waste infrastructure, it cannot favourably consider developing a public resort itself. In addition the management of such a resort does not fall within the ambit of the available municipal expertise. It is therefore necessary that the proposed development should be undertaken by an external party, but in synergy with the Municipality's strategic and developmental planning.

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SECTION 2: SITUATIONAL ANALYSIS

1. PROJECT OUTPUT SPECIFICATIONS

Government policy promotes the concept of a developmental state as part of the strategy to address the serious poverty problem and to promote socio and economic development. It goes beyond the scope of this report to provide even a brief overview of the emergence of developmental local government and the multi-dimensional policy architecture that underpins it. Suffice it to say that the uneven distribution of wealth and the reality of a steadily increasing poor population in need of economic opportunities, basic infrastructure and social support make economic growth and development the biggest government priority in the long run. The proposed development has a major role to play in respect of improved access to economic and social opportunities and municipal resources.

As part of its commitment to promote social and economic development the Municipality wishes to enter into a long term land lease agreement with a financially sound and environmentally responsible developer that has proven expertise to establish, manage and maintain a public resort that caters for the needs of the broader public (including specialist and large tourist groups and commercial interest) through the availability of hotel and conference facilities. The primary goals of the development will be to provide public resort facilities that will increase visitors numbers to Hermanus, especially during the traditional low and mid seasons and create much needed job opportunities (primarily for members of the local community) during the construction and operational phases of the public resort.

It is of paramount importance to the Council that the successful bidder shall act in a manner that respects, upholds and fulfill the fundamental environmental right contained in section 24 of the Constitution. It is recorded that the promotion of conservation of the Klein River Estuarine and preservation of the heritage character of De Mond and its surroundings will rank prominently in the evaluation of development proposals.

2. CURRENT LEASE AGREEMENTS

2.1 INTRODUCTION

The Municipality has over the years entered into a number of lease agreements in respect of the properties concerned. The transaction advisors therefore considered it necessary to investigate and assess to what extent (if any) the current lease agreements may hamper or impact negatively on the proposed future utilisation of those properties. The current lease agreements are discussed in the following sub-paragraphs.

2.2 DE MOND

A small portion of the present caravan park is located on a portion of erf 5327. The largest portion of the caravan park is located on a portion of erf 4831 Hermanus. The national government conditionally granted what is now known as erf 4831 (also referred to as "The Fishery") to Hermanus Municipality in terms of section 10 of the Crown Lands Disposal Act, No. 15 of 1887 (Cape) by the way of Crown Grant No. 110/42 during November 1942.

One of the conditions of grant imposed at the time relates to minerals and precious stones. The other two conditions stipulate that:

- 1) *the land must in accordance with a resolution of Parliament dated 16th and 23rd March 1934 only be used as a place of public resort; and*
- 2) *the Government shall at all times have the free right to use any portion of the land for the purpose of obtaining access to the Klein River Lake.*

The Municipality acquired Erf 5327 in a land exchange transaction when the road now known as the R43 was constructed. The Deed of Sale of this portion of land (also known as "The Fishery B") provides that:

"the State shall have the right at all times, of resuming for public purposes, such portion or portions of the land hereby granted, as may not have been alienated by the Municipality. In the event of resumption as aforesaid, no compensation shall be payable by the State, except in respect of substantial improvements of a permanent nature, erected or made on the land resumed, whether by the Municipality or by any person or body acting under the express authority of the said Municipality."

In terms of the relevant title deed the Municipality may not alienate erf 5327 without the consent of the Minister of Agriculture.

The Council may contractually stipulate that a developer may only use the municipal land concerned for purposes of a public resort. If any approvals under the Land Use Planning Ordinance, 15 of 1985 ("LUPO") (Western Cape) will be required for the proposed development, the Council will also be empowered to impose appropriate conditions of approval (discussed below),¹⁴ which may include a requirement that the land only be used for purposes of a public resort.

Past Use

Erf 4831 was initially used for purposes of a public resort, but over the years various lease agreements were concluded that eventually culminated in the members of the DCPA securing for them certain use rights to the exclusion of members of the broader public.

The first lease agreement for the caravan park was entered into in 1994 with a certain Mr Groenewald. It contained terms and conditions in terms of which:

- it was valid for a seven year period;
- the lessee had to pay the municipality an agreed monthly rental and all rates, taxes and levies;
- the park was to be used for a caravan/camping park and should remain open for such business;
- by referring to patrons, customers and visitors, it clearly envisaged a place open to the public;
- entitled the lessee to allow 31 mobile home sites;
- all or any of the caravan sites could be set aside for the use of permanent residents (the reason presumably being that managing it as a visitor based caravan park was not sustainable);
- the lessor (the Municipality) could, in its absolute discretion, withdraw the right to set caravan sites aside for permanent use at any time;
- improvements could be made to the land, stipulating that structural alterations and additions required the Council's prior written approval;
- *"any such alterations or additions which the Lessee may make having obtained the Lessor's consent thereto in writing shall become the property of the Lessor without any liability on the Lessor to compensate the Lessee in any way in respect thereof; or (at the Lessor's option) shall be removed upon termination of the Lease and the premises restored to their previous condition."*

¹⁴

See "Land Use Planning Ordinance" in Section 3.2.3.1

- the lessee was required, at its own expense and to the satisfaction of the Municipality, to keep and maintain the park and all buildings in a good order inclusive of fencing, roads, and so forth.

During August 1994 the Council resolved that additions to caravans be permitted; provided that each application should include a locality plan and that deviations from such a plan will not be allowed. Towards the end of 1999 the Municipality appointed Advocate Werner Zybrands¹⁵ to investigate the possibility of PPPs for the three caravan parks belonging to the Greater Hermanus Municipality, including De Mond. During March 2000 he submitted a report (the "**Zybrands Report**") to Council, in which he recorded that many additions were made to caravans, but that no formal applications (including locality plans) were ever made or at least none could be found in the Municipality's records by 1999. The Zybrands Report made several recommendations concerning De Mond Caravan Park, *inter alia* that:

- a legal definition of what constitutes a 'public resort' be obtained;
- the 'perceived rights' of the De Mond Caravan Park tenants be clarified;
- the Council favourably considers a long term PPP arrangement with a developer; and
- a RFP document be prepared to solicit proposals from prospective developers to set the process in motion.

The tenants of the De Mond Caravan Park established an association during 2000 and the Municipality authorised with effect from August 2000 the assignment of the lease agreement with Mr Groenewald to the DCPA. The DCPA subsequently applied to Council for an extension of the lease period to 30 years. The Council refused the application and asked for a legal opinion as previously recommended in the Zybrands Report.

Currently the area north of the access road into De Mond is occupied by a residence, administration office and a hall (including a shop and ablution facilities). The remainder of the De Mond site comprises of 212 stands currently occupied by an array of caravans, A-frame wooden houses, permanent wooden houses and tents. All these sites are sub-let on an annual basis to the members of the DCPA, thereby effectively excluding any other tourists or caravaners and preventing its use as a public resort.

Legal opinion

The question of what constitutes a 'public resort' was the subject of a request for a legal opinion put to Advocate Mario Wilker. His legal opinion served before the Council during May 2001. The learned advocate scrutinized the procedure followed in the House of Assembly which culminated in the Crown Grant, but could not find any definition of the words 'public resort' in the House of Assembly minutes or reports or in any applicable legislation. He then concluded that:

- 1) the effect of the reservation contained in the Crown Grant is that 'The Fishery' can be used only as a public resort and that this reservation (which was registered in favour of the State) created a public servitude over the land in favour of the general public, which servitude probably cannot be terminated due to non-use or by prescription; and
- 2) as there is no definition of 'public resort' contained in the statutes, the normal principles applicable to the interpretation of contracts should be applied to determine the meaning of those words (the general rule being that the intention of the parties must be gathered from the language used and that such language must be given their ordinary grammatical meaning).

¹⁵

At that time a local government consultant and currently the Municipal Manager of Overstrand Municipality.

The following is an extract from the legal opinion obtained from Adv. Wilker, quoted *verbatim* to convey clearly some of his findings and submissions:

1. *The Fishery must be used as a public resort, i.e. must be open to the general public at large to be used for recreational purposes. Consultant (the Municipality) has wide powers to give effect to this purpose. The general public should be given as much access as possible to the premises. If the current use is maintained, the occupation of the various units should be made available for rental by the general public for short term visits or, if not viable, should be made available for rental on a yearly basis on tender. Granting certain individuals the right to occupy the units on a semi-permanent basis of up to 30 years would, to a large extent, exclude the use of the premises for recreational purposes by the general public.*
2. *The proposal by the De Mond Caravan Park Association makes no mention of what improvements of the premises are contemplated or what amount will be spent on improving the property.*
3. *It is submitted that it will be in the interest of Consultant to invite tenders to develop and/or manage the property, whether in terms of a[n] annual lease or a long term lease, in order to ensure that the property is used to the benefit of the general public and to maximise possible income of Consultant and the community.*
4. *The rights of the individual tenants/sub-tenants should be separately considered in relation to the specific lease agreement which prevails in respect of the portion of the property which they occupy.*

Based on the legal opinion received, the Collins English Dictionary and the Concise Oxford Dictionary were consulted to establish the ordinary grammatical meaning of the words "public resort". In terms thereof it means a 'place set aside for frequent use by the general public'.

The definitions contained in one piece of the legislation may not be used to interpret the words "public resort" as used in other legislation or, for that matter, in the Crown Grant. The transaction advisors, however, believe that the provisions of the now repealed Public Resort Ordinance, 20 of 1971, serves as a clear indication of what the authorities would normally regard as permissible within a public resort. In terms of that Ordinance, a resort is defined as "a public resort, seaside resort, holiday centre, holiday camp, caravan park, tent camp and picnic place". In terms of that Ordinance the permissible activities within a resort *inter alia* include providing and maintaining-

- works, undertakings and facilities for the recreation, benefit and convenience of the public;
- roads, bridges, aerodromes, ferries, fences, structures, buildings and other works;
- camping, holiday and picnicking facilities, entertainments, transport services and other undertakings and facilities;
- and
- furnishing accommodation, sale of articles and goods to visitors and supply of services;
- the letting of any building, structure or land by public tender or public auction;
- determining fees or charges to be levied for entry into and remaining in such resort and for use and enjoyment of works, undertakings and other services or facilities.

Development and Current Circumstances

Between 2001 and 2007 the Municipality from time to time renewed the lease agreement with the DCPA for short periods, but took no further action in respect of a PPP as proposed in the Zybrands Report. However, during February 2007 the Municipality advertised a RFP. The DCPA submitted a Proposal, but in May 2008, after following the prescribed tender adjudication process, the Municipality appointed someone else that tendered to

develop a public resort on the land on which De Mond Caravan Park is situated. The Municipality at that stage also suspended its lease agreement with the DCPA.

The cumulative impact of a number of factors eventually led to the termination during April 2010 of the development agreement with the appointed developer.¹⁶ As this implied that the Municipality would have to again make a fresh attempt to enter into a PPP, potentially involving lengthy delays, the Municipality concluded a new lease agreement with the DCPA expiring on 29 February 2012. This may leave sufficient time to complete this feasibility study and to procure a willing and able developer.

Perceived Rights

The Zybrands Report confirmed that some members of the DCPA were of the opinion that they were accorded certain "rights", based on the facts that the lease agreement:

- permitted 31 mobile home sites;
- made provision that the lessee could permit caravan sites to be set aside for the use of permanent residents;
- provided for the levying and payment of property tax by the lessee.

It is noteworthy that the Municipality withdrew the right of allowing permanent residents with effect from 1 July 2007. The DCPA subsequently suspended the membership of four of the tenants who continued to reside permanently in the caravan park.¹⁷ Therefore, permanent residency in De Mond is not permitted and, should anyone be in "permanent" occupation, it will be in breach of the relevant municipal lease agreement. Furthermore the lease agreement specifically stated that the lessee "*shall pay by due date all charges and deposits in respect of rates, electric light, power, gas, water, telephone, sewerage, refuse removal and other service charges levied by the Lessor....*". Compliance with the contractual provisions did not give rise to any rights beyond the validity date of the lease agreement.

The legal opinion obtained from Advocate Wilker dealt with the 'perceived rights' of the De Mond tenants. The learned advocate noted the various clauses mentioned above and invited attention to the imminent lapsing of the "permanent residence" concession when the lease agreement expired. He submitted that "mobile" implies "movable" and that the cost of constructions, additions or alterations erected without the consent of the Municipality would not be recoverable by the tenants. In his opinion the tenants would, however, have the right to remove the mobile homes, plastic constructions and any non-essential additions or alterations prior to the termination of the lease period, the essence of the matter being that the property be returned to the Municipality in good order and condition as required in terms of the lease agreement.

As official records show, the Municipality terminated its lease agreement with the DCPA and did not get involved in negotiations with tenants. Instead it required the appointed developer to negotiate and conclude a settlement with the tenants to the Council's satisfaction, before the latter was prepared to enter into a lease agreement with the developer. Unfortunately some of the terms of the agreement which the developer subsequently concluded with the tenants were unrealistic and may have created unrealistic expectations on the part of the lessees, something which may complicate the current process somewhat.

At this stage the settlement agreement are of no further force or effect. The terms and conditions of the municipal lease agreement remain in place and are still fully enforceable.

¹⁶

Invaluable lessons may be learned from that experience.

¹⁷

See the minutes of the Annual General Meeting of the DCPA held on 27 December 2007.

It would appear that the same measure of goodwill that prevailed in the past between the Municipality and the DCPA, still persists. The transaction advisors strongly recommend that in any new tender process and subsequent agreement negotiated with a potential developer:

- the Municipality should retain the responsibility to deal with claims (if any) from erstwhile lessees; and
- the successful proponent should be required to enter into discussions with the DCPA representatives to see whether a special arrangement could be made in terms of which members of the DCPA could be accommodated on a short-term preferential basis in the proposed new development, against payment of reasonable fees and charges and without endangering the financial viability of the project.

In terms of the current lease agreement the DCPA remains fully responsible for the maintenance of the caravan park, including all municipal infrastructure and improvements. It is clear from a recent *in loco* inspection that the caravan park is poorly maintained, with most structures showing varying degrees of neglect. It would appear that between the award of the first development tender in mid-2007 and the re-assignment of the lease to the DCPA during July 2010, the DCPA and its members did not make a *bona fide* attempt to meet their maintenance obligations in terms of the lease agreement.

In an act of goodwill and also to enable the DCPA to do the necessary maintenance, the Municipality stipulated in the new lease agreement entered into during July 2010 (renewed with effect from 1 March 2011 until 29 February 2012) that no rental is payable by the DCPA. Calculated at R43 412-45 per month this concession amounts to R520 949-40. As a further concession, the Municipality also waived the requirement in terms of which the DCPA had to make an investment of R120 000 and cede same to the Municipality as security for the due payment of all monies owed to the Municipality in terms of the lease agreement.

It is common cause that the current lease agreement expires on 29 February 2012. It therefore follows that in principle the contractual rights (if any) of the DCPA members to remain in occupation, will also expire on that date. Moreover, the maxim *nemo plus iuris ad alium transferre potest quam ipse habet* applies. Simply stated it means that a person cannot grant more rights than he himself has. In view of the fact that the only lawful use of the bulk of the De Mond land in terms of the relevant Crown Grant was for purposes of a public resort, the transaction advisors are of the opinion that the Municipality was unable to grant exclusive use rights to anyone in respect thereof.

In dealing with the DCPA and its members' the Municipality is legally bound to take its guidance primarily from the current lease agreement. In terms thereof two situations may potentially arise concerning improvements made to the property by the lessee during the currency of the lease agreement. Firstly the lessee may remove such improvements at the termination of the agreement (provided the lessee restores the premises to their previous conditions). Secondly, failing such removal, the Municipality will retain ownership of the improvements, in which event the developer will have to bear the costs of demolishing existing structures not required for purposes of the proposed development.

Attention is invited to the provisions of the Extension of Security of Tenure Act, 62 of 1997 ("ESTA"). It *inter alia* provides for measures to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated. The purpose of that Act is to extend the rights of tenure of occupiers, whilst giving due recognition to the rights, duties and legitimate interests of owners.

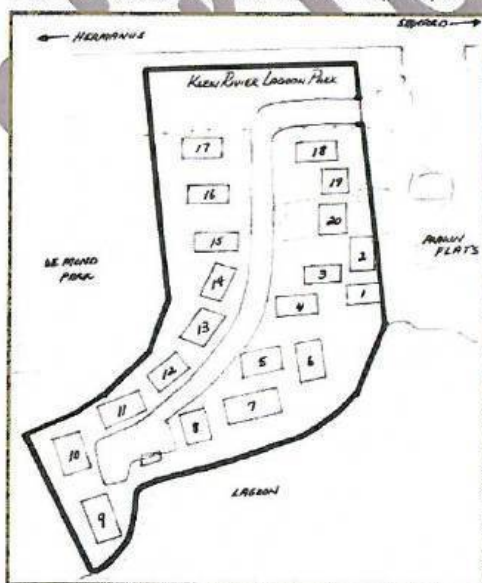
In terms of the Act and its Regulations, an “occupier” means (with certain exclusions¹⁸) a person residing on land which belongs to another person and who has or on 4 February 1997 or thereafter had consent or another right in law to do so. Section 8(1) of ESTA deals with the termination of right of residence and states that an occupier’s right of residence may be terminated on any lawful ground; provided that such termination is just and equitable, having regard to all relevant factors and in particular to the following factors:

- the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
- the conduct of the parties giving rise to the termination;
- the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
- the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
- the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

Although the transaction advisors are of the opinion that there is no legal basis for a claim by the DCPA or its members to remain on the De Mond land after 29 February 2012, they believe that such members have over the years developed a strong sense of “belonging there”, strengthened by the expenses incurred by members in improving and maintaining the property. The transaction advisors therefore believe that principles of fairness and equity dictate that a special effort should be made to see whether current DCPA members could not be accommodated in one way or another in the proposed new development. Hence their strong recommendation above that in any new tender process, the successful proponent should be required to enter into discussions with the DCPA representatives to see whether a special arrangement could be made in terms of which members of the DCPA could be accommodated on a short-term basis on mutually acceptable terms.

2.3 KLEIN RIVER LAGOON PARK

The KRLP is situated on a portion of erf 4831 measuring 6279m² adjacent to De Mond caravan park. During May 1994 the Greater Hermanus Municipality entered into a lease agreement with the Klein River Lagoon Park Body



Corporate for 15 years, with the option of renewal for a further 5 years. During 2009 the KRLP made use of the extension clause, with the result that the lease will expire on 30 April 2014. A monthly rental is payable to the Municipality, escalating at 10% annually. According to the lease agreement, the site may only be used for mobile park homes.

Figure 2.1: Sketch showing position of 20 mobile houses in KRLP.

The KRLP is very well maintained with 20 houses of varying sizes. The owners, the majority of whom are Cape Town based, stay at the park during holidays and long weekends and fund the total maintenance and rates and taxes from the monthly levy payable to the body corporate.

¹⁸

i.e. excluding a labour tenant, a person using the land for industrial, mining, commercial or commercial farming purposes except a subsistence farmer (own interpretation) and a person who has an income in excess of R5000 per month whether it is a cash wage or salary or other earning.

The KRLP lease agreement contains provisions similar to the De Mond lease regarding payment of rates and taxes and the erection of buildings or other improvements on the land with the Municipality's prior written consent. In terms of their lease agreement KRLP had to link up to the municipal water and electricity services, provide its own sewage system and ensure waste removal. It placed the responsibility for the maintenance of the land (including the fence, buildings and structures) on the KRLP and provides that, failing such maintenance, the Municipality may cancel the lease agreement and resume possession of the property without any compensation being payable to the KRLP or its members. In such an event the Municipality may contractually claim expenses due to losses and damages suffered by it from the KRLP.

With regards to the situation applicable at the expiration of the lease, the agreement only states that the KRLP will be expected to "*restore and deliver up to the Lessor the said Land in a condition satisfactory to the Lessor*".

The portion of erf 4831 on which the KRLP is situated, was not included in the previous RFP. It would appear from a discussion held at the outset of the feasibility study with a representative of the KRLP, that the KRLP understands the limitations of its own lease agreement. It has voiced a strong commitment to form part of the proposed project, including potentially making a financial investment therein.

If the proposed development is taken in hand before the KRLP lease agreement lapses on 30 April 2014, several scenarios should be considered. One would be that the development be undertaken in phases, with the phase involving the KRLP land only commencing after 30 April 2014. Another would be, based on the exterior appearance of the houses that those houses may, as an interim arrangement, be retained to form part of the development. It would be reasonable to expect that further negotiations will have to be entered into between the parties concerned and that the Municipality may have a prominent facilitation role to play in the process.

2.4 PRAWN FLATS

Prawn Flats is directly adjacent to the KRLP. It is also situated on a portion of erf 4831 which was not included in the previous RFP. The area is leased to WBA for the purpose of operating a small boat hiring, lagoon cruises and a canoeing facility. The initial three year lease was entered into on 1 November 2004 for a nominal monthly rental escalating at 10% annually.

Similar to the De Mond and KRLP lease agreements, WBA needs the prior written consent of the Municipality *inter alia* to erect buildings or structures or affect improvements or additions to the property. It is also responsible for the maintenance of the land, fence, buildings and structures. As with the KRLP lease, the land must be restored to a condition satisfactory to the Municipality at expiry of the lease. The lease gives WBA three months from date of termination to remove buildings and/or structures, failing which these become the property of the Municipality without compensation. The same condition will apply if the lease is cancelled due to defaulting on rental or any other condition. Removal of structures may only take place if all outstanding monies have first been paid to the Municipality.

The lease agreement has since 2007 been extended on a month-to-month basis on the same terms and conditions. Although legally the lease agreement may be cancelled on with one month's notice, the transaction advisors believe that a three month notice period would be more reasonable, especially as the longer notice period would not be detrimental to the proposed project.

2.5 SEA AND SAND

Sea and Sand is situated on the Prawn Flats land, but the Municipality and the Institute entered into a separate lease agreement in respect of the portion that the Institute is using. That portion of land was not included in the previous RFP.

The lease agreement is for a 25 year period. It commenced on 24 August 1989 and will expire on 23 August 2014, unless terminated earlier. A nominal rental is payable and the property may only be used as a training camp where the focus is on teaching sea rescue and other life skills.

The lease agreement includes the same requirements regarding buildings, structures and fences and maintenance provisions as found in the lease agreements discussed above. It provides that the Municipality may use the land if required at any time for any particular purpose and that the land, buildings and structures thereon will revert to the Municipality in a condition satisfactory to it, without payment of any compensation whatsoever when the lease expires. Contractually the Institute may, however, with prior municipal approval, remove its own funded structures/buildings when the agreement expires.

It is noteworthy that in terms of the lease agreement the Municipality may cancel or amend the lease to enable it to resume possession of the whole or any portion of the land at any time on giving three months' written notice, if the land is required for any municipal or government purpose. In such an event, the Municipality is contractually required to pay the Institute compensation for improvements which it has made on the land. In turn the Institute may cancel the agreement and claim compensation for own funded improvements made on the remaining land, if an amended lease leaves it with a portion of land insufficient for its operations. However, it remains the Municipality's prerogative to decide for which improvements it will pay compensation based on a certified statement of actual capital cost to be submitted by the Institute. It is not foreseen that a development would reach the area used by the Institute before expiry of the lease agreement.

3. LAWS, POLICIES AND PLANS

The Municipality is exclusively a creature of statute and possesses no rights and powers except such as are either expressly or by necessary implication conferred upon it by a competent legislative authority.

As everyone has the fundamental right to administrative action that is lawful, reasonable and procedurally fair and as the Municipality is required to respect, protect, promote and fulfill that right,¹⁹ the transaction advisors made all reasonable efforts to ascertain whether the proposed action on the part of the Municipality is legally permissible and, if statutory empowerment exists for the proposed action, what statutory requirements will have to be complied with for such action to be "lawful".

In South Africa planning and development has to take place in a very dense legislative environment. It goes beyond the scope of this report to deal in detail with all the statutory provisions with which the Municipality and "would-be developers" will have to comply in relation to the proposed development. Suffice it to say that the transaction advisors considered it prudent to only briefly refer to a select few statutory provisions below. The legislation which they considered included national, provincial and municipal laws.

Policy considerations will feature in the evaluation of development proposals. Our courts regard the adoption of policy guidelines by state organs to assist decision-makers in the exercise of their discretionary powers as both

¹⁹

See sections 33(1) and 7(2) of the Constitution. Also see section 1(a) of the Constitution that highlights the supremacy of the Constitution and the rule of law (which underpins the principle of legality).

legally permissible and eminently sensible. However, policy guidelines may not be applied inflexibly or in a manner which excludes decision-making involving the conscientious exercise of the relevant discretion. This means that policy can at most be a guiding principle, but in no way decisive.

3.1 CONSTITUTIONAL MANDATE

The Constitution as the supreme law of the Republic is the logical point of departure for any exploration of the maze of statutory provisions that apply within this field. In terms of the Constitution the objects of local government include-

- *To ensure the provision of services to communities in a sustainable manner;*
- *To promote social and economic development;*
- *To encourage the involvement of communities and community organisations in the matters of local government.*

The Constitution requires each municipality to strive, within its financial and administrative capacity, to achieve those objects.²⁰ It also requires each municipality, to structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.²¹ The public administration (which includes the municipal administration) is governed by democratic values and principles enshrined in the Constitution.²² Included amongst those values and principles are that the public administration must-

- *promote the efficient, effective and economic use of resources;*
- *respond to people's needs;*
- *be development-orientated; and*
- *provide services impartially, fairly, equitably and without bias.*

The municipal mandate derived from these sections is supported through the development of tourism potential and the creation of jobs. The transaction advisors are confident that the proposed development and the downstream economic impact thereof will make a significant contribution in this regard. It should promote more effective use of the municipal land and enable more equitable access to the proposed public resort for members of the broader community.

3.2 NATIONAL AND PROVINCIAL LAWS, POLICIES AND PLANS

The Municipality must act within the statutory framework provided by national, provincial and municipal laws. The legislation that will or may have to be complied with in respect of the proposed development *inter alia* includes the following:

- The Constitution, DFA, MSA, MFMA, ESTA (previously referred to);
- The National Environmental Management Act, 8 of 2004 (the "NEMA"), Cape Outspans Act, 17 of 1937 (the "COA"); the Restitution of Land Rights Act, 22 of 1994 (the "RLRA"); the Removal of Restrictions Act, 84 of 1967; the Marine Living Resources Act, 18 of 1998; the National Environmental Management: Biodiversity Act, 10 of 2004 ("NEMBA") the National Environmental Management: Protected Areas Act, 57 of 2003 ("NEMPAA"); the National Environmental Management: Integrated Coastal Management

²⁰ See section 152 of the Constitution.

²¹ See section 153 of the Constitution.

²² See section 195 of the Constitution.

Act, 24 of 2008 (the "ICMA"); the National Heritage Resources Act, 25 of 1999 (the "NHRA"); the Occupational Health and Safety Act, 85 of 1993 ("OHSA"); the National Water Act, 36 of 1998; the National Building Regulations and Buildings Standards Act, 103 of 1977; the Promotion of Administrative Justice Act, 2 of 2000 ("PAJA") and the Advertising on Roads and Ribbon Development Act, 21 of 1940;

- National and provincial regulations promulgated in terms of the empowering legislation, such as the PPP Regulations and the MAT Regulations.
- The Municipal Ordinance, 20 of 1974 and LUPO; and
- The applicable municipal Zoning Scheme.

Relevant sections of some of these acts and regulations are discussed below.

3.2.1 MUNICIPAL SYSTEMS ACT

Chapter 4 (specifically sections 21 and 21A) prescribes the community consultation processes to be followed by the Municipality when procuring a private party developer. Chapter 5 deals with the Integrated Development Plan (the "IDP"), Chapter 8 with the provision of services²³ and the Municipality's performance management and monitoring mandate is set out in Chapter 6. Section 41 requires the Municipality to extend its own performance monitoring to all its external service providers.

A private developer leasing municipal land for an extensive period and operating a public resort on such land, will promote local tourism, but will not directly provide any municipal services and for that matter will not be an external service provider in terms of the MSA. However, the lease contract will have to be monitored in terms of Section 116 of the MFMA which obliges a municipality to do such management and monitoring and provides guidance on how this is to be done. Briefly, it requires that a contract be properly enforced and performance be monitored with regular reporting to the Council.

Section 98 of the MSA requires the Municipality to adopt bylaws to give effect to its credit control and debt collection policy including its enforcement. Section 75 of the MSA refers to the adoption of by-laws to give effect to the municipality's tariff policy, which in terms of section 74 must determine the fees levied for services rendered by the municipality itself or by way of service delivery agreements. These policies and by-laws are in place and should thus be applied to the proposed development.

3.2.2 MUNICIPAL FINANCE MANAGEMENT ACT

As a whole the MFMA is important in that it regulates municipal fiscal and financial management and sets requirements for the efficient and effective management of the revenue, expenditure, assets and liabilities of municipalities. The land in question is a municipal capital asset. The transaction advisors believe that the provisions of section 14 of the MFMA (which deals with the *alienation* of municipal capital assets) will not directly apply to the proposed transaction. They would nevertheless strongly recommend that the Council decide whether the land in question is required for the provision of essential municipal services before making a RFP and, if it is not so required, that the Council in open Council *inter alia* consider the benefit that the broader community will derive from the proposal, if implemented, once proposals have been received from the private sector.

²³

In terms of section 73 of the MSA the general duties of a municipality include to promote social and economic development.

Chapter 4 of the MAT Regulations regulates the granting by municipalities of rights to use, control and manage capital assets in circumstances where Section 14 of the MFMA do not apply. Needless to say, it will have to be complied with.

Section 120 of the MFMA and the PPP Regulations deals with PPP's as contemplated in the Council's land development proposal. The PPP Regulations define a PPP and put forward three criteria for measuring when a contract between a municipality and a private party could be regarded as a PPP:

"public-private partnership" means a commercial transaction between a municipality and a private party in terms of which the private party—

- (a) performs a municipal function for or on behalf of a municipality, or acquires the management or use of municipal property for its own commercial purposes, or both performs a municipal function for or on behalf of a municipality and acquires the management or use of municipal property for its own commercial purposes; and
- (b) **assumes** substantial financial, technical and operational risks in connection with-
 - (i) the performance of a municipal function;
 - (ii) the management or use of municipal property; or
 - (iii) both; and
- (c) receives a benefit from performing the municipal function or from utilizing the municipal property or both by way of-
 - (i) consideration to be paid or given to the municipality or a municipal entity under the sole or shared ownership of the municipality;
 - (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
 - (iii) a combination of the benefits referred to in subparagraphs (i) and (ii);

The definition is drafted in such a way that there must be compliance with all three subsections for it to be a PPP. In terms of the proposal the developer will acquire the use of municipal property for its own commercial purposes (i.e. developing a public resort and operate it at a profit), assume substantial financial and operational risks in connection with such use (e.g. that sufficient accommodation figures will not be achieved, resulting in a lower income than expected, whilst remaining responsible to service development loan repayments to the financial institutions involved and maintaining rental payments to the Municipality).

The Municipality is of the opinion that since none of these substantial risks currently exist, it will not transfer any risk to the developer. National Treasury accepted this interpretation of the Municipality and advised compliance with the MAT Regulations.

As stated in the Introduction, the approach set out in the MAT Regulations has been adopted. However, given the inadequacy of guidance provided in those regulations regarding the content of a feasibility study, the transaction advisors also took guidance from Section 120 of the MFMA and the PPP Regulations and incorporated Section 120 feasibility study components herein.

A substantial difference between the PPP Regulations and the MAT Regulations is that the latter do not prescribe a public participation process for assets valued at less than R10m and, according to the current value of the land concerned (as indicated in the municipal valuation roll) it is worth less than R10m. However, since the current valuation roll may not reflect the real value of the land and a long term right is to be granted to the selected developer, the Municipality has agreed with the transaction advisors to do public consultation and

soliciting of the views and recommendations of the National and Provincial Treasuries in respect of this study.²⁴ In doing so, the process followed by the Municipality does not differ substantially from a PPP process, given that it includes the required public consultation, Council approvals and a competitive bidding process.

The main difference lies therein that in terms of the MAT Regulations a municipality only needs to consult National Treasury once, whilst the Section 120/PPP Regulations process dictates three such consultations, resulting in a considerably longer project procurement process.

Adherence to its interpretation that no risks are to be transferred to the developer obliges the Municipality to deal with the current lease agreements in respect of the municipal properties concerned and any associated risks. If the Municipality does not follow this route but require the successful proponent to indemnify the Municipality against and take over the risk of all claims that current tenants may institute against the Municipality resulting from termination of lease agreements or in respect of improvements made to the municipal land concerned, there would be a risk transfer from the Municipality to the developer and it would constitute a PPP within the context of the interpretation assigned to it by the Municipality.

Section 33 of the MFMA has a wide range of provisions regarding contracts that have a future budgetary implication and how such contracts should be adjudicated and awarded. It stipulates that, if a contract will impose **financial obligations** on the municipality beyond the 3 years covered in the annual budget for that financial year, the contract may in terms of section 33(1)(a) only be entered into if the municipal manager has, at least 60 days prior to the Council meeting at which the contract is to be approved:

- *made public the draft contract in accordance with section 21A of the MSA including an information statement summarising the municipality's obligations in terms of the proposed contract and invited comments;*
- *solicited the views and recommendations of National Treasury, the Provincial Treasury, the Department of Co-operative Governance and Traditional Affairs and any other national department with an interest;* and

Taken the following into account – Section 33(1)(b):

- *Its projected financial obligations in terms of the contract for each year of its duration*
- *The impact of these financial obligations on future municipal tariffs and revenue*
- *Comments and representations from the community and IAPs*
- *Views and recommendations from Treasury et al.*

Adopted a resolution – Section 33(1)(c) - in which:

- *It determines that the municipality will secure a significant capital investment or will derive a significant financial, economic or financial benefit from the contract*
- *It approves the entire contract exactly as it is to be executed*
- *It authorises the municipal manager (accounting officer) to sign the contract on behalf of the municipality.*

Section 33(2) deals with circumstances when Section 33(1) will not apply and *inter alia* states that if the financial obligation on the Municipality is below a prescribed value or a prescribed percentage of the municipality's approved budget for the year in which the contract is concluded, the process set out above will not apply.

²⁴

Section 34(1) and (2) read with section 35 of the MAT Regulations.

The transaction advisors are of the opinion that there will be no or very limited financial obligations on the Municipality in respect of the proposed land lease for development of a public resort. In the absence of National Treasury circulars and guidelines on the subject, it would appear that no value or percentage as contemplated in section 33(2) of the MFMA has as yet been prescribed. In response to enquiries made by the transaction advisors National Treasury confirmed that, in the absence of municipal financial obligations in respect of the proposed development, Section 33 will not apply.

Chapter 11 of the MFMA deals with the procurement of goods and services by the municipality, and the disposal of assets. Section 112 obliges municipalities to develop and implement a Supply Chain Management ("SCM") policy and the matters to be addressed therein. The Overstrand Municipality has a compliant SCM policy in which the competitive bidding processes to be followed is adequately addressed. Section 6 of the Municipal Supply Chain Management Regulations, 2005 (the "SCM Regulations") requires that the Council performs an oversight role in respect of the implementation of the SCM policy. All risks related to an external service delivery contract must be identified and communicated to a municipality's internal audit unit established in compliance with section 165 of the MFMA. The internal audit unit should then include the contract risk profile in its risk-based audit plan.

3.2.3 LAND USE PLANNING AND ZONING

The proposed development will have to be in visual harmony with the surrounding built and natural environment. To ensure this, it will *inter alia* have to comply with the legislation applicable to land use and zoning.

3.2.3.1 LAND USE PLANNING ORDINANCE

The Municipality's powers and duties in respect of municipal planning and land use management are *inter alia* derived from LUPO. The Ordinance empowers the Municipality to impose appropriate conditions when approving a development application. The Council therefore is able to influence the form and character of the proposed development, so as to ensure that it is, for example, aligned to the municipal strategic planning objectives (e.g. low or high density, preservation of natural character or specific building forms) as set in the Overstrand Growth Management Strategy ("OGMS").

The Municipality has to balance the type of, density and character of development that will be permitted (on the one side) with economic feasibility (on the other side) and as required in terms of the provisions of the zoning scheme. Whilst the Municipality is compelled to enforce the provisions of the applicable Zoning Scheme and conditions of land use approvals, it is also empowered to approve departures from land use restrictions after following due process.²⁵

During May 2011 the Department of Land Affairs and Rural Development released a Draft Spatial Planning and Land Use Management Bill, 2011 for comments. The intention is that the Bill will replace the DFA and some other laws.²⁶ At this stage it is not possible to indicate with any degree of certainty whether the Bill will become law in the course of project evaluation or implementation.

²⁵ See sections 39(1) and 15 of LUPO.

²⁶ The objects of the Bill are *inter alia* to provide a uniform, effective, efficient and integrated regulatory framework for spatial planning, land use and land use management in the manner that promotes the principles of co-operative government and public interest. The Bill will *inter alia* prescribe the preparation and content of municipal spatial development frameworks, municipal land use planning including the obligation that a municipality must adopt and approve a single land use scheme for its entire area of jurisdiction within five years from the commencement of the Act. It also deals with the establishment and composition of Municipal Planning Tribunals and sets out matters to be dealt with by such tribunals.

3.2.3.2 ZONING SCHEME

The Hermanus Municipality's zoning scheme²⁷ (the "Zoning Scheme") currently applies to the land proposed for development. It sets out the land use restrictions that apply to those properties.

In terms of the Zoning Scheme the De Mond site is zoned Resort Zone 1. Holiday accommodation is permitted on land zoned for that purpose as a primary right. The Zoning Scheme defines "holiday accommodation" as "*a harmoniously designed and built holiday development in a unique natural environment with an informal clustered layout which may include the provision of a camping site, mobile homes or dwelling units, whether in private or public ownership, which comprises a single enterprise and which may only be marketed by means of short-term renting or time sharing, but does not include a hotel or motel.*" [Emphasis added].

As a hotel is specifically excluded in terms of the relevant definition and as definitions contained in zoning schemes are not "land use restrictions" as contemplated in LUPO, a developer who intends erecting a hotel on the land will have to obtain appropriate approval for the rezoning thereof.

The remainder of the area under discussion is zoned Open Space Zone II. In terms of the Zoning Scheme, 'open space' means "*any land used or reserved in terms of the scheme for use by the public as open ground, park, garden, playground, recreational ground or square.*" The Municipality confirmed that it is acceptable for public resort facilities to be developed on such land. If need be, the necessary amendment will have to be made to the zoning scheme or alternatively an application for the rezoning of portion of the land or a departure may be required.

The preparation of the IZS that will replace all existing zoning schemes and zoning regulations within the Overstrand municipal area has been taken in hand a number of years ago and the work has reached an advanced stage of completion. The IZS will clarify the grey areas that exist in the Hermanus Zoning Scheme and provide for more consent uses²⁸. Consent uses provide more scope for a diversified public resort development which can holistically address the various lifestyle elements that would determine the financial viability of such a development within a seasonal economy.

The IZS has been submitted to the Western Cape Provincial Government and the Municipality is expecting approval thereof prior to commencement of the proposed development. The project advisors believe that it would therefore be prudent to take cognisance of the provisions contained in the IZS which, if finally promulgated, will contain land use restrictions that will impact on development proposals.

If the IZS is approved and promulgated, Erf 5327 and Erf 4831 (which includes part of De Mond, KRLP, Prawn Flats and Sea & Sand) will be zoned as "Holiday Resort".

In terms of the IZS the primary uses permissible in **Resort Zone 1** will be "*conservation use, holiday accommodation, private open space, private road and tourist accommodation*", whilst consent uses will include "*additional dwelling units, conference facilities, holiday housing, hotel, place of assembly, place of entertainment, recreational facilities, restaurant, rooftop base station, transmission tower, tourist facilities, any other related use determined by Council*".

²⁷

Promulgated as a provincial regulation as P.N. 330/1992 of 10 July 1992.

²⁸

A "consent use" is a use that requires the prior written consent of the Council and is to be distinguished from a primary use right. The Council has discretion whether to grant or refuse an application for consent use.

The Council will be required to formulate development rules that stipulate development parameters with regard to density, height, coverage, layout, building design, landscaping, parking, access, signage and the use of the property zoned for the abovementioned purpose. These matters will probably also be addressed in the environmental authorisation under NEMA. Usually conditions of approval or authorisation include requirements relating to the submission of plans to the competent authorities for approval and those plans (e.g. a site development plan, a landscape plan or an environmental management plan) may not be deviated from without the approval of the competent authority.

The primary uses of Erven 5327 and 4831 will therefore include holiday accommodation and tourist accommodation. In terms of the IZS "holiday accommodation" means *a harmoniously designed and built development, used for holiday and recreational purposes, whether in private or public ownership, which:*

- *consists of a single enterprise in which accommodation is supplied by means of short term renting and time sharing only;*
- *may include the provision of a camping site, mobile home park and dwelling units;*
- *may also accommodate a restaurant and indoor and outdoor recreation facilities, but*
- *does not include a hotel or conference centre.*

A number of definitions are relevant to highlight some of the consent uses in Resort Zone 1:

"dwelling units" *meaning a unit containing one or more rooms, with adequate sanitary facilities and a kitchen, which may be used for long or short term accommodation purposes, and may be included in or separate from the main building on the property;*

"conference facilities" *means a place of commercial nature where information is presented and ideas exchanged among groups of people or delegates whose normal place of work is elsewhere, and may include overnight accommodation and the supply of meals and beverages to delegates;*

"holiday housing" *means dwelling units, mobile homes or camping sites that are harmoniously designed and built, for holiday or recreational purposes, and which may be separately alienated by means of sectional title division, fractional title, the selling of share blocks or the subdivision of property;*

"hotel" *means a property used as temporary residence for transient guests, where lodging and meals are provided, and may include: a restaurant or restaurants, associated conference and entertainment facilities that are subservient and ancillary to the dominant use of the property as a hotel; and premises which are licensed to sell alcoholic beverages for consumption on the property but does not include an off-sales facility;*

"place of assembly" *means a public hall, a hall for social functions, a music hall, an exhibition hall, a club house, a town hall, civic centre, which is not directly related to a commercial undertaking and excludes a place of entertainment;*

"place of entertainment" *means a place used for commercial entertainment which may attract large numbers of people, operate outside normal business hours or generate noise from music or revelry on a regular basis, including a cinema, theatre, amusement park, dance hall, night club, gambling and live music;*

"recreational facilities" *means the use of land, including stretches of coastline, for large uncovered or open areas developed or undeveloped to practice a particular sport or combination of sports and general recreation, and includes a clubhouse, associated infrastructure and buildings, indoor and outdoor swimming pools and associated infrastructure and includes a firing range and driving range, but does not*

include any building or structure that is used for business or any other use not aligned to or dependent on the sport concerned;

“transmission tower” means any support structure and associated infrastructure more than 3m in height, that is used for the transmission and/or reception of electromagnetic waves; and includes telecommunication, cellular communication, radio, television and satellite transmission;

“tourist facilities” mean amenities for tourists or visitors such as lecture rooms, restaurants, picnic areas, gift shops, cafés, restrooms, recreational facilities, animal parks (domestic or otherwise), but does not include a hotel or overnight facilities;

The possibility to provide holiday accommodation on Erven 5327 and 4831 and facilities such as a restaurant and recreational facilities will form the backbone of a public resort. If the Council grants special consent, dwelling units (including time sharing and short term rental) and hotel and conference facilities will be permitted, which will be ideal, given the location of Erf 5327 in respect of the R43. Also included as consent uses are holiday housing under section title, fractional title or share blocks. Fractional title will, due to the exclusivity limitations in respect of the Crown land portion of erf 4831, only be allowable on the portions of erf 4831 currently occupied by the KRLP and Prawn Flats.

It is not contemplated at this stage that the land will be subdivided (*inter alia* as no portion of Erf 5327 may be alienated without the consent of the State, something which will involve a time-consuming process with an uncertain outcome).

Other attractive consent uses include a place of assembly and a place of entertainment, which when granted will probably be made subject to stringent conditions to ensure that undue interference with rights to peace and quiet are respected.

The likelihood of consent use applications being granted should be strongly influenced by the Klein River Estuarine Management Plan (the “KREMP”), other similar Council policies and the related legislation. It can be accepted that the Council will probably attach strict conditions to consent uses to ensure the protection of the environment.

As it is, the De Mond site currently includes two sewage pump stations. A consent use will probably be required for ‘utility services’, depending on the development proposal.

The uncertainty surrounding the granting or refusal of applications for consent uses should pose a risk to potentially interested developers. It can safely be accepted that those developers will require a due diligence period and will require that any development agreement that may be concluded, contains a suspensive condition in terms of which the agreement will become unenforceable if the required consent uses are not granted.

3.2.3.3 RESTITUTION AND LAND RIGHTS

The RLRA regulates the restitution of rights in land in respect of which persons or communities, who regard themselves as having been dispossessed of land under discriminatory laws, could have lodged claims for restitution or restoration. According to the findings of the historical research done as part of the Overstrand Heritage Survey Report (the “OHSR”), a land claim was lodged in terms of the RLRA by persons, claiming to have been forcibly removed from Mount Pleasant during 1998. This land claim was apparently combined with an earlier land claim for the areas of Stanford & De Mond, in an attempt to avoid that it be rejected on

the ground of being lodged after the stipulated closing date for claims. It is further stated in the OHSR that an answer is "still awaited" and that the process has apparently been highly contested, with accusations of new-comers trying to stake false claims and corruption on the part of the committees handling the matter. It is important to note that the fact that a land claim has been submitted, does not translate into a prohibition of any further development on the land concerned. Section 11(7) of the RLRA regulates the situation. If the regional land claims commissioner concerned is satisfied that a claim received complies with the requirements of that Act, the commissioner must publish the prescribed notice in the Government Gazette. Section 11(7) of the RLRA *inter alia* provides that, once that has been done, *no person may in an improper manner obstruct the passage of the claim and that no person may sell, exchange, donate, lease, subdivide or rezone the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so.*

The transaction advisors have attempted to establish from the responsible regional land claims commissioner whether the claim referred to above, has been accepted and, if so, whether a notice as contemplated in section 11(7) was published in the Government Gazette. Unfortunately they have as yet not managed to solicit a reply from the commissioner's office or otherwise obtain more information of the claim. As a safety precaution a developer would be well-advised to serve notice that complies with the requirements of section 11(7) on the regional land claims, of the developer's intention to lease, subdivide or rezone the municipal land concerned.

3.2.4 PROVINCIAL POLICIES AND PLANS

The transaction advisors investigated and assessed the consistency of the proposed utilisation of the land concerned with applicable provincial policies and plans. The Provincial Spatial Development Framework (the "PSDF") deserves special mention. It was adopted by the Western Cape Government as a policy plan towards the end of 2005 and has subsequently been approved in terms of LUPO as a so-called "section 4(6) structure plan". It calls amongst other things for a tight urban edge and *inter alia* aims to discourage the phenomenon of urban sprawl.

3.2.5 ENVIRONMENTAL LEGISLATION

South African legislation governing environmental management and related matters is extensive, fragmented and sometimes overlaps. The Municipality is keenly aware of the statutory obligations that it has in terms of that legislation.²⁹ It has therefore incorporated specific provisions into strategic municipal documents to promote environmental management objectives as found in the legislation and to ensure lawful administrative action.

Examples of such strategic documents are the OGMS, OHSR, KREMP, the municipal Spatial Development Framework (the "SDF") and the Overstrand Density Survey (the "ODS").³⁰

3.2.5.1 ENVIRONMENTAL AUTHORISATION

NEMA provides that no one may commence with any listed activities before obtaining environmental authorization from the competent authority. Anyone wishing to obtain such authorization must follow a

²⁹ E.g. in terms of section 54 of the NEMBA, a municipal IDP must take into account the need for the protection of ecosystems either nationally or provincially listed as critically endangered, endangered, vulnerable or protected ecosystems. The conservation of estuaries is *inter alia* covered in the Marine Living Resources Act, No. 18 of 1998.

³⁰ Also see "Estuary Study and Management Plan" under Strategic and Institutional Plans.

basic or a *full* environmental impact assessment process, depending on the type of activity envisaged.³¹ The onus will be on the appointed developer to ascertain which listed activities will be triggered by the proposed development and what the applicable statutory requirements are that will have to be complied with to obtain the required environmental authorization.

A detailed discussion of the provisions of the EIA Regulations falls beyond the scope of this report. Suffice it to say that in terms of Listing Notice No. 3³² the construction of resorts, lodges or other tourism accommodation facilities that sleeps 15 people or more in an estuary, in urban areas within 1km from the high-water mark of the sea and/or in areas within 100m from the edge of a watercourse, is a listed activity requiring environmental authorization. It is noteworthy that both "estuary" and "watercourse" as used in the EIA Regulations, carry wide meanings.

The establishment of a Development Setback Line ("DSL") for estuaries requires an assessment of a specific set of processes and local conditions, determined with the inputs from ecologists and engineers.³³ If a setback line has been determined in terms of the applicable legislation, environmental authorization will be required before commencement of such activities within the setback line. The Municipality is in the process of determining a Development Setback Line ("DSL") for the area of development as informed by the various studies mentioned in this report. It appears that the DSL will be a strict measure thus placing the major part of the proposed development area on the watercourse side of the development setback line.

In terms of the EIA Regulations the competent authority would ideally take a decision within 30 days, but built into the regulations are extension periods which effectively allow for 120 days if the application complies with all requirements. Taken into account the required content of a basic assessment and its public consultative process, it could realistically be assumed that it would take between 9 and 12 months to obtain environmental authorization for the proposed development.

Since the proposed development will fall within 1 kilometre of the high water mark it will also be within the Coastal Protection Zone as defined in ICMA, the goal of which is to enable the use of land that is adjacent to coastal public property or that plays a significant role in a coastal ecosystem to be managed, regulated or restricted.

3.2.5.2 ASSESSMENTS, SURVEYS & INVESTIGATIONS

It is to be expected that a Geophysical Survey and a Geotechnical Investigation may be required as part of the EIA process to be followed for purposes of obtaining environmental authorisation in terms of the relevant legislation. Likewise a traffic study may also be required before an application for environmental authorisation may be finally considered. It may be advisable that the selected developer conducts a geophysical survey before commencing with a formal EIA process, using a reliable method to assess the likely variations in the bedrock topography along selected traverse lines; to determine the location of geological structures for the positioning of drill-sites for the abstraction of groundwater and to assess the

³¹ Environmental Impact Assessment Regulations, 2010 (the "EIA Regulations") published in Government Gazette 33411 (Notice No 664) of 30 July 2010.

³² Item 6(d) in Notice 546 in Government Gazette 33306 of 18 June 2010.

³³ Usually the setback line is measured from the high water mark which, in SA, is approximately 2m above Mean Sea Level ("MSL"). As per a DSL analysis done in 2008 by a local consultant for the previous developer, a "development setback line" is defined as meaning "an area between the location where a development is contemplated and the high water mark of the sea, the edge of an estuary or river system, or the edge of a cliff. It provides a safe landward limit which will ensure that developments will not be damaged by storm events, flood erosion, sand movement, or slumping of cliffs or steep slopes." The DSL analysis determined that the three low lying areas of the De Mond site with dwelling structures, measured between the 2m and 3m above MSL contours and that the major part of the property lies above 12m MSL. According to the analysis, it is well known that the low-lying areas were flooded during high water levels in the Vlei.

soils' aggressiveness in order to establish a benchmark for the soil samples to be taken during the geotechnical investigation.

The Geotechnical Investigation would have to be done through the excavation of a sufficient number of pits to cover the land to be developed in order to record the water rest levels; recording of surface features; recording the results of field penetration and laboratory tests as well as a chemical analysis of soil-water extracts - the objective being to determine all possible geotechnical constraints to be taken into account in the planning and design of the various components of the development.

3.2.6 HERITAGE LEGISLATION

Section 38 of the NHRA has specific relevance. It states that if a development which will change the character of a site exceeding 5000m² in extent is contemplated, the responsible heritage authority must be notified thereof at the time of its initiation and should be furnished with details regarding the location, nature and extent of the proposed development. The responsible authority will then decide if a HIA is necessary and besides the standard information required other conditions to be met.³⁴

3.2.7 HEALTH AND SAFETY LEGISLATION

Given that the municipality will remain the owner of the land concerned, it would be essential to include in a contract with a developer a Health and Safety Indemnity Agreement in accordance with the stipulations of OHSA.

3.2.8 CAPE OUTSPANS ACT

It could make a substantial contribution to the sustained financial viability of the project if portion of the land that the Municipality acquired under the relevant Crown Grant, could be sold and the proceeds of the sale could be put towards the costs of the proposed public resort. For this reason the transaction advisors considered it necessary to consider the current constraints on the sale of portion of that property.

It would appear that a number of laws would potentially feature prominently, should it be decided to pursue the avenue of selling portion of the land concerned. It would *inter alia* include:

- the COA;
- the MFMA (more particularly section 14 of the MFMA);³⁵
- LUPO (to achieve subdivision and rezoning) and potentially the NHRA, NEMA and so forth; and
- the MSA.³⁶

The following provisions of the COA may find application in the scenario sketched above:

1. ***Issue of deeds of grant of outspans to divisional or municipal councils.*** – *Upon application by any divisional council or municipal council, the Minister of Public Works may, in his discretion, and without payment of any consideration, cause a deed of grant, containing such conditions as he may think fit, to*

³⁴ See further discussion in "Due Diligence" under regulatory issues.

³⁵ At this stage section 14 of the MFMA is dealing with the alienation of a municipality's capital assets (which include land).

³⁶ See the provisions of sections 21 and 21A of the MSA requiring that contract documents be made known for public comment and be approved by the Council.

be issued to that council in respect of the whole or any portion of the land of which any outspan consists, being Crown land, situated within the area of jurisdiction of that council, and in the case of a divisional council, not situated within the area of jurisdiction of any other local authority.

2. **Exemption from transfer duty.** –

3. **Resumption for public purposes.** –

(1) *While any land which has been granted to any council under section one remains the property of that council, the Minister of Public Works may resume for public purposes the whole or any portion thereof, subject to the payment to the council of compensation.*

(2) *If the amount of compensation to be paid under sub-section (1) is not settled by agreement between the Minister of Lands and the council concerned, the amount shall be fixed by arbitration under the provisions of the Arbitrations Act, 1898 (Act No. 29 of 1898) of the Cape of Good Hope, and for that purpose it shall be presumed that the said Minister and the council concerned, agreed to refer the fixing of the amount to a single arbitrator.*

4. **Council to whom land granted not to alienate or burden it without Administrator's consent.**—*The council to which any land has been granted under section one shall not sell, exchange or donate or otherwise alienate, or let or mortgage or otherwise burden, the land or any portion thereof, without the consent of the Administrator of the Province of the Cape of Good Hope, and except upon conditions approved by him.*

It is noteworthy that even the letting of land obtained by way of a Crown Grant under the COA, is subject to the "Administrator's consent"³⁷. If the purpose of the sale would be to achieve the purposes of the original grant (namely to develop in a meaningful way a public resort on the remainder of the land), the required consent would probably be obtained. It is to be expected that obtaining the necessary approval will probably be a time-consuming process³⁸ and, when granted, that the approval will probably be subject to appropriate conditions.³⁹

Obtaining the Premier's approval for the sale of portion of the land will only be a first step in a lengthy process. In order to achieve the sale and transfer of the portion of land, it will *inter alia* be necessary to obtain the approvals of all the competent authorities charged with the responsibility of applying the environmental heritage, land use and other applicable legislation (e.g. to create a new land unit for purposes of separate registration in the Deeds Registry). The transaction advisors believe that it would be premature at this stage to discuss in detail the steps that will have to be followed in order to satisfy "due process" requirements, should it be decided to pursue the "sale option". Suffice it to say that the steps to be taken, should the Premier's approval under the COA be obtained, will probably take at least two years to complete.

3.2.9 SUMMARY

The Municipality is duty-bound to focus on the delivery of basic services, but also to promote social and economic development. The proposed development of a public resort will promote social and economic development, as will more fully appear from this report.

The Municipality is obliged to ensure that the land on which the De Mond Caravan Park is located is used as a public resort. In doing so, the land will be utilised in a fair and equitable non-exclusive manner. The Municipality must also ensure that the current lessees of the De Mond land as well as the lessees of other portions of the

³⁷ The word "Administrator" should now be read as "Premier".

³⁸ The application for consent would have to be fully motivated and substantiated with adequate financial facts and reasoning for the Premier to grant the Municipality a right in principle to proceed with the sale.

³⁹ E.g. relating to ring-fencing the revenue acquired through the sale of a portion of the land, to ensure that it is only used for the development of a public resort.

municipal property concerned be treated fairly and equitably, each according to the conditions of the lease, consideration of the financial investments that were made and goodwill.

The transaction advisors are satisfied that the Municipality is following the correct processes to procure a private developer for purposes of the contemplated development. The municipal administration is keenly aware of the environmental, heritage and other legislation that the contemplated development will have to comply with. In the opinion of the transaction advisors the municipal administration should be able to monitor the implementation of the proposed development.

In terms of the Zoning Scheme the land in question is correctly zoned for the proposed development provided that the current zoning does not include a hotel. The IZS may be finalised before the development commences. The IZS will be more suited to handle the consent applications which will be required for purposes of the proposed development.

3.3 MUNICIPAL LAWS, POLICIES AND PLANS

3.3.1 BY-LAWS AND POLICIES

The applicable municipal by-laws must be complied with and the relevant municipal policies (e.g. the local labour promotion programme and the plot clearing policy) will have to be taken into consideration as guidelines when planning the proposed development and evaluating the development proposals. Those by-laws include by-laws relating to fire safety, electricity, water and sanitation, storm water management, swimming pools, solid waste management, streets and public places, property rates, outdoor advertising and signage. The Fire Protection requirements set out in SANS 0400 will also have to be complied with.⁴⁰

3.3.2 STRATEGIC & INSTITUTIONAL PLANS

The Municipal Council governs Overstrand in accordance with a number of key strategic planning and management instruments. Those instruments are used to achieve integrated development and planning within financial constraints, principles of economic, social and environmental sustainability, engineering excellence and are focused on meeting community needs.

This section investigates the alignment of the proposed development of a public resort on municipal land with the vision, mission and key objectives of the Municipality as reflected in its principal strategic planning document, namely the IDP. The Municipality has aligned its IDP with the National Spatial Development Perspective, including the national key performance areas, the Provincial Growth and Development Strategy; and the District Growth and Development Strategy ("DGDS").

Other relevant documents consulted included the ODS, the OGMS, the SDF and the OHSR. Documents not specifically consulted for the purpose of feasibility, but which a developer should consult, are sectoral plans such as the Integrated Transport Plan, the Water Services Development Plan and the Integrated Waste Management Plan. This will be necessary to ensure that the bulk services of the proposed development will be aligned with the municipal standards, systems and practices.

⁴⁰

Requirements *inter alia* include that a fire hydrant be provided not more than 90m away from every dwelling unit, that professional design standards must include determining the fire risk category of the development to give access to the appropriate fire fighting vehicle in terms of road width and turning circle, and so forth.

3.3.2.1 INTEGRATED DEVELOPMENT PLAN

The Municipality's vision is expressed as follows in the 2011-12 IDP: *to be a centre of excellence for the community*. Its mission is to deliver optimal services in support of economic, social and environmental goals. Key to the provision of a better quality of life for all its communities is local economic development. It is therefore the main function of the Directorate of Economic Development to promote economic development initiatives, tourism, sustainable job creation, poverty reduction and shared growth that integrates and, on the other hand, to connect the Municipality, its citizens and its natural resources.

The Overstrand economy comprises 40% of the Overberg district economy with Hermanus being the economic hub of the municipality contributing almost two-thirds of the economic output. This has led to the migration of low skilled job seekers to the area, putting pressure on the Municipality to create more sustainable jobs and there is a growing realisation that unless Overstrand stimulates shared growth it will not be able to meet its development mandate.

Through its economic development strategy, Overstrand has *inter alia* set itself the goal to increase economic growth to 6% per annum by 2014, sustain its natural resource base, halve official unemployment and poverty figures by 2014 and broaden participation in the economy. Each of these goals could be directly addressed by the proposed development project as well as indirectly since growth of the tourism industry will have a knock-on effect on all other industries and has real potential to leverage job creation. Recognising this, Overstrand has identified tourism as a priority sector and facilitation of its growth as a strategic intervention. Strategic interventions include ensuring an enabling spatial framework by utilising *inter alia* municipal assets; managing natural resources in a manner that ensures the long-term transformation and sustainability of the economy; and promotion of job creation. However, since the Municipality realises these interventions cannot be implemented simultaneously, its IDP specifically identifies the private sector as contributing to *inter alia* tourism development and job creation.

Apart from the Municipality's role in specific PPP's that could for example be part of tourism development (such as the proposed project), the Municipality has a broader yet vital role to fulfil in attracting investors to Overstrand and cultivating the secondary industries and businesses that follow.

In order to fulfil its constitutional objectives⁴¹ the Municipality depends largely on financial support from the national and provincial governments. The Municipality will receive a provincial transfer of R103,998m over the next three years of which 98,3% must be used for housing. It does not include an allocation for economic development and tourism. National transfers focus mainly on institutional strengthening, infrastructure investment and the equitable share. It is expected that a Municipal Infrastructure Grant ("MIG") of R42,553m will be received over the next three financial years and beyond. In terms of its master planning the Municipality will, however, require approximately R100m per annum (2011 prices) for the next 25 years to invest in new and maintenance of existing infrastructure.⁴²

It was previously estimated that the cost of developing a public resort on the De Mond land would amount to approximately R198m.⁴³ Given the infrastructure investment costs set out above, this is not a financial commitment that the Municipality can afford to make towards local economic development and tourism.

⁴¹ See section 152(1) of the Constitution.

⁴² I.e. water R822m, sanitation R668m, electricity R595m and roads R408m.

⁴³ Estimate of the developer whose development agreement was terminated during April 2010.

The proposed development may, however, be an attractive business proposition to a private developer if undertaken "in partnership" with the Council.

It is noteworthy that, in terms of the Constitution, the Municipality is required to be development-orientated.⁴⁴ The Municipality in its IDP confirmed its commitment to create an enabling environment for the success of projects, such as the proposed development. Although the seasonal nature of public resorts generally impacts negatively on the financial viability of such undertakings, the Council is confident that it can make a positive contribution to promote tourism in the traditional mid and low seasons (e.g. by initiating or facilitating activities such as conferences that will attract more visitors to the public resort). It has already embarked on a benchmarking project including the development of a Tourism Business Barometer to determine the extent of tourism on the economy and enable forecasting of tourism growth figures through reliable data collection and analysis on an annual basis.

An important area of socio-economic alignment between the proposed project and the Municipality's strategic efforts concerns the Municipality's goal to implement more focused Broad Based Black Economic Empowerment ("BBBEE") and the development of emerging entrepreneurs and contractors. This is to be achieved *inter alia* through a skills development and mentoring programme and developing a database of such skills. Although some of the job opportunities created during the construction phase of the project would be temporary in nature, it would assist to alleviate poverty. During the operational phase of the project a significant number of permanent jobs would be created. Procurement stipulations will include appropriate BBBEE requirements⁴⁵ and that preference will be given to employment of local skills and labour. In terms of the IDP requirements PPP proposals will be assessed through the lens of BBBEE and in consideration of the stated principles.

The transaction advisors found that the proposed development project will be directly aligned to the Municipality's economic development drive, its key priorities and interventions focused on unlocking the full potential of tourism and the creation of sustainable employment.

3.3.2.2 SPATIAL DEVELOPMENT FRAMEWORK

Sustainable development relates to balancing human well-being, economic efficiency and environmental integrity. The SDF is a sectoral plan that forms part of the comprehensive IDP and is one of the municipal tools used to promote sustainable development. The SDF contains the municipal spatial policy, guiding the creation of integrated and sustainable use of land. This has to be achieved within the broader context of protecting the value of the Overstrand Municipal area as a natural resource and enhancing the sub-region as a popular eco-tourist destination.

Overstrand has recently completed a review of its SDF in which it consolidated existing spatial policy and plans. As planning is a continual and incremental process linked to various dynamics, it constitutes a cyclical process which demands continued updating and annual reviews of the SDF. The environmental and social responsibility with which planning is approached is clearly articulated in the SDF and several of the objectives could be directly or indirectly achieved or contributed to by the proposed development.

The bioregional planning model adopted by Overstrand provides a significant departure from previous planning models of a Land Use Management System ("LUMS") aimed at protecting ecosystems. Several

⁴⁴ See sections 152(1)(c) and 195(1)(c).

⁴⁵ See the Preferential Procurement Policy Framework Act, No. 5 of 2000 (the "PPPFA"), the Preferential Procurement Regulations (2001) and the new set of Regulations gazetted on 8 June 2011 that will commence on 7 December 2011.

other sectoral plans which are part of the SDF have been or are in process of being finalised. The KREMP and the OGMS, serve as examples.

KREMP was prepared in conjunction with Cape Nature, is in its final stages of refinement and is considered to be of particular importance for this study. The Council approved the OGMS during January 2011.

According to the Development Pattern Policy for Urban Nodes and Settlements as contained in the SDF, De Mond falls within the Greater Hermanus Regional Node. Applicable guidelines indicate that as a general principle, public investment initiatives should focus on strategically located (public) properties that are linked to the town's comparative advantage (tourism). The focus should then be to upgrade and develop these properties to improve quality of life and to establish an enabling environment for job creation in partnership with the private sector. The SDF includes as a specific strategy that the Municipality must identify and actively facilitate key catalyst projects in conjunction with strategic partnerships with business/investors. The proposed development fits perfectly into this scenario.

The Tourism Related Land Uses Policy as contained in the SDF differentiates between agri-tourism and eco-tourism which includes the proposed public resort. From a land use management perspective the majority of the policy and guidelines in Table 2.1 below, as extracted from the SDF, will be applicable to the proposed development.

Table 2.1 – Tourism Related Land Uses

No.	Policy statement
P12.1	Eco-tourism accommodation should only be permitted as a single enterprise. Separate alienation (Resort Zone II purposes) should as a general principle only be permitted within existing urban nodes, rural settlements, the urban fringe and designated rural development areas (RDA – refer Section 5.4.4).
P12.2	Council should only in exceptional circumstances allow separate alienation (Resort Zone II purposes) within conservation and environmentally sensitive areas, where adequate proof is provided to its satisfaction of the implementation of an approved environmental management plan and in exchange for designating / rezoning land for conservation purposes.
P12.3	A primary requirement of an eco-tourism development should be that the development should be natural resource based focused on a specific natural attraction.

Issue	Guidelines
Definition / description	<ul style="list-style-type: none"> • Eco-tourism development means a business enterprise providing overnight accommodation to transient guests and related holiday activities often located within a unique setting. The types of facilities include a range of building sizes, building types and building arrangements such as: <ul style="list-style-type: none"> - resorts (holiday accommodation) - guest house - camping - hotels
Land use parameters	<ul style="list-style-type: none"> • Ancillary activities / uses to be shown on a SDP and Council to approve the use; i.e. lecture rooms, restaurants, tourist facilities, conference facilities, spa/hydro wellness centre and any other use which is in its opinion reasonably and ordinarily related to the resort. • Where more than 5 additional units are permitted on an agricultural unit, application will be required for resort purposes. Only the "footprints" of the buildings could be rezoned to resort purposes, depending on the objective of the development.
Development parameters	<ul style="list-style-type: none"> • The size of the development / number of units / density shall be determined: <ul style="list-style-type: none"> - by contextual informants such as environmental sensitivity, views, carrying capacity for the environment, services provision - on its own merits according to desirability criteria - with reference to place-making elements (refer to Section 5.3.10) - maximum density of 1 unit/2,5 ha • A site development plan (SDP) should be submitted simultaneously for all development applications. Council to determine conditions of approval attached to the SDP. • The cumulative effect of the existing buildings and the proposed development should not impact on the rural character of the surrounding area. • Proof must be provided that sufficient housing exists for farm workers before additional dwelling units for tourism purposes will be permitted. • The resort development should not be subdivided from the agricultural unit. • The size of additional dwellings should be restricted to 120m². • Dwellings should be grouped and where applicable, incorporated into the farm buildings. • Visual impacts should be restricted and the aesthetic qualities of buildings should complement the existing architecture and heritage character of the area.

Issue	Guidelines
Development form	<ul style="list-style-type: none"> • Prevent linear development (e.g. along rivers or along the shores of dams) by strictly limiting development within designated nodes/clusters.
Services	<ul style="list-style-type: none"> • Water provision for domestic and drinking purposes should comply with the SABS's standards for domestic water (SABS 241). • Any solid waste that may arise from the proposed development should be moved to an approved dumping site. The storage/ transportation of any solid waste should be done in a manner that will prevent any form of pollution of the environment, including pollution of water resources. • All domestic sewerage should be disposed of in such a manner as to prevent any pollution of water resources (underground or surface). If septic tanks are to be used, an impact study should be undertaken in order to determine the soil characteristics as well as the possible impact of such disposal on ground water resources. • All services should be provided by the developer subject to requirements of Water Services Act for water and sewage.

Whilst the intention with the various plans, policies and strategies *inter alia* is to stimulate eco-tourism, this must take place within the framework of the applicable municipal parameters.

3.3.2.3 OVERSTRAND GROWTH MANAGEMENT STRATEGY

The Municipality adopted a holistic approach in the development of the OGMS. It *inter alia* considered engineering inputs concerning water, sewerage, electricity, solid waste and roads and placed a specific focus on the protection of sensitive natural and heritage environments and resources.

The OGMS forms part of the SDF and serve as a guiding principle in municipal decision-making. In essence it addresses the critical spatial issues relating to future municipal growth and development, e.g. the containment of urban sprawl, the need for increased residential densities and the improvement of social and economic integration of existing urban areas.

Hermanus East is a high property value area with a low vacancy factor of less than 8%. Several natural features (e.g. the heritage areas along the coast) mark it as a sensitive area to development and place restrictions on the extent to which development may take place. However, development opportunities do exist. The area under discussion serves as an example. It falls within the south eastern edge of the Hermanus East Planning Area. The OGMS identifies the promotion of a medium density housing node adjacent to the caravan park and specifically emphasizes the De Mond Caravan Park area as offering an opportunity for redevelopment. In fact, the De Mond Caravan Park in its current state is almost paradoxical to the aesthetic residential area adjacent to it.

- Eight Planning Units have been identified for the Hermanus East Planning Area, which on average would increase the current gross density for the area from 6.3 to 9.1 dwelling units per hectare. The De Mond area is not included in any of the planning units but are flanked on two sides by planning units 4 and 5 for which a variety of densification interventions, some incrementally, are proposed.

The ownership of the De Mond area is indicated as municipal owned and it falls partly within the current urban edge as defined in the SDF. The Klein River Lagoon, Prawn Flats and Sea and Sand areas seem to fall outside the urban edge. The Municipality has, however, confirmed that from a municipal perspective, public resort facilities may fall outside of the urban edge. It should be noted that the Municipality must ensure its viewpoint is in alignment with the Provincial Spatial Development Framework.

The land use of the De Mond area is indicated as structured open space Resort Zone 1 with the lagoon front as Open Space Zone II. De Mond is characterised in the OGMS as a special area within the green belt. Any development would be seen as a Green Corridor Development with the opportunity being to improve equitable public access to this municipal resource. The inclusion of the other areas (i.e. Klein River Lagoon area, Prawn Flats and Sea and Sand) in the proposed development could enable orderly development. This may be achieved while retaining the current low density character and ensuring environmentally integrated activities with minimised and controlled disturbance of the natural environment within the applicable sensitive areas parameters.

3.3.2.4 OVERSTRAND DENSIFICATION STRATEGY

Growth management is essentially the result of key spatial concerns which are *inter alia* addressed through densification strategies. The Overstrand Densification Strategy therefore feeds into the OGMS. The Densification Grading of the De Mond area is 10 – 20 DU/H and the De Mond Caravan Park is 9,3 hectares in size. This is substantially lower than the current usage which relates to 212 individual caravan stands in close proximity to each other. As far as the proposed development is concerned, the impact of the suggested densification should be limited given that the expected style of development would allow substantially more open space resulting in a lower density development.

3.3.2.5 OVERSTRAND HERITAGE SURVEY REPORT

Heritage issues are addressed within the legal context of primarily the provisions of the NHRA.⁴⁶ The SDF contains a Heritage / Landscape Conservation Policy in compliance with the NHRA. The overarching heritage policy requires the Municipality to coordinate and manage the protection and enhancement of the unique character of the region and to ensure that appropriate heritage management practices become an integral component of overall municipal management. The Heritage Survey Report points out that property development that took place without a Heritage Impact Assessment ("HIA"), have had a major impact in the cultural landscape along the south coast.

There are no specific historical buildings of places or archaeological sites in the immediate area of the development. The landscape study done by the Heritage Survey identified the mountain ranges and the coastline as providing the natural landscape frame. The proposed development would be located on the growth management zone identified as the coastal interface zone which has high social and aesthetic significance and relate to heritage overlay zones, i.e. areas where the existing nature and development together contribute to the local character. Preferably development in these areas must be limited and rather be directed to other areas with greater capacity for growth.

The heritage survey makes provision for proposed heritage conservation areas and special areas. As stated De Mond is regarded as a special area. The survey specifically states the following:

"That an area including the coastal zone from the new harbour to the old harbour, and from the Marine Tidal pool to De Mond, and including the cliff paths and the interface between the built edge and the natural coastal environment, be proposed as a special area. This would apply to areas not already covered by existing environmental legislation, such as tidal pools and beaches. Attention should be given to the protection of the elevated sea views and scenic links between the natural and built environments along this

⁴⁶

Act 25 of 1999. See for example the requirements made in section 38 relating to notification to be given to the competent heritage authority of proposed developments.

edge. Special policies and guidelines should be prepared to safeguard these landscape qualities, and may include the following:

- Subdivision and density controls along the sea /suburban edge;
- Height and roofscape controls;
- Protection of private garden landscapes along cliff paths
- Retention of Single Residential zoning status in sensitive areas;
- Controls to avoid the interruption of sea views; and
- Garden boundary wall controls adjacent to cliff paths and other sensitive areas.”

The proposed development will have to comply with these criteria and aim to contribute to the heritage character of the area. As indicated in this report a landscape master plan will be required for the development. Base information is already available as a landscape architect prepared a landscape concept for the earlier development proposals that did not materialise. The landscape concept took the heritage characteristics of the site into account.

3.3.2.6 **KLEIN RIVER ESTUARY STUDY AND MANAGEMENT PLAN**

A host of legislation prescribe conservation in respect of estuaries but it is the ICMA⁴⁷ that provides various levels of protection and governs the management thereof.

ICMA was not yet applicable when the KREMP was prepared. To give effect to the provisions of ICMA and to include municipal planning for 2013-2018, KREMP is now under review. The Municipality is committed to the clear vision and strategic objectives of KREMP and the proposed development, given its location in terms of the estuary as indicated in Figure 2.2, will have to adhere to that vision and objectives and, where applicable, assist with the implementation thereof.

Figure 2.2: Aerial View of the Proposed Development Area (Source: OGMS)



KREMP identified four key strategic areas that are already in various stages of implementation.⁴⁸ In respect of each of these key strategies, the Municipality is an important role-player both as implementer and enforcer of implementation.

⁴⁷

The National Environmental Management: Integrated Coastal Management Act, No. 24 of 2008.

⁴⁸

That is the establishment of the institutional arrangements which include the KREMP Forum and a Technical Working Group; improving the quality and flow of water to the extent that it is safe for swimming all year round; getting users to attach greater social and economic value to the estuary and the municipality and land owners to introduce land use management measures and practices that safeguard the health of the estuarine ecosystem.

In respect of water quality the Municipality will through its water quality practices as *inter alia* also outlined in its Water Safety Plan, pursue a multi-faceted campaign to 'clean up' polluting activities and installations which may include holding national and provincial departments responsible for their obligations in terms of water legislation.

KREMP puts forward three important strategies to integrate KREMP in land use management. Firstly to integrate the spatial implications of the KREMP into the Municipality's SDF (refer to Figure 2.3). Secondly the adoption of a Coastal Zoning Scheme as contemplated by the ICMA and integration thereof in the Municipality's LUMS (refer to Figure 2.4) and, lastly, the adoption and implementation of the guidelines supported by its Biodiversity Assessment (refer to Figure 2.5).

Figure 2.3: 1st Draft Spatial Conservation and Development Framework for the KREMP (Source: KREMP)

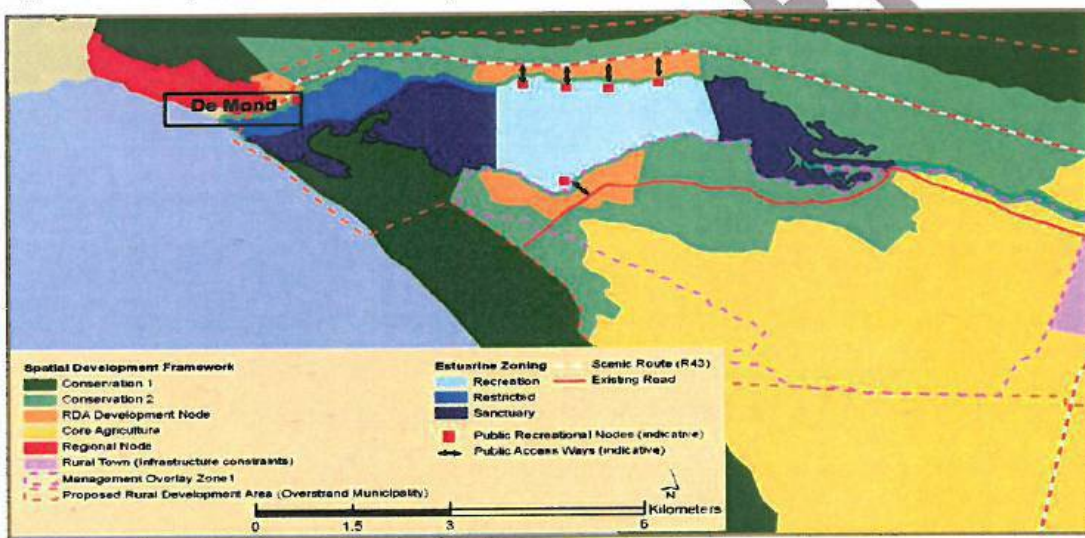


Figure 2.4: 1st Draft of the Coastal Zoning Scheme for the KREMP (Source: KREMP)

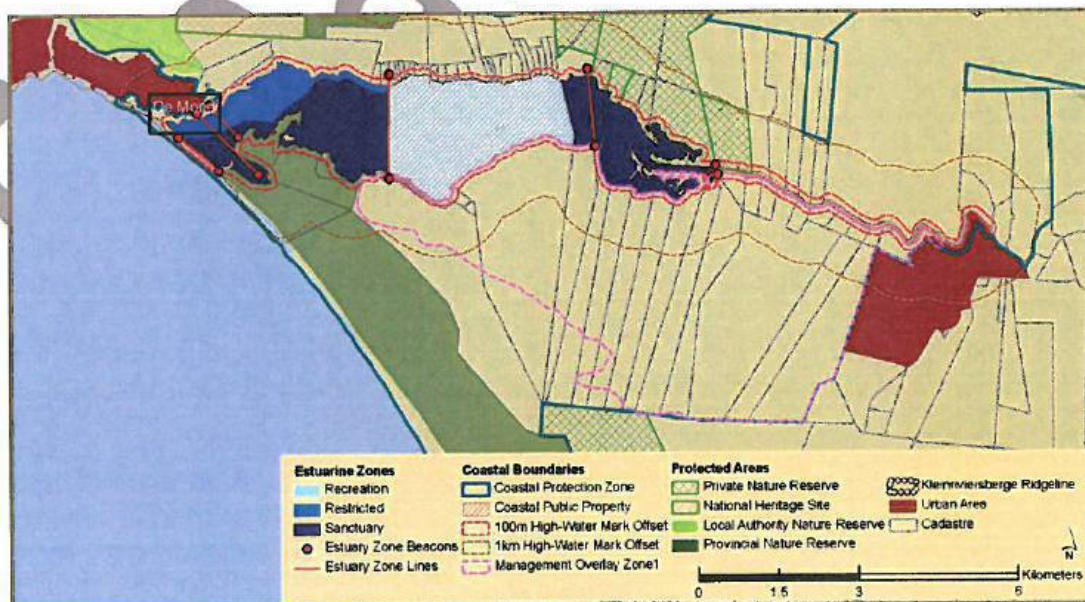
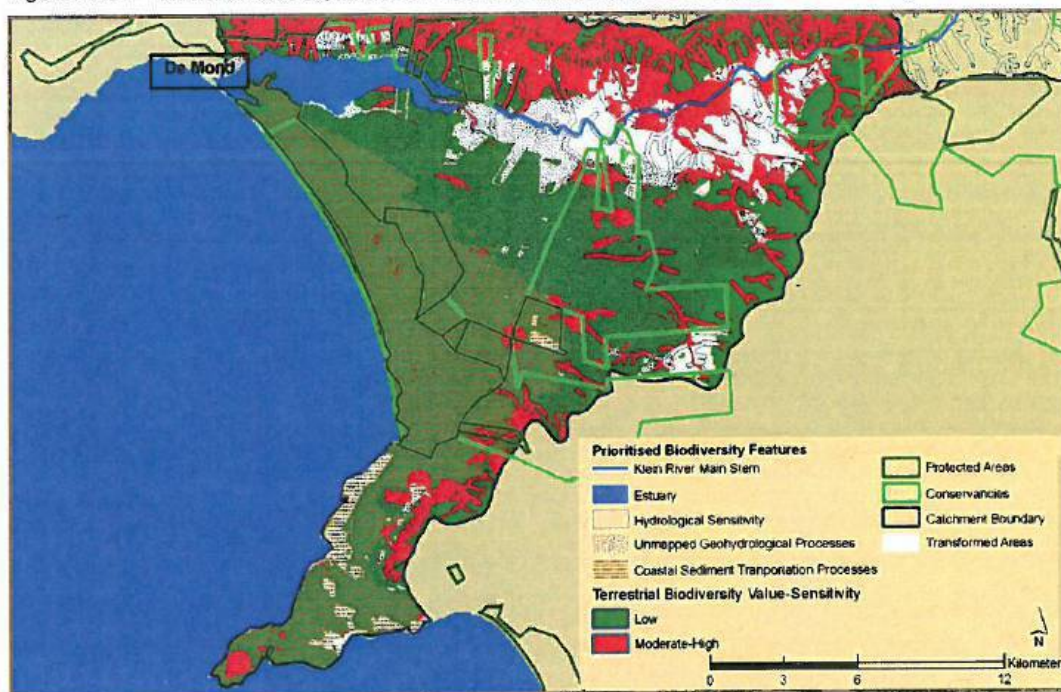


Figure 2.5: 1st Draft Biodiversity Assessment of the Klein River EM Area (Source KREMP)



The proposed development sites are at the centre of the KREMP's coastal zone⁴⁹ focus. As the proposed development will fall within 1 kilometre of the high water mark it will be within the Coastal Protection Zone. The goal of the Coastal Protection Zone is to enable the use of land that is adjacent to coastal public property or that plays a significant role in a coastal ecosystem, to be managed, regulated or restricted. Coastal public property in turn is made up primarily of the seashore (i.e. the area between the low and high water marks) and coastal waters are essentially all waters influenced by tides – whether an estuary, harbour or river – and the sea, out to the limit of the territorial sea.

Also indicated as falling under the Coastal Protection Zone is the 100m High Water Mark Offset. Environmental authorisation is required before certain listed activities⁵⁰ may commence within that zone. The proposed development will involve activities for which environmental authorisation will be required under NEMA.

Special land use restrictions that will apply within the coastal zone will be incorporated into the Municipality's IZS which is currently being compiled.

As is indicated on the map above, De Mond is on the northern bank of a defined restricted zone. KREMP proposes that the area must be subject to stringent measures to protect the estuary and provide access thereto, as more fully explained in its operational objectives and management guidelines. The specific supported and non-supported uses and activities which the KREMP would like to see becoming Council policy and part of the Overstrand Zoning Scheme are as listed below.

⁴⁹ A coastal zone is defined in the ICMA as the "area comprising coastal public property, the coastal protection zone, coastal access land and coastal protected areas, the seashore, coastal waters and the exclusive economic zone and includes any aspect of the environment on, in under and above such area."

⁵⁰ See section 24 of NEMA, the EIA Regulations and Listing Notice 1 published in Government Gazette 33306 (Notice No 544) of 18 June 2010.

Supported uses and activities:

- *Line fishing from the shore or from a boat or craft in compliance with MLRA permitting system and bag*
- *limits.*
- *Bait collecting, subject to periodic review, in compliance with MLRA permitting system and bag limits.*
- *Collection of mud prawn, sand prawn, bloodworm, pencil bait and tapeworm restricted to daylight hours,*
- *using legal implements.*
- *Canoes, kayaks, paddle skis, rowing boats and other low impact non-motorised craft.*
- *Motorised boats < 7Hp in transit only.*
- *Sailing and para-sailing – only registered participants during authorised regattas.*
- *Bird watching, hiking, swimming, non-destructive scientific research.*
- *Aquaculture enterprises, subject to EIA, licensing and concessions awarded through open and transparent*
- *procurement processes.*
- *Sustainable levels of harvesting of plant material from estuarine habitats to support job creating enterprises*
- *and livelihood strategies.*
- *Rehabilitation of the riparian reserve.*

Non-supported uses and activities:

- *No capturing or removal of fish during mouth breaching events.*
- *No capturing of line fish species with cast nets, seine nets, gill-nets or traps.*
- *No removal of indigenous vegetation, no planting of any material (except where rehabilitation is underway),*
- *No fertilisers or pesticides in the riparian reserve.*
- *No jet skis. No motorised boats > 7HP. No skiing.*
- *No sail craft except as supported.*
- *No sand mining.*
- *Infrastructure and municipal services:*
- *No bridges or causeways.*
- *Limit of one only licensed launch site and jetty. No other wharfs or edge hardening.*
- *Management interventions*

It would appear from the findings of the 1st Draft Biodiversity Assessment of the KREMP Areas (See Figure 2.5) that the proposed development will require a hydrological sensitivity analysis and geotechnical study.

3.3.3 ALIGNMENT OF PROJECT

The transaction advisors conclude that the proposed development project is directly and soundly aligned to the Municipality's economic development drive and its key priorities and interventions, focused on unlocking the full potential of tourism and the creation of sustainable employment.

Furthermore, that it is aligned to the SDF, the OGMS and municipal densification objectives. The proposed development will have to comply with heritage and environment protection requirements. In addition to the applicable statutory requirements, the relevant competent authorities may impose further requirements to be complied with as conditions of approval.

4. MUNICIPAL CAPACITY AND MANAGEMENT CONSIDERATIONS

4.1 MUNICIPAL STAFF

Except for the oversight of the Municipal Manager and the inputs to be provided by the Chief Financial Officer from time to time, the functions related to the procurement, management and monitoring of this project to develop a public resort are all located in the Directorate of Infrastructure and Planning ("DIP") with qualified staff heading the various divisions. Included herein are the divisions of Water and Transport, Electricity, Solid Waste Planning, Town Planning and Property Administration, Project Management and Development Control, Building Control, Environmental Management Services, Geographical Information System and Planning and Provision of Bulk Infrastructure.

To complement the expertise and capacity located in the Town Planning and Property Administration Division as the division mainly responsible for the project procurement, administration and management of the project's implementation, the Municipality has appointed the transaction advisors.

The DIP has undertaken master planning of the engineering infrastructure requirements (i.e. water, sanitation, roads, storm water and electricity) linked to expected short, medium and long term development projections which *inter alia* include the proposed development. It also has the expertise to approve engineering services designs and standards for new developments to ensure water and sewer distribution systems planning. The DIP staff members have adequate skills to liaise with consultants, developers and contractors and will conclude a service agreement for the new development inclusive of regulating the bulk service contributions.

The DIP has in the past, through its divisions working together in an integrated manner, managed other large projects. The transaction advisors are confident that it will again be able put a project team together that will be able to manage, monitor and control the various aspects of the project development cycle.

Irrespective of the liaison that a developer may have with the KREMP Forum, the Heritage Committee and other environmental groups, it can be expected that the Municipality (as an important participant in these forums and committees), will ensure the views of environmental stakeholders are solicited and their interests served as best possible through the development. For instance, to meet the stringent water and wastewater quality standards of the Department of Water Affairs, it can be expected that the Municipality will expand its quality sampling regime to include the development. Logically these management and monitoring operations will have operational budget implications but none is expected to fall outside the budget or having an over-expenditure impact thereon.

Although contract management, monitoring and performance reporting in compliance with Section 46 of the MSA and Section 116 of the MFMA will primarily be a function of the Town Planning and Property Administration Division, the nature of the development will require the Municipality to establish adhocracies of expertise dealing with specific matters as these arise. The latter division will also have to deal speedily and effectively with the number of consent uses expected due to the primary zoning uses of the land in question not making provision for all the components (e.g. conference facilities that will make the development sustainable notwithstanding the seasonal nature of tourism).

An essential stipulation in the development agreement should be a three-year review of the contract, not with the purpose of changing the goal posts, but to iron out and refine problematic issues which will in their original form not be sustainable over a thirty year or more period.

Given that any bulk infrastructure systems will form part of the council's assets, these will have to be recorded by the Financial Directorate in the asset register with depreciated values based on an annual condition survey.

It is the objective of the Municipality's Directorate Economic Development to build and maintain cordial relationship with its provincial and district tourism partners. It may therefore be able to assist to speed up the processing of the EIA application.

4.2 FINANCIAL OBLIGATIONS

The transaction advisors believe that potential municipal financial obligations flowing from or connected with the proposed project will be limited to the following:

- Demolition costs;
- Costs to maintain insurance cover in respect of municipal assets such as bulk infrastructure;
- Costs of municipal staff (e.g. that of the Project Manager and staff associated with the administration of the long term lease agreement);
- Costs to comply with health and safety legislation;
- Compensation payable in the event of premature cancellation of lease agreements;
- Legal costs to resist claims from current lessees or to obtain ejection orders against occupiers;
- The provision or upgrading of external bulk or link municipal services;
- Costs of the transaction advisors and advertisement costs.

The developer should contractually be made responsible for the *costs of demolishing* buildings and other structures on the project site, such as the ablution blocks and clubhouse.

The costs of maintaining *insurance cover* in respect of municipal assets such as infrastructure and buildings on the property is normal expenditure that would have been incurred if the project would not have been undertaken. It should be made a term of contract that, from date that the developer takes possession of the municipal property concerned, the developer shall be responsible to arrange and maintain insurance cover in respect of the municipal assets on or under the property, until same is demolished or removed with Council's consent. This approach will result in a *saving* on current municipal expenditure.

The Council will not be required to appoint additional *municipal staff* to assist with the proposed project. Staff currently in the employ of Council (e.g. the Project Manager and staff associated with the administration of the municipal lease agreements) may be required to assist with project planning, implementation and operational matters (e.g. receipt of rentals). The municipal expenses relating to existing staff members would have been incurred even if the project would not have been undertaken and therefore do not represent additional municipal expenditure. The operational costs associated with the administration of the leased property should (excluding the added contract management responsibilities), be less than current expenditure as only one tenant will remain. The operational budget of certain divisions (e.g. project management and environmental management) will have to include responsibilities linked to the development for the planning and implementation phases of the proposed development.

The health and safety legislation squarely places certain obligations on the Municipality as landowner. The Council may (and should) protect itself against claims made under the health and safety legislation in respect of incidents occurring on the property to be leased on a long term basis to a developer. This can be achieved by inserting appropriate conditions of lease which will place the onus on the developer to arrange and maintain

adequate insurance cover to the Municipality's satisfaction; and to indemnify the Municipality against all claims that may be made or brought against it under or arising from the provisions of health and safety legislation.

If dealt with as per the different lease stipulations and, as suggested, in a fair and equitable manner, the Municipality should not have to spend any compensation or other legal monies on dealing with its current land lease stakeholders except for the fees of the transaction advisors facilitating the necessary contractual wrap-up arrangements. If the Council should take a decision to prematurely cancel any of the current lease agreements, it probably will attract financial obligations arising from such cancellation. The Council itself is in control of its decisions and can avoid attracting liability by not cancelling any lease agreement prematurely. However, the Municipality may have to incur legal costs to resist claims from current lessees or to obtain ejectment orders against occupiers. It may have been necessary to incur such expenditure even if the development project would not be proceeded with. In order to comply with the conditions of the relevant Crown Grant, the Council must take effective steps to ensure that those conditions are complied with. Such steps may include legal action against occupiers who are not prepared to vacate the premises after the current lease agreements have lapsed.

In terms of standard municipal practice conditions of approval imposed under LUPO makes the developer responsible to provide at own cost all the required internal municipal services as well as for the cost of link services.

Section 42 of LUPO also empowers the Council to require from a developer as condition of approval that a financial contribution be made to the Municipality for municipal expenses incurred in the past that facilitates the proposed development and/ or to fund or provide engineering services that are directly related to the needs arising from the development. Basically the thinking behind the relevant provision is that any formula for contributions in respect of the cost of providing services should ensure equal treatment; more particularly that the residents of the "old town" should not subsidise the new development and that neither should the "old town" derive any benefit from the new development, unless a deliberate decision to the contrary is taken.

The Municipality has a Development Contribution Policy which forms part of its Tariff Schedule. The DIP has master plans in place for all municipal bulk services and continuously updates same to reflect supply and demand projections, the proposed density proposals and maintenance costs. DIP is therefore able to do accurate bulk service contribution calculations, ensuring the Municipality (and therefore land owners in the "old town") does not have to fund augmentation of these services using own capital. In appropriate circumstances the Municipality may require a developer to install or upgrade municipal services in lieu of payment of development contributions.

The OGMS identified a new water reservoir to cater for increased demand as a medium term requirement, mainly due to the impact of increased densification in Hermanus East. A short term requirement is the upgrading of the Scout and De Mond pump stations for which the Municipality has voted some funds, but may prefer to spend it on other pump stations. It is accepted that the Municipality will determine the bulk service contributions to be paid by the appointed developer, based on the developer's SDP and will require the developer to upgrade the De Mond pump station as part of its reticulation network.

The costs of the transaction advisors are directly related to their time required to perform the necessary work relating to the project. In addition to undertaking this feasibility study, they will be required to assist the Municipality with the procurement of a new developer for the proposed public resort, should the Municipality decide to go ahead with the proposal. The quality and innovativeness of the developmental proposals and the complexity and extent of contract negotiations will have a direct impact on the time required by the transaction advisors to perform their work.

The Municipality should place the onus on the new developer to apply at own cost for all necessary approvals and authorisations in terms of the applicable legislation. If this is done, the Municipality will not incur any expenditure in respect thereof and further inputs from the transaction advisors in respect of land use and environmental matters will not be required, which will translate in a saving of municipal expenditure. Further municipal costs relating to the project should, in those circumstances, be restricted to the costs of statutory advertisements which the Municipality will have to place relating to the invitation of proposals, the letting of land and so forth. The Municipality may, however, be required to incur costs to obtain realistic market valuations of the properties concerned.

The Municipality will terminate the current short term lease agreement of the historical Selkirk Cottage when required. This will pose no problem or financial implications.

Based on the above it is not foreseen that the project will require capital costs or place any significant operational financial burden on the Municipality.

4.3 AVAILABILITY OF SERVICES

The Municipality receives grants for the upgrading of infrastructure, but these grants are earmarked for previously disadvantaged areas. Those grants will therefore not be available for use in the area where the development is contemplated.

4.3.1 ROADS

The R43 provincial road runs alongside the eastern border of the area. According to the OGMS, the existing and well maintained collector and local road systems of the Hermanus East Planning area are currently operating within acceptable levels of service. It is possible as indicated by the OGMS, that the road systems would be able to accommodate the increased densities proposed by the OGMS but it cannot be assumed that the number of users added to the immediate road infrastructure would not in itself justify an upgrading of any of the feeder roads. The extent, size and character of the proposed development will determine if the developer must include a Traffic Impact Assessment with the EIA. Should it be determined that the development necessitates an upgrading of the road system, it will be for the cost of the developer. Similarly, the traffic impact assessment will be used to determine if the developer might be partly responsible for an increase in the maintenance responsibilities and costs of the Municipality. Of certainty the access road/s to the development will need to be upgraded and an internal network of roads will be part of the development.

4.3.2 WATER AND SANITATIONS

There is a local water supply line to the De Mond property which has sufficiently capacity for current use. An independent investigation conducted by GLS Consulting Engineers prior to June 2009, concluded that the Voëlklip water reservoir of 4500kl has sufficient capacity to serve a proposed public resort development at De Mond. In May 2010 the OGMS concluded that although the bulk water supply to Hermanus East area is regarded as sufficient, the potable water treatment works are operating at capacity and will require a costly upgrade to provide for development in the existing as well as the future areas; the water network was old and required replacement and an additional water storage reservoir will soon be required to service Hermanus East as and when further development takes place.

The De Mond site is currently partially serviced by 75mm diameter asbestos cement pipes and small diameter pipes installed on an ad hoc basis over the years. Should it be required, the Municipality will be able to indicate

all buried reticulation services installed by it and the current occupants of the De Mond Caravan Park should be able to verify the location of additional water lines and power supply connections which may have been installed by them but not recorded on a layout plan of the park. However, it will probably be best to abandon the current internal distribution system.

The main sewage collector line runs along the northern border of the park to the De Mond pump station with the Scout Camp pump station further east. Sewage from De Mond, Lakeview (approximately 20 chalets owned by the Municipality and located opposite the R43) and the KRLP is pumped by rising main to the Scout Camp pump station from where it is conveyed to the Hermanus Waste Water Treatment Works. An independent investigation undertaken by GLS Consulting Engineers prior to June 2009 showed that the existing Voëlklip sewer network will require upgrading to meet the demand of a proposed public resort development. Upgrades mentioned were *inter alia* a new rising main to the Klein River Pump Station and the pump station itself. A new internal sewage collector system draining to the existing or more sewage pump stations will be required. The capacities of these pump stations would therefore need to form part of project planning and further development would in the medium to long term require an upgrade of and a connection to the bulk wastewater treatment works.

The assessments referred to above do not provide a basis for planning. It is only when the extent and nature of the development is known as indicated on the Site Development Plan of the developer, that the Municipality will be able to determine the 'cradle to grave' impact of the development on the bulk water and sanitation services and the corresponding costs to be provided for in the bulk services contributions of the developer. The internal water and sewage reticulation network would be the responsibility of the developer as approved by the Municipality in terms of its Site Development Plan.

4.3.3 ELECTRICITY

According to the OGMS, sufficient capacity is currently available to serve the needs of Hermanus East but the demand trend is increasing and will have to be carefully monitored. Apart from that it would be feasible to do an audit of the bulk Eskom electricity supply and distribution network to see if it would be able to accommodate the proposed increased densities in Hermanus East.

Electricity is provided to De Mond, KRLP, the De Mond sewage pump station and Lakeview Chalets on the other side of the R43 (also municipal owned) from a 500kVa mini-substation on the border of the De Mond camp. The Institute gets its power from a 50kVa pole transformer. An analysis of the cumulative demand of these consumers, especially in peak times, clearly indicates that there is hardly any spare capacity available.

It is not possible to determine the power demand of a new resort development unless the nature and extent of the development is known. The Site Development Plan of a selected developer will be used to determine the power supply needs of the development, the short, medium and long term impact thereof on the bulk supply and distribution network of the Municipality and the costs to be apportioned to the bulk services contribution of the developer. The internal electricity network would be the developer's responsibility as approved by the Municipality.

4.3.4 WASTE

According to the OGMS, sufficient solid waste capacity exists to service the town. The proposed development is on the existing municipal refuse collection route and the Voëlklip drop-off site is not far from the area on the

R43 towards Stanford. In accordance with the municipal by-laws, a refuse collection enclave will have to be constructed at the service entrance to the development to enable the Municipality to remove the refuse.

4.4 ASSET MANAGEMENT

Section 63 of the MFMA requires a municipality to manage its assets and liabilities. Erven 5327 and 4831 will remain municipal property and must, as is currently the case, be reflected on the Municipality's Asset Register, be dealt with in terms of its Asset Management Policy and the Generally Recognised Accounting Practice ("GRAP") as applicable to municipalities. The land lease will classify as a finance lease earning rental revenues and subject to capital appreciation to be accounted for in terms of GRAP 16, the accounting practice applicable to investment properties.

Any bulk infrastructure paid for in full or in part by the developer in compliance with the Municipality's Development Contribution Policy will become part of the Municipality's infrastructural assets and thus will need to be reflected in the Municipality's asset register, annually verified and aligned with the requirements of GRAP 17 (the accounting practice in respect of property, plant and equipment) and be included in its maintenance plans. Internal reticulation infrastructure will not form part of the Municipality's assets.

In terms of its asset management policy and procedures, the Municipality will be responsible for insuring assets included in its asset register and the developer for its own internal infrastructure as would be stipulated in a lease contract.

5. BBBEE AND SOCIAL DEVELOPMENT ANALYSIS

Job opportunities created during the construction phase of the project would be temporary in nature but will assist to alleviate poverty. During the operational phase of the project a significant number of permanent jobs will be created.

The Municipality is committed to the promotion of BBBEE. It is therefore necessary to achieve socio-economic alignment between the proposed project and the Municipality's strategic efforts to implement more focused BBBEE. Development proposals will be assessed through the lens of BBBEE and the municipal principles to develop emerging entrepreneurs and contractors and give preference to employment of local skills and labour.

In terms of sections 21 and 28 of the SCM Regulations, all bids must be evaluated in accordance with the Municipality's SCM, the PPPFA and the applicable Preferential Procurement Regulations. In terms of the PPPFA and its Regulations, bidders will be able to earn preferences for elements such as the number of specific designate representatives in management, transfer of skills, equity employment, indirect empowerment by procuring goods and services from specific designated enterprises and socio-economic development initiatives in terms of the BBBEE Scorecard to be included in the RFQ/RFP.

6. STAKEHOLDER ANALYSIS

As owner of the land earmarked for the proposed public resort and having to ensure a financially sound and sustainable development is procured to the social and economic benefit of its community, the Municipality (represented by both municipal officials and town councillors) is an important stakeholder. However, there are a number of other stakeholders who have rights or interests in the matter, the views of whom must be taken into account, acknowledged and/or protected in the process now in hand.

6.1 DE MOND CARAVAN PARK ASSOCIATION

The Municipality has over the years maintained an open and transparent relationship with the DCPA. On 20 December 2010, the transaction advisors met with the DCPA at which meeting the Municipality formally confirmed its intention to put the proposed development out on tender again after following due process commencing with this feasibility study. An outline of the content of the study and the estimated procurement timeframe were presented. The projected timeframe was estimated to be two years but possibly shorter depending on the legal process advised by National Treasury.

The DCPA voiced concerns regarding the sustainability of the proposed development given the current economic climate, repeated its 2009 AGM recommendation that the proposed development be put on ice for a period of five years and requested a fair process providing their members adequate time to manage their own interests. Subsequently National Treasury advised the Municipality to follow the shorter process as prescribed by the MAT Regulations and the Municipality, through its advisors, provided the DCPA with a process diagram indicating the estimated target date for finalisation of a new Lease Agreement with a developer as June 2012.

It was agreed that the Municipality and the DCPA including their external advisors, should have a shared information base, be transparent and meet as and when the process necessitates it but keeping communication channels open. The DCPA was requested to give feedback of their AGM and the Municipality's advisors undertook to meet with the DCPA's legal advisor.

The DCPA at its AGM decided to improve the condition of the ablution blocks and fences at an estimated cost of R100 000 with individual members committing to the upgrading of their stands – an envisaged spending of R1,5m. The DCPA requested the municipality to assist with the upgrading of the internal roads as apparently it was done by the Municipality in the past. The Municipality was not prepared to invest additional funds due to the current and envisaged set of circumstances and indicated that the total rental saving of R0.5m (if calculated until February 2012) could be used by the DCPA for this purpose, given that it is contractually their responsibility and for their own use.

The transaction advisors met with the DCPA's legal representative on 2 March 2011. They noted the expectations of the DCPA members and the reasons put forth to support their expectations. These matters will have to be dealt with as already outlined.

At the meeting held between the transaction advisors and the representative committee of the DCPA on 20 December 2011, the DCPA committee gave the Municipality the assurance that it has a mandate from their members and will ensure that any future discussions are entered into with a re-confirmed mandate.

6.2 KLEIN RIVER LAGOON PARK

The Municipality has a good relationship with the Body Corporate of the KRLP. As with the DCPA, the Municipality also had a meeting with the KRLP's representative on 20 December 2010, at which meeting the Municipality formally confirmed its intention to put the proposed development out on tender again after following due process as outlined at the meeting and that, different from the previous tender, the envisaged tender will include the land on which the KRLP is situated.

The KRLP's first choice as communicated would be to become part of a proposed public resort development, preferably still managing itself, but the members are open for different options and quite prepared to make a financial investment. The last recorded sale of a KRLP property was approximately two years ago and based

thereon the smaller units are worth between R350 000 – R400 000 while the larger units trade at R0,5m. From the Municipality's perspective as communicated, its primary goal would be to see the KRLP accommodated within a sustainable development, but keeping in mind that it has to pursue a total solution for the land in question which would not be open to any disputes.

It was agreed that the Municipality and the KRLP keep channels of communication open, including feedback on this document and process. The representative of the KRLP gave the transaction advisors the assurance that he has been mandated to represent the KRLP in discussions with the Municipality.

6.3 WALKER BAY ADVENTURES

The communication between the Municipality and WBA, is mostly limited to regular extensions of the lease agreement. As a land lease stakeholder, it would be fair and reasonable that the WBA be included in any further meetings with the other lease stakeholders.

6.4 SEA & SAND

The communication between the Institute and the Municipality is limited and only initiated if a specific issue necessitates such. As a land lease stakeholder, it would be fair and reasonable that the Institute be included in any further meetings with the other lease stakeholders and it should be kept in mind that its lease agreement will only expire on 23 August 2014.

6.5 SELKIRK COTTAGE

Selkirk Cottage, approximately 150m² in size, is situated on the Prawn Flats. It is the fenced, standalone historical building owned by the Municipality and currently occupied in terms of a short term lease. The cottage is listed on the Heritage Register and due to its historical value, the Municipality intends to keep it and terminate the lease agreement when required. The Municipality will restore the cottage as and when required. A developer will be expected to include the cottage in its terrain plan and ensure it is not damaged in any way.

6.6 ENVIRONMENTAL STAKEHOLDERS

Important stakeholders to be consulted by the Municipality (when having to decide on whether it would grant consent use applications) and by a procured developer in complying with the applicable legislation, would *inter alia* be the Heritage Committee, the KREMP Forum and environmental conservationists with an interest in the development. These parties will, through a public consultation process, also get an opportunity to comment on the feasibility of the development project.

6.7 COMMUNITY

The expectation is certainly that all jobs created would benefit the local community and that affordability and value-for-money principles are adhered to. The community who may share in the use of a public resort and who will benefit from the social and economic spin-offs in respect of tourism and job creation is an important stakeholder. The community will, through a public consultation process, get an opportunity to comment on the feasibility of the development project.

6.8 TRADE UNIONS

It is not envisaged that any of the Municipality's employees will be directly involved in the proposed development project. The Municipality is thus not legally obliged to consult the trade unions, but will nevertheless make the feasibility study and the proposed agreement available to the trade unions for comments, if required.

6.9 CONSULTATION PLAN

As indicated above, meetings have already been held with important land lease stakeholders to ensure transparency and fairness. The Municipality will make any studies and/or agreements available to identified stakeholders following processes as stipulated in either the MSA (refer to Sections 21 and 21A), the MFMA, the MAT Regulations and other applicable legislation, depending on the circumstances.

Final Draft

SECTION 3: PROJECT ANALYSIS

1. STRATEGIC IMPORTANCE

The proposed development project is directly and soundly aligned to the Municipality's economic development drive and its key priorities and interventions, all of which are focused on unlocking the full potential of tourism and the creation of sustainable employment. It is also aligned to the SDF, the OGMS and municipal densification objectives.

The proposed development will have to comply with heritage protection and environmental requirements, some of which are to be found in statutory provisions and the other that may be imposed by the competent authorities when granting approvals or authorisations required by law.

2. PROJECT ABILITY

If a private developer funds the proposed public resort development, it will imply that the Municipality has complied with the relevant condition of the Crown Grant without using enormous amounts of public funds to perform this obligation. The transaction advisors are confident that such a development will provide Hermanus with improved means of accommodating day tourists, large tourist groups and the commercial market in need of conference facilities. It should be able to compete successfully with nearby facilities such as Arabella and improve visitor figures, especially in the traditional mid and low seasons. In addition the establishment of hotel and other public resort facilities could cater for various needs of the local community. All development (e.g. residential accommodation and recreational facilities) will be done within the boundaries imposed by an environment sensitive to exploitation of its unique character and heritage qualities.

The proposed project presents the Municipality with the opportunity to turn the current uncoordinated arrangement of the existing land usages into an orderly, coordinated, integrated and well-managed development and use of municipal property. The intention is that the proposed development will provide the broader public with more equitable access to municipal resources in an orderly manner and present the opportunity to better manage pollution prevention and conservation of the biodiversity of the Klein River Estuarine.

Ideally positioned at the entrance of Hermanus where the R43 enters it from Stanford, the development should contribute and enhance the pristine character of Hermanus East and Voëlklip and contribute to the image of a town taking pride in its appearance.

During construction of the facilities it will be possible to create a considerable number of jobs varying in skills requirements and duration, but contributing to the livelihood of the local community. Fully developed, the resort should offer valuable permanent job opportunities again with varying degrees of skills and expertise. The opportunities offered for the development and transfer of skills are significant and not limited to the resort given the potential impact of the resort on down-stream economic activities by capturing a larger segment of the economy either through the tourism, commercial, training or recreational facilities it will offer.

3. PROJECT ASSET PROVISION

The Municipality will be responsible to make the municipal land concerned available to the developer on a long term lease basis. It may well be that it would make business sense for a developer to retain some of the existing structures on the property, even if only during the construction phase of the project. This may require that the developer concludes an agreement with the rightful owners of such structures (e.g. the owners of mobile homes).⁵¹ The transaction advisors strongly recommend that the preferred bidder not be required to negotiate settlement with any of the parties that have made permanent improvements to the municipal land.

It will be primarily the Municipality's responsibility to ensure the entire portion of land is an asset to the developer and not in parts a liability. In this respect it will have to be able to give full assurance and record it as such that the developer will, within the conditions imposed by the competent authorities, be able to erect on the land all the facilities needed to establish a sustainable economic unit. It is only the small portion of fenced-off land on which the historical Selkirk Cottage is located that will not be available to the developer.

Fixed assets such as fencing, internal roads and water and sewer reticulation systems will be regarded as part of the land leased without any regard to its condition at the time of handing it over to the developer. Although the existing sewer pump stations will serve the development and must as such be upgraded at the total or partial cost of the developer, these will due to its wider functionality within the municipality's system, remain municipal assets, recorded on the municipal asset register and part of the bulk system maintained by it unless otherwise negotiated.

Any bulk infrastructure will irrespective if it is funded in total or partially with the development contributions of the developer and irrespective of whether the Municipality elects to do the upgrading works itself or prefer these to be done by the developer, become and remain municipal assets. These assets will be recorded, insured, maintained and annually depreciated by the Municipality unless otherwise determined by the lease agreement.

The number, combination and character of fixed building and infrastructure assets provided by the developer as part of the development will depend on its development proposal but it could foreseeably include the following:

- hotel, conference, restaurant, a quick on-site shop and related tourist retail facilities
- dwelling units of the size, height, density and otherwise as allowed by municipal zoning and policy considerations
- recreational facilities as allowed by primary and consent uses
- security structures and equipment including fencing and gatehouse
- safety equipment including fire-fighting equipment
- internal road and paving network
- internal electricity reticulation network
- internal water and sewerage reticulation network
- storm water drainage
- waste handling area including containers for recyclable goods

The manner and extent to which a developer incorporate "green building" design principles such as energy efficiency measures, should be an important consideration on the part of the Municipality.

⁵¹ In terms of the *superficies solo cedit* maxim, the ownership of improvements that have been affixed on a permanent basis to land, belongs to the owner of the land on which it has so been affixed. Mobile homes are not regarded as immovable property. It is for this reason that, should the new developer require the use of the mobile homes, it will have to conclude agreements with the rightful owners thereof.

4. PROPOSED PROJECT DURATION

It is necessary to distinguish between the planning and construction phase of the proposed development (on the one hand) and the operational phase of the proposed development (on the other hand).

The land lease agreement will need to be of sufficient duration to enable the developer:

- sufficient time for the work that will be required *before* the public resort will become operational (e.g. staff training, the acquisition of furniture and so forth);
- sufficient time, once the public resort becomes operational, to recover his capital investment, interest payments made to a financier and to make an acceptable return on the capital investment.

It is foreseen that the duration of the planning and construction phase will be approximately four years given the time needed to complete an EIA and other prescribed studies, finalisation of consent use applications, the provision of required bulk infrastructure and installation of reticulation infrastructure.

The MAT Regulations in terms of which this study and procurement of a developer for the public resort is done, does not prescribe the duration or other conditions of the project to the Municipality.⁵² The transaction advisors are of the opinion that the duration of the land lease agreement should not be dictated in the procurement documents. Proponents should be required to indicate the proposed length of lease agreements and to provide a detailed motivation why a shorter lease period would not be viable. It goes without saying that the Municipality will have to comply with all relevant statutory provisions and that the nature of the proposal and the benefit to be derived by the Municipality and the community from different contract periods as substantiated in a developer's proposal, will feature as important considerations in the final determination of the lease period.

5. RISK CONSIDERATIONS

Risk is an important component to be considered in respect of the proposed long term land lease agreement with the aim to identify and manage these risks throughout the RFQ/RFP, contracting and contract management phases. The following discussion seeks to highlight the most prominent risk areas.

Legal risks:

A number of legal risks are inevitable in projects such as the proposed.

The legal land issues and the risks these present are adequately discussed in the preceding and next section of the study. Two other risk areas need to be pointed out:

- If the study proceeds to a bidding/tendering phase, the risk that the bidding process followed is not in accordance with the processes prescribed in relevant legislation, regulations and the Municipality's SCM policy. The transaction advisors will take care to ensure the RFQ/RFP process is done correctly and it will be mainly the Municipality's task to ensure the correct processes are followed in evaluating, adjudicating and awarding of the tender.
- That the land lease agreement concluded between the Municipality and a preferred bidder is not specific enough in respect of grey areas, all grey areas are not foreseen and addressed, inconsistencies are unintentionally written into the agreement, the agreement contains clauses which are open to different

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Section 40 of the MAT Regulations provides that the Municipality may grant the right to use, control and manage a municipal asset subject to any conditions including the period for which it is granted.

interpretations and the agreement does not cover all relevant aspects. The Municipality assisted by the transaction advisors have the expertise to ensure the drafting, negotiation and conclusion of a good and practically executable agreement and it is assumed that a selected developer will have an equally competent legal team to assist it.

Regulatory risks:

This relates to the necessary authorisations and consents required from other government authorities, e.g. failure to apply for or obtain environmental authorization or delays in respect thereof, as well as the ease of control and enforcement of the development contract by the Municipality. The need for obtaining environmental authorization has been identified and the risks related to the enforcement of the contract can be managed through proper contract management and monitoring as required in terms of municipal legislation.

Insolvency risk:

In respect of a private entity the possibility of insolvency can never be ruled out. The impact and consequences of a selected developer becoming bankrupt will need to be adequately addressed in the agreement. More important will be the inclusion of qualitative criteria in the RFP to ensure only proven financially viable bidders enter the process and strict adherence to financial criteria during the tender evaluation and adjudication processes.

Site and availability risks:

To avoid a reoccurrence of the financial and other risks which confronted the previous developer, the Municipality must ensure it finalises all aspects of the current land leases and present the developer with vacant land in respect of De Mond and the other portions of the land currently occupied or a definite date on which land with leases only expiring in 2014 will be available.

The establishment of infrastructure and facilities holds a number of risks, e.g. planning, design and construction risks linked to the supply of material, theft, availability of water, electricity, etc. From a municipal perspective the contemplated development will require detailed site development plans and bulk services' contributions to enable availability of infrastructure and services, legally compliant designs, hands-on project management by the developer and strict quality control.

Although section 42 of LUPO empowers the Council to require from a developer as a condition of approval that a financial contribution be made to the Municipality for municipal expenses in respect of services' availability incurred in the past that facilitates the proposed development, such a requirement will present a risk to potential developers who will factor it into their proposals.

The zoning of the land earmarked for the development is another risk area, in particular a municipal risk. Included thereunder is the Municipality being able to get the more enabling new IZS approved in time to form the baseline for the development and, assuming this is done, the zoning consent uses to be approved by the Municipality will be a definite risk for potential developers. Non-performance by the Municipality to address these risks could result in a non-viable project.

Operating (including technology) risks:

These risks concern any factors (other than force majeure), impacting on the operational requirements of the development. It includes operating expenditure exceeded, labour problems (e.g. availability and establishment of required skills, incompetence, fraud, corruption, mismanagement of equipment and financial obligations, incompleteness or faulty completion of jobs, technology failure, environmental incidents, crime such as theft of vehicles, equipment and stock). Except for the Municipality being the ultimately accountable party in respect of health and safety and environmental incidents, all the other risks mentioned will be carried by the

developer/operating company. Mitigating measures for the Municipality will be to use the RFP and contracting processes to ensure the appointment of an experienced and competent developer/operating company.

Maintenance risks:

Managing and mitigating the maintenance risks inherent in the services' and built infrastructure will be the responsibility of the developer/operator. Through the development agreement the Municipality will establish its requirements for the maintenance of the public resort and in particular the services' infrastructure and through its contract management practices it will exercise an oversight role that these requirements are met.

Environmental risks:

Parts of the development will be in environmentally high risk areas, e.g. the area adjacent to the Klein River Estuary. An environmental authorization will lay down specific conditions and an environmental management plan will form part thereof to ensure the development exists in synergy with its environment. However, these measures will not completely rule out the risk of environmental damage arising from operational activities. An experienced public resort operator will be a mitigating factor. The Municipality can add thereto by making ISO 9001; ISO 14001 and OSHAS 18001 accreditation an advantage in its RFP and awarding marks for it.

Health and safety risks:

Health and safety risks will be most applicable to construction activities and continue to be important throughout the lifespan of the development in relation to staff and visitors. The signing of an Occupational Health and Safety Indemnity Agreement as part of the contractual arrangement between the Municipality and the developer/operator is essential.

Insurance risks:

Inadequate or no insurance of infrastructure which belongs to the Municipality will be the Municipality's risk. Construction liabilities and losses, the on-site assets of the development and the operation and maintenance related insurance risks will be the developer's responsibility. The agreement will need to address public liability insurance and stipulate the need for 'contractor all risk' insurance during the construction phases.

Financial risks:

It is not foreseen that the Municipality will carry any financial risk. It could however, by awarding the tender to a developer which is not financially sound, assume the potential financial risk of having to go through another procurement process and losing rental, property rates' and services' revenue. The same situation will apply if a developer does not obtain the consent land uses needed to establish a viable public resort.

On the other hand, the developer/operator will assume substantial financial risk. To mitigate its capital investment risks it could be expected that the developer will require a land lease agreement of sufficient duration to get a return on investment and contractual terms and conditions that link the compensation payable to the Municipality to the financial viability of the public resort. It is also to be expected that a number of suspensive clauses will be required in the development agreement (e.g. that environmental authorization be granted, approval of the IZS to ensure the most enabling zoning of the land, approval of consent land uses and finalisation of all matter incidental to the current land leases by the Municipality).

Depending on the financial arrangements of the developer, other factors such as interest and inflation rates could have a considerable impact on the developer's financial stability. Interest rates have been adjusted radically to mitigate the huge negative impact of the slump in the world economy on local businesses and individuals. Given that all predictions are that the world economy and SA's will take at least two years to become stable and only then enter a slow growing phase again, it can be assumed that the interest rate would rather be adjusted

downward more in the following year and then to remain stable for at least some time before any further adjustments would be considered. Mainly due to the economic downswing the inflation rate has increased and it is not expected to become as stable as it has been for the few years preceding the current downswing. However, South Africa's monetary and fiscal policies are still strictly applied and it can be expected that it will, over the longer term, result in a stable inflationary environment.

Force majeure risks:

These are unforeseen risks which usually hold a surprise element. Droughts and floods are such risks. The contract will include a standard clause on these risks.

Residual value risk:

It concerns the risk that the fixed assets situated in the public resort, are not maintained in a good condition when as at the expiry date of the lease agreement or, when handed to the Municipality at an earlier date due to the developer not complying with the relevant lease obligations. Mitigating measures could include the securing of a maintenance bond from the developer/operator. However, the transaction advisors do not recommend same as it may potentially impact negatively on the other provisions of the lease agreement to be concluded. Adequate contract management including an oversight evaluation and random verification of the assets' condition will form part of the agreement and should be sufficient to identify and manage 'red flag' situations.

Crime risks:

A number of the risks referred to crime. In reality crime plays a role in the execution of many if not most projects. These risks will have to be managed by the developer/operator through 'hard' and 'soft' mitigating measures, e.g. fencing and security, referencing, training and adequate remuneration of staff.

SECTION 4: DUE DILIGENCE

1. LEGAL LAND ISSUES

Although the Municipality is by statute empowered to enter into a long term lease agreement in respect of Erf 5327 and the portions of Erf 4831 concerned, it will have to follow due process to ensure that it acts lawfully. The Municipality will *inter alia* have to obtain all necessary approvals required in terms of the applicable legislation and conditions under which the land was obtained.

The Council has preliminary resolved to make the land available for development of a public resort by way of a long term lease agreement to fulfil its legal mandate but will make a final decision once the public participation process with regards to this study has been concluded and an acceptable development proposal procured.

The Crown Grant in terms of which a portion of Erf 4831 was acquired clearly stipulates that it should be used for purposes of a public resort. The transaction advisors are satisfied, based on the legal opinion referred to above, that the proposed land use will satisfy the conditions of grant.

The current and proposed zonings of the properties concerned have been discussed in detail above. It is not necessary to repeat the discussion. Suffice it to say that the current and proposed zonings of the properties may present certain obstacles in the way of the proposed development, although those obstacles should not be insurmountable. The following comments serve to highlight some of the concerns which the transaction advisors have in this regard.

- Although holiday accommodation is a permissible land use on land zoned Resort Zone 1 (i.e. the current zoning of the De Mond site), the definition of "holiday accommodation" specifically excludes a hotel. As definitions contained in zoning schemes are not "land use restrictions" as contemplated in LUPO, a "departure" application is not an option and a developer who intends erecting a hotel on the land, will have to obtain appropriate approval for the rezoning of the property.
 - The lagoon front at De Mond and the remainder of the area under discussion are currently zoned Open Space Zone II. Although the Municipality confirmed that it is acceptable for public resort facilities to be developed on land zoned Open Space Zone II, the existing lawful development on the property constitutes the land use parameters that apply to the property. If anything more is contemplated (such as erecting a hotel), it will therefore require approval of a departure under section 15 of LUPO or it may be necessary to rezone the property.
 - In terms of the IZS which the Municipality expects to be approved prior to the development, the proposed zoning of Erven 5327 and 4831 is Holiday Resort as confirmed by the Municipality. It would appear that in terms of the IZS the primary land uses will be less limiting and that, combined with the consent uses, it will allow more scope for a diversified resort development. However potential developers will probably regard the uncertainty surrounding the granting or refusal of applications for consent uses as risk factors. It can safely be accepted that those developers will require a due diligence period and will require that any development agreement that may be concluded, contains a suspensive condition in terms of which the agreement will become unenforceable if the required consent uses are not granted.
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2. REGULATORY ISSUES

The most prominent regulatory measure may potentially prove to be the requirement that environmental authorisation be obtained in terms of section 24 of NEMA before commencement of any of the listed activities that will form part of the proposed development. It would appear that a full EIA may be required, which should include a heritage assessment. This would imply that the competent heritage authority will become a commenting authority (as opposed to a decision-making authority).⁵³

In terms of the applicable legislation the Municipality has a limited albeit important role to play in the environmental process. The transaction advisors expect that the Municipality will probably only be required to play a facilitating role in respect of liaison with the Overstrand Heritage Committee and the Klein River Estuarine Forum. Potential bidders would be well-advised to take note of the list of recreational activities published by the Forum, which the Forum will not support for inclusion in the coastal zone parameters of the IZS (refer to item 3.3.2.6).

3. SITE ENABLEMENT

The current lease agreements of the DCPA, KRLP, WBA and the Institute required careful analysis to ascertain if there are risk areas and, if so, what these would be and how they should be dealt with. The transaction advisors endeavoured to determine those risks (if any) and came to the conclusion that the current lessees and their members do not have contractual rights to remain on the properties when the current lease agreements lapse. However, legal and goodwill considerations discussed earlier, support a fair and equitable process going beyond the lease stipulations.

Trading of stands/mobile homes by the members of the DCPA and the KRLP has been an on-going and sometimes lucrative practice but the Municipality has not had any involvement therein neither did it get any dividends from it. The respective lease agreements of these entities are silent on the matter of site-trading. Any consequences due to misrepresentation of the future of these stands/homes to new buyers by the members or body corporates of the DCPA or the KRLP will not be the Municipality's concern.

Should it become necessary for purposes of the proposed project to cancel a lease agreement prematurely (if permitted), the Municipality will have to comply with the relevant obligations that it has contractually accepted. However, premature cancelling of leases is not anticipated. With the De Mond lease agreement expiring on 29 February 2012 and the WBA agreement extended on a month-to-month basis, these agreements pose no problem. The other two leases expire respectively 30 April and 23 August 2014. Based on an expected project lead time of four years of which the first two years will be mostly dedicated to the EIA, planning, design and consent use applications before actual construction can take place, these leases might have expired or be on the verge of expiry by the time that actual construction begins. Irrespective, should these leases be allowed to run their full period, all matters related thereto must be contractually stipulated in the lease agreement between the Municipality and a selected developer.

The Municipality must deal with the occupants of Selkirk Cottage but need not do so before an agreement with a selected developer has been concluded and, even so, it could be possible to reach mutual agreement with the selected developer that the cottage be rented out until construction begins.

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See section 38(8) of the NHRA.

The land claim in terms of the RLRA referred to earlier, if published, should not present an obstacle in the way of the proposed development, provided the requirements of that Act relating to advance notice to the regional land claims commissioner are complied with.

From the available information it would appear that in principle sufficient bulk services capacity exists or can be provided though some upgrading of bulk water, sanitation and electricity distribution networks and link services will be required *inter alia* to cater for the needs that will arise from the proposed development. It can thus be concluded that the proposed development is feasible in terms of the provision of civil and electrical engineering services.

The Municipality will only be in a position to determine the nature and extent of the infrastructure upgrades and link services necessitated by this project and the concomitant bulk service contribution required from the developer, once the Site Development Plan of the development is provided to it. It is quite likely that the Municipality will prefer not to use its own project procurement and management capacity but will instruct the developer to use his bulk contributions, procurement processes and contractors to do the upgrades, limiting the Municipality's role to approval of designs, oversight and final sign-off. The agreement with the selected developer will make provision for such an arrangement.

To the extent dictated by the Municipality's asset management policy, the selected developer will be required to draw up a detailed contour site plan indicating all underground reticulation services installed on the land concerned and its maintenance responsibilities in respect thereof will be spelled out in the land lease agreement.

4. PROCUREMENT ISSUES

The report set out the legislation governing the feasibility and procurement processes. Since it is the Municipality's contention that there will not be any risk transfers and therefore that the project does not comply with all the criteria needed to qualify as a PPP, the alternative process of the MAT Regulations is implemented as advised by National Treasury albeit with strong elements of the PPP process embedded therein. However, the Municipality must keep an open mind to the effect that, if it appears that financial, technical or operational risk transfer becomes a real issue, the Municipality must incorporate into the procurement process the other legal prescriptions needed to comply with the PPP procurement process. With the possibility of the latter in mind, the transaction advisors have ensured that such adaptability will be possible.

The Municipality is obliged to follow a transparent process, allowing ample opportunity for public participation and, in certain instances, for a right to aggrieved parties to appeal to the competent authorities. It is not considered necessary to discuss in detail all the statutory requirements relating to advertisement of proposals and the public participation process that will have to be followed in respect of the proposed development. Suffice it to say that the final feasibility report will be an opportunity for the broader public to obtain information regarding the proposed project and to make their comments and concerns known to the Municipality.

Another main part of the procurement process concerns the provisions of Section 33 of the MFMA in respect of contracts imposing long term financial obligations on the Municipality. The municipality is convinced that there will not be such obligations and, if any, these would be minimal and probably below the threshold of financial impact still to be set by National Treasury. Again an open mind is necessary. Irrespective of whether a section 33 process is followed or not the land lease agreement as concluded will be available for the public to scrutinise.⁵⁴

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Section 46(b) of the MAT Regulations stipulates that an agreement granting a right to use, control or manage a capital asset to a private sector party or organ of state may not be withheld from public scrutiny subject to the stipulations of the Promotion of Access to Information Amendment Act, 54 of 2002 (the "PAIA").

5. INSTITUTIONAL ISSUES

The Municipality will need to deal quickly and effectively with applications lodged with it under LUPO⁵⁵ and other legislation which the Municipality administers.⁵⁶

If the transaction advisors must assist the Municipality with the various facilitation tasks indicated in this report, the communication channels between the transaction advisors and the various divisions within the Municipality must also be effective.

Final Draft

⁵⁵

E.g. applications for rezoning, subdivision and departures.

⁵⁶

E.g. applications for consent used in terms of the Zoning Scheme or IZS and applications for building plan approval under the National Buildings Regulations and Buildings Standards Act, 103 of 1977.

SECTION 5: VALUE ASSESSMENT

1. CURRENT PROPERTY ASSESSMENT

The valuations for the properties under discussion as reflected in Table 5.1 were extracted from the current municipal valuation roll. The current values are not market related and it is therefore not advisable to use these as a basis for rental determination. The Municipality should review these values prior to the commencement of the development and thereafter at regular intervals in accordance with Council policy for asset management and property rates' purposes.

Table 5.1: Valuation Roll extract reflecting the current land values of the proposed development sites

ERF NO	SUB CODE	TOWN	TOWN	INITIALS	NAME	EXTENT	STREET	STREET	LAND VAL	IMPR/MENTS	TOTAL	VALZONE	USAGE	LANG-UAGE	PROP TAX CODE
4831	HKR	KLEINRIVER			MUN OVERSTRAND	2346447	ZZZZ	UNKNOWN	0	0	0	MUNI	HOUSE	E	EXEMP
4831	2	HKR	KLEINRIVER		WALKERBAY ADVENTURE	300	ZZZZ	KLEIN RIVER LAGOON	400000 HER	564000	960000	BUS	SHOP/OFFICE	E	BUS
4831	3	HKR	KLEINRIVER		MUN OVERSTRAND	0	ZZZZ	SELKIRK COTTAGE	RM0	0	0	MUNI	HOUSE	E	EXEMP
4831	4	HKR	KLEINRIVER		MUN OVERSTRAND	8999	ZZZZ	FOURTH STREET	M0	0	0	MUNI	HOUSE	E	EXEMP
4831	5	HKR	KLEINRIVER		PRAWN FLATS MARINA	300	ZZZZ	KLEIN RIVER LAGOON	500000 HER	300000	800000	RES	HOUSE	E	RES
4831	6	HKR	KLEINRIVER		MUN OVERSTRAND	500	ZZZZ	SEVENTH STREET	RM0	0	0	MUNI	HOUSE	E	EXEMP
4831	45	HKR	KLEINRIVER		SEA AND SAND	5000		PRAWN FLATS	0	0	0	RES	HOUSE	E	RES
4831	47	HKR	KLEINRIVER	FM	SWANGLER	486	ZZZZ	FOURTH STREET	M0	0	0	RES	HOUSE	E	RES
4831	48	HKR	KLEINRIVER	SG	PAGE	500	ZZZZ	SELKIRK COTTAGE	RM0	0	0	RES	HOUSE	E	RES
4831	50	HKR	KLEINRIVER		MUN OVERSTRAND	500	ZZZZ	SELKIRK COTTAGE	RM0	0	0	MUNI	HOUSE	E	EXEMP
4831	51	HKR	KLEINRIVER		KLEIN RIVER LAGOON PAR	18998	ZZZZ	DEMOND CAMP	100000 HERN	100000	210000	RES	HOUSE	E	RES
4831	1	HKR	KLEINRIVER		ATTERBURY CONSORTIUM	M 0	ZZZZ	UNKNOWN	HERM 3375000	0	3375000	BUS	HOU/ACCOM	E	BUS
5927	HVK	VOELKLIP			MUN OVERSTRAND	12470	S32Z	SEVENTH STREET	500000 HERM	0	500000	MUNI	ROAD/POS	E	EXEMP

The monthly and annual revenue earned by the Municipality from the properties which form part of the proposed development is indicated in Table 5.2.

Table 5.2: Current municipal revenue from the properties

Property	Value of Property	Monthly Rental	Rental as % of value	Monthly Property tax	2011/12 Tariff*	Monthly Rental & Prop Tax	Total Annual
De Mond**	R 3,375,000.00	R 43,412.45	15.4	R 1,338.75	0.00476	R 44,751.20	R 537,014.40
KRLP	R 2,120,000.00	R 5,318.87	3	R 667.24	0.00476	R 5,986.11	R 71,833.32
WBA	R 964,000.00	R 670.00	0.83	R 382.39	0.00476	R 1,052.39	R 12,628.68
S&S***	R			R 0.04	-	R 0.04	R 0.50
Total	R 6,459,000.00	R 49,401.32		R 2,388.42		R 51,789.74	R 621,476.90
Total Revenue							R 673,266.64

* Property rates as applicable to commercial land and commercial improvements
 ** The Municipality has suspended the De Mond rental for the current lease period, i.e. March 2011 to February 2012
 *** Sea and Sand pays only for services rendered

The Municipality has suspended the De Mond rental payable for the lease period March 2011 to February 2012 therefore the total current rental received by the Council for these properties amounts to R5 988.91 per month.

Other revenues include payment for electricity and water consumption which varies substantially between quiet and peak times.

Service charges excluded, the members of the DCPA pay on average R211.09 per month and the members of the KRLP on average R299.30 per month to the Municipality for their sites. However, the lease agreements of these properties make the tenants fully responsible for the maintenance of the land, internal infrastructure, fences, buildings and structures, therefore in principle, the DCPA and KRLP save municipal maintenance expenditure with regards to these properties.

From a municipal perspective, the financial management of these properties is relatively simple and, based on the small rate payable per site by the members of the DCPA and the KRLP, it is clear the Municipality's focus has been on sustainability rather than revenue enhancement.

2. BUSINESS MODEL

The transaction advisors are satisfied that the development project is legally permissible; will give effect to the clear terms of the Crown Grant in terms of which the bulk of the De Mond land was acquired; and that it is physically possible to implement.

The preliminary financial feasibility of the project is set out below. The Municipality has no benchmark for this type of development and it does not want to be prescriptive, therefore, due to the many uncertainties that will only be clarified once the development proposals are received and a preferred bidder selected, the figures discussed are mostly estimates or based on assumptions.

2.1 PROPERTY/ASSET COSTS AND VALUE

The value of the land concerned as "vacant land" will increase considerably once new infrastructure has been installed and permanent improvements (such as buildings) have been constructed on the property.

The Municipality will in terms of the *superficies solo cedit* maxim become the owner of permanent infrastructure on the land but in terms of the land lease agreement to be concluded the use, management and control of these assets will be granted to the developer for the period of the lease together with the risks and accountability for the initial asset (the land) and the added assets (services and build infrastructure) on the land. For the full period of the lease the risks and liabilities of the on-site assets (on and under the ground) will be the responsibility of the developer for which adequate insurance would have to be obtained at the developer's cost.

The maintenance and insurance of off-site upgraded/new bulk infrastructure and link services necessitated by the development and paid for by the developer through its bulk services' contribution will be a municipal responsibility and so reflected in its asset management register and maintenance plans.

It is expected that the development will take place in phases. The total value of the build and services infrastructure to be added to the Municipality's assets in respect of the current De Mond site is expected to exceed R198m.⁵⁷ Further phases of development including the other sites currently occupied by KRLP, WBA and the Institute will possibly double the investment amount over an estimated span of 10 years. However, these figures and timeframe are rough estimates which can only be verified and substantiated once the development proposals based on the RFP are received and evaluated.

The demolition costs of current municipal owned infrastructure such as the ablution blocks and clubhouse on the Erf 5327 portion of the De Mond site will be incurred by the developer.

2.2 LAND LEASE REVENUE

The rental amount which the appointed developer/resort operator will have to pay to the Municipality once the facilities are operational will be considerably higher than the current monthly rentals payable by existing lessees.

⁵⁷

This figure is based on the development proposal received in 2007.

The determination of a fair lease amount will have to take into account the interests of the Municipality; the interests and financial ability of the developer and the sustainability of the public resort during its phases of development and once it is completed.

Initially the only baseline for determining the lease amount will be the value of the vacant land available for development to the developer. Realistically it will be the land currently occupied by the DCPA and possibly WBA with the other areas, i.e. the land leased to the KRLP and the Institute excluded until these leases expire in 2014. The lease amount could be an agreed fixed percentage of the value of the available land aimed at ensuring the Municipality's revenue equals current rental revenue or an acceptable amount based on financial viability considerations. Alternatively, it could be an agreed escalating percentage based on the value of the land to deter the developer from delaying construction without good reason.

As the other land becomes available for development, a revaluation of such land will have to be done and factored into the rental calculation but it is foreseen that, as a baseline, an initial fair adjustment of the current value of all portions of the land will have to sustain at least until the applied for land consent uses have been granted or until the 1st phase of the public resort is operational if so negotiated with the developer. Thereafter determination of the lease amount could be based on a fixed or escalating percentage of the value of the land and/or a fixed or escalating percentage of the gross income of the public resort or a mix of these. The transaction advisors are of the opinion that an income-based rental is preferable to support the financial viability of the developer/operator. The structuring, phasing and escalation of a rental amount will also depend on the nature, extent, phasing and duration of the development and the risks and liabilities inherent to the development.

Notwithstanding the points made above, the Municipality will not dictate to potential developers how to approach this matter in their proposals. Adopting a flexible approach to the determination of the rental amount will necessitate an agreement with sufficient checks and balances to ensure the interests of one party do not outweigh the interests of the other party.

It is possible to construct various land lease rental scenarios but in the absence of a revaluation of the land and the market related proposals put forth by potential developers it will be a premature exercise.

2.3 PROPERTY RATES REVENUE

The property rates payable by the developer will be based on the value of the land in question and will, as is the case with the other service charges, be billed separately by the Municipality. The 2011/12 property rate tariff applicable to commercial land and commercial improvements is R0.00476 (VAT included). Based on an annual tariff escalation of 9%⁵⁸, substantially higher land values and build/services infrastructure added to the value of R198m, the property rate revenue will increase at least sixtyfold in respect of the De Mond land. Further increases in land value and property rate revenue will be dependent on the phasing and the nature of the development.

2.4 SERVICES' REVENUE

It is realistic to expect that the electricity and water consumption will in comparison with the current consumption figures of De Mond and KRLP increase significantly especially during peak times. A reliable benchmark was not available.

⁵⁸

This is on average the annual increase of the Municipality's rates and taxes.

Refuse removal revenue will be subject to seasonal fluctuation but will on average increase considerably in comparison with current such revenue earned from these properties.

Additional services' related revenue could be, in accordance with Section 42 of LUPO, a financial contribution required by the Municipality from the developer for municipal expenses incurred in the past to install bulk infrastructure that now facilitates the proposed development and/or to fund or provide engineering services that are directly related to the needs arising from the development. These expenses could also be factored into the bulk services' contribution of the developer. However, as pointed out in the report, uncertainty on how the value of existing infrastructure is calculated could be a risk factor for potential developers.

2.5 MUNICIPAL COST IMPLICATIONS

It is not foreseen that the project will require municipal capital input costs or place any significant operational financial burden on the Municipality.

The main components of municipal operational cost that will not be recuperated from the developer will be the following:

- staff and administrative costs for procurement, project and contract management and its related matters such as legal, asset quality and maintenance monitoring;
- valuation costs;
- infrastructure insurance; and
- legal costs, e.g. for negotiation and conclusion of the agreement.

2.6 MARKET APPETITE

Although the rate of development in SA has in general slowed down considerably, the transaction advisors believe that the project would be appropriately supportable from the market subject to the ironing out of the zoning consent use issues set out in this report. Hermanus is a very popular tourist destination but tourism trends are linked to seasonality. Market appetite will be good provided the composition of the development can bridge this seasonality by accommodating large groups for conferences and its usability as a venue for a wider range of events and occasions, thus subject to a number of consent uses being granted.

The development being a public resort in Hermanus will most likely attract investors who have the financial capacity and the operational competence to run such a resort or joint ventures of investors and operators who, collectively, have the funds and knowledge to establish a successful resort. The transaction advisors are satisfied that a sufficient number of entities active in the field of developing and operating resorts are available in the country.

The Municipality will ensure the RFP is widely advertised to attract suitable developers/operators.

3. AFFORDABILITY ASSESSMENT

An assessment of the affordability of the proposed development must analyse if it will be a viable project for the Municipality and the developer whilst benefitting the community.

The proposed resort presents a highly affordable growth and development opportunity to the Municipality. It will not be required to make any capital investment or commit operational expenditure specific to the development other than the transaction advisor fees, a very small percentage of staff and administrative capacity for project,

asset and contract management, bulk infrastructure insurance costs and the maintenance costs of new/augmented bulk infrastructure and link services. The Municipality's operational expenditure will be minimal in comparison with the revenue that it could earn from the development.

For a developer, the viability of the proposed public resort will depend on a number of primary factors discussed in this report, i.e. enabling land use permissions, fair rental, an enabling agreement and successful mitigation of risks. Therefore, potential developers will regard the affordability and financial viability of the development as closely linked to the diligence and ability of the Municipality to successfully process its consent land use applications, the Municipality's baseline for calculating rental revenue and the duration of the agreement. A flexible income-based approach rather than a rigid asset value based approach to rental determination will be more aligned with fair and sustainable business principles and practices thus enhancing the viability of the development. A balanced approach composed of a fair basic rental and a percentage of gross income will provide the Municipality with a stable revenue source.

4. INITIAL VALUE FOR MONEY ASSESSMENT

The current use of the land provides the Municipality with a stable revenue source but the revenue earned is much lower than the revenue that could be earned if the land is optimally used. Apart from the activities of the WBA and the Institute, the land is not used to stimulate or accommodate local tourism and is of no socio-economic benefit to the wider community.

The development of the land will:

- enable the Municipality to fulfil its legal mandate of establishing a public resort;
- substantially increase the revenue (rental and property rates) earned by the Municipality's from leasing the land;
- significantly expand the Municipality's asset base;
- enable increased socio-economic activities in the community;
- give effect to the municipal strategic objectives of local economic development, job creation and sustainable tourism; and
- provide shareholding, management and contractual BBBEE opportunities.

There is no doubt about the potential socio-economic value of the development both in terms of the downstream impact of the tourism it will attract and the job opportunities to be created.

The transaction advisors found that the proposed development project will be directly aligned to the Municipality's economic development drive, its key priorities and interventions focused on unlocking the full potential of tourism and the creation of sustainable employment.

Irrespective of any initial leniency built into the rental determination based on the weak economic situation prevailing in SA and the world, the lease of the land under discussion to a private developer for the establishment of a public resort will result in a significant economic and financial benefit to the Municipality.

5. INFORMATION VERIFICATION

All the data used in the Feasibility Study Report has been obtained from municipal documents or directly from the Municipality or other stakeholders.

It is noted that:

- at the commencement of this study the zoning of Erf 4831 in terms of the IZS was indicated as Open Space Zone 1: Nature Reserve. The transaction advisors pointed out the complexity and risks involved in the zoning of Erf 4831 as a "nature reserve" to the Municipality and provided a few alternatives. Acting on their advice, the Municipality has affected an amendment of the IZS that it considered suitable and confirmed to the transaction advisors that in the IZS submitted to the province Erven 5327 and 4831 are now zoned as Holiday Resort. The transaction advisors accepted this as correct and have based the discussion and assumptions thereon.

The report has demonstrated the value-for-money to be derived from the development of a public resort on the land under discussion. The structure and detail of the business model will depend on the development proposals received in response to the RFP. Since these proposals may outline a number of business scenarios, it would have been a premature exercise to do detailed financial projections and analyses. However, a number of broad assumptions were made that clearly argued the strategic, financial and socio-economic advantages of the development for the Municipality.

It was explained that the Municipality will incur minimum operational and no capital cost with regards to the development. The risks have been identified and mitigation measures discussed. Except for a few risks relating to site enablement and regulatory matters, the risks will be owned by the private developer and costs have not been apportioned to these risks.

All documentation used for and produced in respect of this study is on record with the transaction advisors and notices, advertisement, etc. handled by the Municipality are also on record at its appropriate offices for the purposes of an audit by the Auditor-General or should it be sourced in terms of the PAIA.

The Feasibility Study and its related processes comply with all legislative requirements as pointed out herein. Briefly, it is in accordance with the provisions of the MAT Regulations and aligned to the requirements of section 120 of the MFMA and the PPP Regulations. It has studied the related national, provincial and municipal legislation and policy documents. The planned procurement and contract management processes will also comply with applicable legislation.

The transaction advisors relied on the information provided by municipal officials in the course of the study and, wherever reasonably possible, attempted to independently verify the accuracy of such information.

SECTION 6: PROCUREMENT PLAN

1. PROCUREMENT FRAMEWORK AND TIMETABLE

1.1 DEPARTURE POINT

The procurement must take place in accordance with the Overstrand SCM Policy and with the applicable legislation. It *inter alia* includes:

- the MSA, the MFMA and the PPPFA;
- the applicable National Treasury regulations.

The transaction advisors consider compliance with the provisions of the MAT Regulations, the Preferential Procurement Regulations (2011) and the National Treasury PPP Guidelines, including the Code of Good Practice for Black Economic Empowerment in PPPs, of particular importance within the context of the procurement process.⁵⁹

1.2 RFQ AND RFP PROCESSES

The procurement will involve a combined RFQ and RFP evaluation process. The RFQ process will include evaluation criteria such as:

- project understanding;
- property development capabilities and experience;
- the strength of covenant between companies in a consortium or joint venture;
- financial and market standing;
- ability to raise funding;
- legal commitment and integrity;
- BBBEE credentials; and
- a proven record of the ability to manage, operate and maintain a public resort

on which the shortlisting of qualifying bidders will be done.

Depending on the quality and appetite of bidders, the result could be two to three qualifying bids whose proposals will be further evaluated. Thus a failure to pre-qualify at the RFQ stage will effectively disqualify a bid from being further evaluated.

The second evaluation will only include the shortlisted bidders and result in the selection of a preferred bidder with whom the municipality will enter into negotiations. The RFP evaluation criteria would be substantial and rigorously applied *inter alia* requiring:

- adequate proof of the sustainability of partnerships or joint ventures or contingency planning to ensure the continuance of the strengths (e.g. skills, capacities, project experience on which the bid is based);
- comprehensive financial modelling including cash flow projections demonstrating affordability;

⁵⁹

This is so, even though the Municipality does not regard the proposed project as a PPP; a view confirmed by National Treasury.

- value for money and the optimum combination of whole life costs and benefits enabling the Municipality to thoroughly interrogate the proposal;
- a full risk assessment will be required taking all internal and external factors into account and indicating how key sensitivity variables will be managed;
- information related to corporate governance, quality management, environmental impact management inclusive of all legal processes and timeframes, health and safety management, operational management; and
- BBEE factors such as bidder equity in respect of investment, management and operational aspects.

If, in the opinion of the municipality, the RFP evaluation renders a result calling for or making it possible to appoint a preferred bidder and a reserve bidder, this will be done. Therefore the success of negotiations with the preferred bidder will determine whether the Municipality will eventually enter into a lease agreement with the preferred bidder to achieve the proposed public resort development. If not, the Municipality may in its sole discretion decide to negotiate with the reserved bidder.

1.3 KEY PHASES AND TIMEFRAME

The key phases and timeframe as currently pursued are set in Table 6.1 below.

Table 6.1: Key Phases of the Project and Timeframe Pursued

KEY PHASES	PROJECTED TIME FRAME
PHASE 1: Submission and finalisation of the Feasibility Study followed by the obligatory consultation processes as per legally stipulated periods	October – December 2011
PHASE 2: Conclusion of the Feasibility Study process with Council approval of the recommendations and the RFQ/RFP process to proceed	January 2012
PHASE 3: Submission of RFQ and RFP combined document inclusive of the outline of a contract and contract management plan and municipal approval to proceed with procurement process – time allowed for exploratory talks with possible investors prior to finalisation of RFQ/RFP document and eight weeks allowed for submission of proposals (obligatory site meeting to be done).	February 2012 March – April 2012
PHASE 4: Procurement process – first the RFQ and thereafter the RFP evaluations and the adjudication process with a report submitted to the Municipality.	May 2012
PHASE 5: Based on municipal authorisation to proceed with negotiations with the preferred bidder, draft PPP contract concluded and submitted to municipality.	June – July 2012
PHASE 6: (only if section 33 of MFMA involved)	July - August 2012

Obligatory consultation processes as per legally stipulated periods if s33 of MFMA involved.	
PHASE 7: Final approval of PPP contract by the Council, contract signed and start of implementation phase	September 2012

2. PROCUREMENT MANAGEMENT

The project team comprising of the transaction advisors and municipal personnel, will take this process through procurement to contracting and implementation of the contract.

The Municipality has prescribed processes which must be and will be followed. In terms of the MFMA the Municipality is duty-bound to comply with the provisions of its SCM policy, including the preferential procurement stipulations contained therein. The transaction advisors are satisfied that within the operational framework provided by the various statutory provisions and policies, no room has been left for manoeuvring or unacceptable methods to be implemented. In order to ensure a smooth transition from procurement to contract implementation and compliance with the relevant contractual terms and conditions of approval, a contract management plan will be put into place at the same time as concluding a lease agreement with the preferred bidder.

In accordance with the above the Municipality's bid evaluation and adjudication committees will see to it that the bids are fairly evaluated and the adjudication process implemented as prescribed. The transaction advisors will assist those committees in an advisory capacity. Should there be an appeal against the bid awarded, the Municipal Manager will handle the appeal process in terms of the prescribed procedure.

The transaction advisors will draft the RFQ and RFP document and it will be subjected to an adequate internal quality assessment process to ensure it complies with municipal requirements. Bids received that do not comply with the bid conditions and requirements, should be rejected outright.

3. STAKEHOLDERS

The Municipality regards on-going stakeholder engagement during all stages of the process as essential for the successful conclusion of the project. It has undertaken to maintain adequate and continuous communication with the executive committees of the DCPA and the KRLP representative. The owners of WBA and the Institute should also be kept informed regarding progress with the procurement process. The Municipality should take the position of the members of the DCPA and the KRLP into account when negotiating with the preferred bidder.

If any of the aforementioned stakeholders become a party to a bid consortium or put in a bid as a separate entity, it goes without saying that further communication with such a party would have to ensure that information, if made available, does not provide the party with an unfair advantage or prejudice any other bidder.

4. INFORMATION TO BIDDERS

The tender process should include an obligatory briefing session and site meeting. The RFQ/RFP document should be inclusive and contain all the necessary information. However, it is expected that some bidders will want to study the volume of documents in respect of town planning, environmental planning, services' master planning, etc. available before preparing and submitting proposals or bids. Therefore the Municipality will need to establish a data room at the offices of the DIP which will be open at specific hours to the bidders who attended the briefing

session and site meeting.

It is to be expected that potential individual bidders may raise questions or require further clarification. The Municipality should stipulate a cut-off date for the submission of such questions and should reserve the right not to respond to any particular query or question. The reply to such questions received should be in writing and should be made available to all potential individual bidders on record.

5. OBLIGATIONS & CLARIFICATION

Bidders should be required to strictly and properly comply with all municipal RFQ/RFP and tender requirements (e.g. to give full information, to present same in the required format and to lodge the required warranties).

The RFQ/RFP document should provide that the Municipality may have informal clarification sessions with individual bidders to address unclear aspects of their bids; provided that bidders will not be permitted to amend, vary or add to their bids at such sessions.

6. SECURITY AND CONFIDENTIALITY

The public administration is enjoined to foster transparency by providing the public with timely, accessible and accurate information and to be accountable. In addition it is required to respect, protect, promote and fulfil everyone's fundamental right of access to information held by the Municipality. Whilst the Municipality is bound to comply with those requirements, it should implement and maintain the necessary security and confidentiality measures to likewise ensure that the privacy of communications is not infringed.⁶⁰

7. AUDIT TRAIL

Both the transaction advisors (on the one hand) and the Municipality's project officer (on the other hand) will keep an audit trail and regularly submit audit reports to the Municipal Manager.

⁶⁰

See section 195(1)(f) and (g), section 32(1)(a) and section 14(d) of the Constitution. Also see the PAIA.

APPENDIX A



Naam: W. J. Brands

Uitsluiting:
Die Referensie:

Datum:
Date: 3 December 2010

K. H. ROOPE VAN DE MERWALE B.T.O. (Pty) Ltd
OFFICE OF THE MUNICIPAL MANAGER

Head of PPP Unit
National Treasury
Private Bag X115
Pretoria
0001

Fax: 012 315 5132

Dear Sir,

NOTIFICATION OF A SECTION 120(4) FEASIBILITY STUDY

With reference to Regulation 2(1) of Regulation 309, the Municipal Public-Private Partnership Regulations ("the Regulations") to the Municipal Finance Management Act, No. 56 of 2003 ("MFMA"), you are hereby notified that:

1. Overstrand Local Municipality intends to conduct a Section 120(4) feasibility study for a public-private partnership with respect to the development and use of its De Mond Caravan Park by a private party for its own commercial purposes based on a long term PPP lease agreement.
2. Based on a Council Resolution in this regard (refer to **Annexure 1**) the Municipal Manager has been mandated to authorise the transaction advisor to proceed with the Feasibility Study and accordingly wishes to register the project with National Treasury.

It is hereby confirmed that:

1. The Municipality has the necessary internal expertise to oversee the Feasibility Study, which study is to be done in accordance with the requirements of Section 120(4) of the MFMA and Regulation 3 of the Regulations.
2. A transaction advisor/....

-2-


3. A transaction advisor with the relevant skills and expertise, namely Johan du Plessis, Project Management & Facilitation, has been appointed (refer to **Annexure 2**) to manage the completion of the Feasibility Study and, if so decided, the preparation and procurement of a PPP agreement on behalf of the Municipality; and
4. Mr Riaan Kuchar, has been appointed as the Project Officer. His contact details are: Tel. 028 313 8087 and e-mail: rkuchar@overstrand.gov.za

We trust you will find the above notification and information satisfactory in compliance with Regulation 2 but, should additional information be required, please do not hesitate to contact me.

It is confirmed that the Municipality is aware of its further consultative obligations in respect of National and Provincial Treasury as per Sections 120(6) and 33 of the MFMA and Regulation 4 of the Regulations and will adhere to these as the process unfolds.

Also be advised that the Municipality intend to submit a Pre-TVRF 1 Application for funding of the process by the Project Development Facility (PDF) of National Treasury once notification of registration of the project is received.

Yours sincerely


WERNER ZYBRANDS
MUNICIPAL MANAGER

Annexure F 1/8

BOX 42

[Handwritten signature]
13/3/2012

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Before the Honourable Mr Justice Gamble
Cape Town: Thursday 8 March 2012

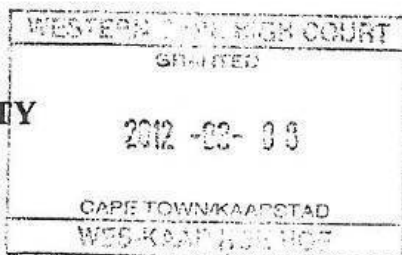
Case No: 4344/2012

In the matter between:

OVERSTRAND MUNICIPALITY

And

DE MOND CARAVAN PARK ASSOCIATION



Applicant

Respondent

DRAFT ORDER

**HAVING READ THE PAPERS FILED OF RECORD AND HAVING HEARD
COUNSEL FOR THE PARTIES, THE FOLLOWING ORDER IS MADE:**

1. A rule *nisi* is issued calling on the Respondent to show cause at 10h00 on 12 APRIL 2012 ~~23 March 2012~~ why orders should not be made:

[Handwritten mark]

[Handwritten signature]

1.1. Declaring that:

- 1.1.1. the Applicant is permitted to disconnect forthwith, in terms of the first proviso to regulation 7(7) of the Electrical Installation Regulations, 2009, made under section 43 of the Occupation Health and Safety Act 85 of 1993 ("the EIR"), the electricity supply to a portion of Erf 4831 Hermanus situate on the South Eastern side of 17th Avenue, Hermanus known as De Mond Caravan Park ("the Park") by switching off, with effect from, the mini-substation "DEM", all applicable networks leading to this site;
- 1.1.2. subject to paragraph 4.5 below, the Applicant is permitted to refuse to reconnect the electrical supply to the Park or any part of the Park unless and until all faults with the electrical installations and network in the Park have been remedied and the Applicant has been supplied with a valid certificate of compliance, issued in terms of regulation 7(1) read with regulation 9 of the EIR, for such installations and network; and
- 1.1.3. directing that the costs of this application be paid by the Respondent such costs include the costs of two counsel to the extent two counsels have been employed.
2. Pending the final determination of the proceedings in paragraph 1 above, the orders in paragraphs 1.1.1 and 1.1.2 shall operate as interim orders, subject to paragraphs 3 and 4 below.



3. The electricity supply to the Park shall be terminated at 15h00 on Monday 11 March 2012, it being recorded that the Respondent has undertaken to use its best endeavours to ensure that, apart from Ms Elizabeth Theron (referred to in paragraph 4 below), Mr and Mrs De Beer (the caretakers) and Mr Cilliers (the chairman of the Respondent), no one shall be permitted to enter or remain in the Park between the time this order is made and the termination of the electricity supply on Monday 11 March 2012 except to remove perishables from fridges and freezers at the Park.

4. If the Respondent wishes the Applicant to re-energize the connection to Unit 161 also known as "Lagoon Cottage" which is currently occupied by Ms Elizabeth Theron and/or the street lighting in the Park, then and in that event:

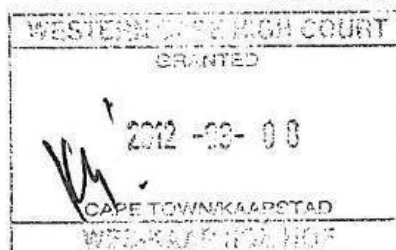
4.1. the Respondent shall ensure that all circuitry branching from the main overhead line, except the connection to Unit 161, is removed forthwith;

4.2. if the electrical supply for the said connection to Unit 161 and for the street lighting in the Park is not already on the one phase re-energized circuit breaker within mini-substation "DEM", the Respondent shall ensure that the said supply moved to the said circuit breaker;

4.3. the Respondent shall ensure that:




- 4.3.1. the said connection to Unit 161 is brought forthwith to the standard required by the EIR to qualify for the re-energization of that portion of the network; and
- 4.3.2. all circuitry branching from the main overhead line for the street lighting in the Park is brought forthwith to a standard which is satisfactory to the Applicant's Deputy Director: Electrotechnical Services for the re-energization of that portion of the network;
- 4.4. once the steps described in paragraphs 4.1 to 4.3.1 above have undertaken the Respondent shall procure and present to the Applicant a certificate of compliance, issued in terms of regulation 7(1) read with regulation 9 of the EIR, for the portion of the network referred to in paragraph 4.3.1 above;
- 4.5. upon receipt of such certificate and upon the Applicant's Deputy Director: Electrotechnical Services being satisfied as referred to in paragraph 4.3.1 above, the Applicant shall re-energise the portions of the network referred to in paragraph 4.3 above (and no other) by switching on the relevant circuit breakers within mini-substation "DEM",
- 4.6. the actions described in paragraphs 4.1 to 4.4 above shall be undertaken at the Respondent's cost by an electrical contractor or contractors appointed by the Respondent.



- 5. All questions of costs shall stand over for later determination.

BY ORDER OF THE COURT


COURT REGISTRAR
Box 42
Deirdre Olivier
Fairbridges Cape Town

WESTERN CAPE HIGH COURT
GRANTED
2012-08-08
CAPE TOWN/KAAPSTAD
WESTERN CAPE HIGH COURT



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 15032/2012

4344/2012

CAPE TOWN: Monday, 10 December 2012

Before the Honourable Mr Justice Saldanha

In the matter between:

Applicant

OVERSTRAND MUNICIPALITY

and

DE MOND CARAVAN PARK ASSOCIATION	WESTERN CAPE HIGH COURT CIVIL APPEALS	First Respondent
HANNA AURET	2012 -12- 10	Second Respondent
KEITH HAMPSHIRE	CAPE TOWN/KAAPSTAD	Third Respondent
PIETER RAUTENBACH	WES-KAAP HOË HOF	Fourth Respondent

ORDER

HAVING READ THE DOCUMENTS FILED OF RECORD AND HAVING HEARD COUNSEL FOR THE PARTIES, THE FOLLOWING ORDER IS MADE:

1. It is declared that the failure by the above-named First Respondent to vacate a portion of Erf 4831 Hermanus situate on the South Eastern side of 17th Avenue, Hermanus known as De Mond Caravan Park ("the Park") by 31 July 2012, was unlawful and its continuing occupation of the Park is unlawful.
2. Subject to paragraph 4 below, the First Respondent and all others, save for Ms Elizabeth Theron, the second, third, fourth respondents and Ms

Beryl Howard, who may claim through or by the First Respondent occupation of the Park or any part thereof, shall vacate the Park by 14h00 on Friday, 21 December 2012.

3. In the event of the First Respondent and/or any of the persons who shall vacate the Park in accordance with paragraph 2 above failing to do so by 14h00 on Friday, 21 December 2012, the Sheriff of this Court is authorized and directed to evict from the Park the First Respondent and any such persons.
4. The First Respondent and all persons who shall vacate the Park in accordance with paragraph 2 above, and /or their agents or contractors bearing written authorization from the First Respondent or such persons as the case may be, may gain access to the Park after 14h00 on Friday 21 December 2012 until 14h00 on 31 March 2013 for the limited purpose of removing from the Park their movable structures, their contents, possessions and the materials comprising such structures.
5. The First Respondent shall remove from the Park all movable structures and their contents and the materials comprising such structures, save for the structure occupied by Ms Elizabeth Theron, the second, third, fourth respondent and Ms Beryl Howard and shall give the Applicant vacant possession of the Park, by 14h00 on 31 March 2013.



6. In the event of the First Respondent failing to comply or comply fully with its obligations under paragraph 5 of this Order by 14h00 on 31 March 2013, the Sheriff of this Court is authorized and directed:
- a. to remove from the Park all movable structures and their contents and the materials comprising such structures that the Applicant may require be removed, save for the structure occupied by Ms Elizabeth Theron, the second, third, fourth respondents and Ms Beryl Howard.
 - b. to destroy or sell the movable structures and their contents so removed and to apply the proceeds to defray the cost of the eviction, removal sale and destruction.
7. The counter application by the first respondent is dismissed.
8. The First Respondent is ordered to bring the contents of this order to the attention of its members as a matter of urgency.
9. The costs of this application, the costs of the counter application and the costs of the application under case number 4344/2012 shall be paid by the First Respondent.

BY ORDER OF COURT



COURT REGISTRAR
42 Fairbridges
CAPE TOWN

/avz



OVERSTRAND MUNICIPALITY

Internal Memo

Annexure G 1/4

To: Director: Infrastructure & Planning
For attention: Mr S Müller
From: Ms A Le Roux (Manager: Property Administration)
Date: 27 October 2020
Re: **OPINION ON A POSSIBLE DIRECT LEASE OF THE DE MOND CARAVAN PARK SITE**

1. This memorandum was requested to provide the necessary information and recommendations as to a possible direct lease of the old De Mond Caravan Park on a portion of Remainder Erf 4831 Hermanus. Please note that the legal opinion of Adv Breitenbach will be incorporated into this memorandum.
2. The procedures and conditions for the lease of municipal immovable property are contained in the Municipality's Administration of Immovable Property Policy as amended in 2015. This mentioned policy was prepared in terms of the Local Government: Municipal Finance Management Act (Act 56 of 2003) and the Local Government: Municipal Finance Management Act: Municipal Asset Transfer Regulations of 2008.
3. As several cross references are made in the act, the regulations and several policies, only the following acts, regulations and policies were perused and taken into account in preparing this memorandum:
 - (a) Local Government: Municipal Finance Management Act (Act 56 of 2003) ("MFMA")
 - (b) Local Government: Municipal Finance Management Act (56/2003): Municipal Asset Transfer Regulations (2008) ("MATR")
 - (c) Local Government: Municipal Finance Management Act (56/2003): Municipal Supply Chain Management Regulations (2005) ("SCM Regulations")
 - (d) Overstrand Municipality Supply Chain Management Policy (2020) ("SCM Policy")
 - (f) Overstrand Municipality Administration of Immovable Property Policy (2015) ("AIP")
4. The only reference in the MFMA to the leasing of municipal assets (properties), is in section 168(1)(g), which reads as follows:

*"The Minister, acting with the concurrence of the Cabinet member responsible for local government, may make regulations or guidelines applicable to municipalities and municipal entities, regarding- ... (g) the alienation, **letting** or disposal of assets by municipalities or municipal entities".*
5. The MATR are the most important of the regulations made under section 168 of the MFMA relevant to the leasing of immovable properties. More specifically, Chapter 4 thereof (regulations 33 to 46) contains an intricate set of provisions which, together, *"regulate the granting by municipalities and municipal entities of rights to use, control and manage capital assets in circumstances where sections 14 and 90 of the Act and Chapter 2 and 3 of these Regulations do not apply"* (regulation 33(1)).
 - 5.1 Regulation 1 of MATR deals with the definitions, with the relevant ones being:

"Capital asset" means any immovable property such as land, property or buildings; or ...

"long term" means a period longer than three years.

"right to use, control or manage" in relation to a capital asset, means a right to use, control or manage the capital asset for a period exceeding one calendar month without ceding legal ownership in the asset.

- 5.2 As a note: The MATR is quite clear that if the right to use, control or manage the asset confers on the person to whom the right is to be granted the power to use, control or manage the asset as if the person is the beneficial (but not legal) owner of the asset, the processes as stipulated in Chapters 2 and 3 must be followed. This will then entail a competitive bidding process.
- 5.3 Chapter 4 stipulates the processes that must be followed when a right is to be granted. More specifically the process that must be followed for the granting of a long term (> 3 years) right to use, control or manage a capital asset where the value of the asset is in excess of R10 million. This process does not indicate that a competitive process must be followed, but does entail additional steps that must be taken before the right may be granted as well as who may approve the right (only Council may approve this right). To establish whether this process must be followed, the value of the lease area and the term of the lease must be obtained.

As to the above:

- (a) The intention is to make the asset (immovable property) available for a period longer than 3 years (thus a long term lease); and
- (b) The total value of Erf 4831 Hermanus (land and buildings) as on 30 June 2020 is R26 712 000.00, however, the value of the proposed lease area as on 30 June 2020 is R8 050 000.00, bringing it under the R10 million mark. There is no regulation that stipulates that **one** must use the value of the whole asset in determining if this process must be followed.

Taking the information into consideration, one can establish that the right can be granted in principle by the Municipal Manager and approved by the Executive Mayor¹ as per the System of Delegations and Powers approved by Council in February 2020. A public participation process must however be followed.

- 5.4 Regulation 36 indicates what must be considered when the in principle approval is obtained. More specifically that written views and recommendations by National Treasury and the relevant Provincial Treasury. This was done in the beginning, but as the process of allocating the right may change from a competitive bidding process to a direct lease, it might be necessary to obtain their views again. (We must just see what was proposed to them in the past)
- 5.5 Regulation 40 indicates that an in principle approval of a right to use, control or manage a capital asset may be given subject to any conditions, including, the way² in which it is to be granted.
- 5.6 Regulation 41 requires, however, that the granting of a right to use, control or manage a capital asset must be **in accordance with the disposal management system of the municipality**, irrespective of the value of the asset, the period for which the right is to be granted and whether the right is to be granted to a private sector party or organ of state (regulation 41(1)).
6. The Minister of Finance, acting pursuant to section 168(1)(g) of the MFMA, has included in the SCM Regulations a regulation on "*Disposal management*", which includes the following provisions relevant to the letting of municipal assets:

"40(1) A supply chain management policy must provide for an effective system of disposal management for the disposal or letting of assets, including unserviceable, redundant or obsolete assets, subject to sections 14 and 90 of the Act.

(2) A supply chain management policy must –

- (c) *provide that –*
- (i) ***immovable property is let at market related rates except where the public interest or the plight of the poor demands otherwise; and***
- (ii) ***all fees, charges, rates, tariffs, scales of fees or other charges relating to the letting of immovable property are annually reviewed"***.

¹ MATR only refers to an "in principle decision" with no indication if a final decision must be obtained after a public participation process. One can only infer that it was the intention that a final approval be obtained, hence the inclusion thereof in the Administration of Immoveable Property Policy.

² The Administration of Immoveable Property Policy (2015) stipulates this

7. As required by regulation 40 of the SCM Regulations, the Municipality's SCM Policy of 2020, deals with "Disposal management" in paragraph 40 thereof by stipulating as follows:

"c) *Granting of Rights*

The granting of rights (where sections 14 and 90 of the MFMA do not apply) by the Overstrand Municipality, shall be executed strictly in accordance with Chapter 4 of the Municipal Asset Transfer Regulations and the Administration of Immovable Property Policy, as amended from time to time."

The SCM Policy further defines the "Granting of Rights" as "the granting by the Overstrand Municipality of the right to use, control or manage capital assets in circumstances where sections 14 and 90 of the MFMA and Chapters 2 and 3 of the Municipal Asset Transfer Regulations do not apply. In other words, where the granting of such rights does not amount to "transfer" or "disposal" of the asset and which includes leasing, letting, hiring out, etc., of the capital asset."

8. As a note: There are no provisions in the Municipality's Asset Management Policy (2020) relevant to the leasing of municipal property.
9. As to the granting of a long term direct right to use, control or manage a capital asset (i.e. the direct leasing of municipal immovable property), the Municipality's Administration of Immovable Property Policy (2015) stipulates as follows:

"17. *Taking into consideration the nature and duration of the lease to be entered into, the leasing of immovable property may be affected by means of either:*

- 17.1 *a competitive process, which may include a closed or public tender or proposal call, specifically in circumstances listed in paragraph 18 below; or*
17.2 *a direct lease.*

18. *A competitive process³ must at all times be followed in circumstances where:*

- 18.1 *the lease is for a long term with an income value in excess of R10 million;*
18.2 *the lease is for a formal business premises with a market related rental;*
18.3 *more than one party, in discretion of the municipality, is interested in the lease of the subject property; and/or*
18.4 *by discretion of the municipality, a competitive process will best serve the interests of the community.*

20. *Long term lease of municipal immovable property with an income value less than R10 million:*

- 20.1 *The Municipality may grant a long term lease of municipal immovable property with an income value of less than R10 million only after:*
(a) *the Accounting Officer has approved the lease in principle;*
(b) *....*
(c) *the Executive Mayor, as delegated authority, has subsequently approved that the right may be granted.*

24. *The fair market value for the alienation of, the rental amount for the leasing or compensation payable for a servitude over municipal immovable property shall be determined by an independent professional valuer or professional associated valuer registered in terms of the Property Valuers Profession Act, 2000 (Act 47 of 2000), or any ensuing act at the cost of the purchaser (in the case of a direct sale) or lessee (in the case of a direct lease)/servitude holder (in the case of a servitude).*

25. *The Municipality, as a rule, bearing in mind the provisions of paragraph 23 and save for those cases mentioned in paragraphs 21, 25, 26 and 58 to 62, shall not:*

- (a) *let immovable property at a lower rental than market related rental or the rental approved in the tariffs;*
(b) *sell, alienate or dispose of immovable property, grant a servitude or alienate a right at a lower amount than the amount at which it has been valued;*

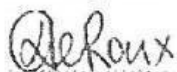
³ *This is in terms of our Policy, not the regulations.*

except in cases when the public interest or the plight of the poor demands otherwise and taking into account the provisions of Regulation 13(2) of the MATR, the latter in circumstances of an alienation.

36. *All costs pertaining to a transaction, e.g. survey, advertisements, valuation, relocation or provision of services where necessary, shall be borne by the Lessee. The Municipality may, however, waive ⁴its right to claim all or any portion of the costs. Where necessary a deposit to cover the costs may be required.*
10. Thus in terms of the AIP, the Municipality must follow a competitive process for the lease and development of the old De Mond Caravan Park. However, as this is only a requirement in terms of the said policy, it can be deviated from. One of the reasons that can be given for this deviation is the fact that the Municipality has followed a competitive process on more than one occasion with no success.
11. In terms of the AIP and the SCM Regulations the lease and management can only be at a market related rental. This cannot be deviated from as it is contained in regulations.
12. As a final note, we must at all time ensure that the proposed lease and development does not give the lessee the power to use, control or manage the property as if it is the beneficial owner ⁵(not legal owner) of the asset.
13. The upshot is that direct leasing⁶of municipal immovable property is permitted if, and to the extent that, it is covered by AIP (or any deviation thereof).

I trust that you find the above in order.

Kind regards



Anja Le Roux
Manager: Property Administration

⁴ Only Council may approve this.

⁵ There is no definition for this in the MATR.

⁶ The Guideline of National Treasury on the MATR does not come to the same conclusion, but I have found quite a few flaws in the guidelines.