4.3
PORTION 47 OF FARM HANGKLIP NO.559, HANGKLIP, OVERSTRAND MUNICIPAL AREA: PROPOSED REMOVAL OF RESTRICTIVE CONDITIONS: MESSRS PLAN ACTIVE TOWN AND REGIONAL PLANNERS ON BEHALF OF MR J DE JAGER ON BEHALF OF THE TRIO DATA SECURITY SERVICES BK

KHANG 47/559 (4060)
H van der Stoep (028) 313 8900 Hermanus Administration
28 December 2020

1. EXECUTIVE SUMMARY

An application was received on 26 June 2018 from Messrs Plan Active Town and Regional Planners on behalf of Mr J de Jager on behalf of the Trio Data Security Services BK on Portion 47 of the Farm Hangklip No. 559 for the following:

- Removal of restrictive title conditions with reference to Clauses D.(b), D.(d), D.(e), D.(i), D.(n), D.(o), D.(r), E.(i), E.(ii) and E.(iii) of Title Deed T3920/2017 applicable to Portion 47 of the Farm Hangklip No. 559, in terms of Section 16(2)(f) of the Overstrand Municipality By-Law on Municipal Land Use Planning, 2015.

The restrictive conditions contained in Title Deed T3920/2017 to be removed read as follow:

"Clause D:

(b) No wood and iron buildings or works of any description shall be erected nor shall corrugated iron be used for roofing purposes.

(d) All buildings and other constructional works, including all fences and garden or other gates, shall be of good design and sound construction and plans thereof must be approved by the Seller before construction is commenced. In the event of a breach of this Clause the Seller shall have the right to require the Purchaser to demolish such unauthorised buildings or works and/or shall have the opinion to re-purchase the land upon payment of the cost price thereof without compensation for improvements.

(e) No signs, advertisements, advertisement hoardings or other lettering shall be erected on the land hereby sold and purchased, nor shall any advertisements, signs or lettering be pained on any buildings, walls or fence erected or to be erected on the said land save and except with the written approval of the Seller.

(i) No Person other than the registered owner and his immediate family shall camp overnight or light open fires on the said land save with the written consent of the Seller which shall have the right to refuse such consent without assigning any reason therefore or to give such consent subject to such conditions as it thinks fit.

(n) The land shall be used only for agricultural purposes and the breeding and keeping of domestic animals, poultry and/or bees provided that no goats or pigs may be kept except with the special written consent of the Seller.

(o) Only buildings and structures to be used as dwellings and farm buildings shall be erected on the land.

(r) No boarding houses, flats, maisonettes, hotel, shops, public garage or filling station, business premises, canteen, restaurant, bioscope, factory or industrial buildings shall be erected on the land nor shall any such business or entertainment be conducted on the land"

E. ENTITLED to the benefit of the conditions referred to in the Servitude Endorsements appearing on said Certificate of Registered Title No. T5789/1957 which said endorsements are dated and read as follows:

(i) 17th December 1959:

By D.T. No 18344/59 dd. This day Portion 59 thereby conveyed is subject to conditions relating to (a) buildings (b) restriction against erection of signs, advertisements etc. (c) restriction against trade (d) prohibition against making of bricks, tiles and pipes (e) prohibition against deposit of debris, scrap, etc. (g) camping (h) access (i) sewerage (j) water (k) sub-division, and use of land i.f.s. the remainder of within portion 45 meas. 250,8309 hectares held hereunder. As will more fully appear on reference to the said D.T."

(ii) Dated 10th May 1960:

"By Deed of Transfer No. 6799/1960 dated this day Portion 62 = 9,2831 hectares thereby conveyed is (A) not entitled to conditions referred to in certain, endorsements and (B) Subject to conditions relating to (a) (b) (c) and (d) buildings and design (e) advertising (f) trade (g) and (h) building materials and scrap (j) camping (k) access to roads (l) sewage (m) use of water (n) subdivision (o) (p) (q) (r) & (s) use of land and buildings in favour of the remainder of Portion 45 = 242,1473 hectares held hereunder, as will mote fully appear on reference to the said Deed of Transfer."

(iii) Dated 20th of November 1961:

"By Deed of Transfer No. 16184/1961 dd. This day, Portion 58 meas. 9,6944 hectares thereby conveyed is (A) Not entitled to conditions referred to in certain endorsements and (B) Subject to conditions relating to (a) (b) (c) and (d) buildings and design (e) advertising (f) trade (g) & (h) building materials and scrap (j) camping (k) access to roads (l) sewage (m) use of water (n) sub-division (o) (p) (q) (r) & (s) use of land and buildings in favour of the remainder of Po9rtion 45 meas. 232,4530 hectares held hereunder as will more fully appear on reference to the said Deed of Transfer."

A Locality Plan of the property concerned is attached as Annexure A. The Motivation Report from the applicant in support of the proposal is attached as Annexure B. Title Deed T3920/2017 is attached as Annexure C.

2. DECISION AUTHORITY

Municipal Planning Tribunal

3. BACKGROUND / SITE HISTORY

The property is located adjacent the R44 (Clarence Drive), approximately 2km in a south eastern direction from Rooi Els. A dwelling and outbuilding are established on the property. The property is zoned Rural Zone 2: Conservation Usage (R2). The land uses surrounding the property are either vacant or used as residential.

The item served before the Municipal Planning Tribunal (MPT) during 2019 and was referred back to address Court Case No 3399/2010: Van Rensburg N.O. and Other vs MEC for Housing, Local Government and Traditional Affairs.

LEGAL OPINION ON COURT CASE NO. 3399/2010 BY LEGAL DEPARTMENT

VAN RENSBURG NO AND ANOTHER v MEC FOR HOUSING, LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, EASTERN CAPE AND OTHERS Case 3399/2010- [2012] ZAEPEHC Nov 2012

1. I thought it prudent and at the outset to refer to an important statement the learned judge made in [91] in **that decision makers must apply their minds to all the relevant and material information placed before them, evaluate it properly and accord it such weight as the degree of importance requires,** which to me, among other considerations, clearly confirms the age-old principle that every case should be considered on its own merits and that no two cases are the same, and is the matter under discussion no different.

2. In accordance with the above I cannot but state that the facts and circumstances of the application under discussion are miles removed from the facts and circumstances that were considered in Van Rensburg and this is evident by simply considering and comparing the restrictive conditions sought to be removed in each case with each other. Now as the conditions sought to be removed in the matter at hand are before the Tribunal in the item I shall only list the conditions that were relevant in the Van Rensburg judgement, to wit:

   (a) that the erf (Erf 102) owned by the Respondent, Equus, may be used for residential purposes only;
   (b) that only 1 house designed for the use of one family together with such outbuildings which are ordinarily required to be used therewith, be erected on the erf;
   (c) that no more than ½ the area of the erf be built on;
   (d) that no building or structure on any portion thereof, except boundary walls and fences, shall be erected nearer to the street lines which form a boundary of the erf than the buildings indicated on the diagram of this erf.

3. In addition to the above this judgement was delivered subsequent to Equus' 4th application for removal of the restrictive conditions to the Municipality – the previous three (3) had in effect amounted to nothing - which had been approved by the MEC, was challenged on appeal by the Applicants.

4. The important issues to be decided on in the matter were that Equus wanted to convert a single storey dwelling into a double storey (and had in fact commenced with the construction) for purposes of establishing a guest house with eleven (11) rooms and eleven (11) parking bays in a low-density upmarket suburb of Port Elizabeth (PE) which would have had an erf coverage of just about the complete erf, and which would have obscured the sea views of neighbours. The structure would also have been nearer than the permissible 9,45 meters (30 Cape feet) from the boundary, so I don't think it's difficult to imagine what the impact of this gigantic, or as the Court referred to it as a "disproportionately large structure" [96] would have had in an "ordinary" suburb, and I also don't think it's difficult to understand why there were in fact 94 objections to it? It also had to be decided whether the Zoning Scheme trumped the Conditions of Title – as advocated by the Municipal Planning Manager or vice versa; what the legal position was re "obsolete restrictive conditions" and if it could be said that they were "relics of the past" that in effect impeded development in the area, and the nature of restrictive conditions, i.e. were they personal or praedial?

5. The Applicants in essence applied for the consent given by the MEC for the removal of the conditions to be set aside mainly for the suburb to retain its single sea-side residential character, and to negative the fact that all that Equus was interested in was its own financial interests.

6. The Court correctly, said with respect, stated that the personal interests of the owner for the removal of the restrictive conditions was irrelevant and that the interests which had to be served by the removal were the broader interests of the township / area / public, but again in my opinion, this has to be considered or understood <u>in the context of the particular matter and not as an everlasting unassailable principle which will be applicable in all such matters.</u>

7. So yes, the Court concluded that the Zoning Scheme does not trump Conditions of Title; that the conditions were **praedial,** (i.e. a limited real right constituted in favour of the owner of a property which entitles him/her to exercise a right on the property of another or to prohibit another property owner from exercising a normal right of ownership on his/her property. It is important to note that there must always be at least two (2) properties involved as opposed to personal servitudes where one (1) property will be sufficient, and not personal and that these conditions in effect were applicable to all the properties in the vicinity making these properties both dominant and servient as they were probably contained in the Conditions of Title of other properties. Examples of such praedial servitudes are a right of way or a servitude that restricts the erection of a building above a certain height etc.

   The Court concluded that the removal of these praedial servitudes **without sufficient reason** would be equal to arbitrary removal of the rights **other** property owners had, i.e. an arbitrary deprivation of constitutionally enshrined rights to property (Section 25(1) in the Constitution). It should be kept in mind that these praedial rights have to be "servitudinal rights" and not merely praedial rights ("saaklike regte") in other words, before a right can be referred to as a servitude against immovable property it has to notarially drafted and formally registered in the Deeds Registry against a property's Title Deed. In any event, the praedial rights in Van Rensburg were indeed servitudes, and yes, if the structure had been allowed to continue it would certainly have been equal to the arbitrary deprivation of other owners' property (rights).

I think it is obvious that when all of the above is taken into account and considered and given the specific location and the eventual extent the guest house would have resulted it is not difficult to respectfully agree with the outcome, i.e. that the **decision of the MEC to consent to the removal was wrong and had to be set aside. It is abundantly clear that both the MEC and the Municipal Planning Tribunal did not apply their minds to all of the relevant and material information placed before them and that they did not evaluate and accord it such weight as the degree of importance required.**

Now as to the matter that the MPT has to consider I am respectfully of the opinion – as stated above – that the issues in it compared to the Van Rensburg matter are miles removed from each other and that to try and do it will undoubtedly be comparing apples with pears. In my previous opinion I discussed at length the restrictive conditions of title the applicant sought to be removed and my reasons therefore, but in addition to it what seems difficult to understand from the point of view of the objectors is why do they want a condition of title that in effect gives the "seller" i.e. the previous owner – whom-ever such a person is or whatever body it might be - a right to demand that the property must revert back to him/her/ it in the event of the current owner not obtaining his/her consent to camp or to make an open fire on the property? I can find no authority which determines that a condition of title, however strong, trumps a person's constitutional right to ownership of immovable property?

Another aspect which is difficult to understand is why must the applicant be restricted to utilize the property for agricultural purposes only, and why is the breeding of dogs for example permitted, but not the keeping of pigs or goats? Does "dog breeding" fall under the definition of "agricultural"? The answer is "no" it does not, and as stated previously, establishing chicken batteries **are not prohibited** either despite the massive associated pollution which results from this industry? How can these conditions ever be in the interests of other landowners / the township Rooi Els and/or the public? How will the removal negatively impact on the character of Rooi Els? Do the objectors consider this "desirable", i.e. to have dog breeding, cattle farming or chicken batteries instead of two (2) quiet guestrooms added to the existing dwelling?

With regard to the condition that only agriculture is permitted, what if the owner is not a farmer, never has been and never will be, but acquired the property for its setting and view or as an investment? Must said owner for ever be denied the right to the enjoyment of his/her property, and why must the applicant/owner be held hostage by some or other "seller" / previous owner's "consent" how to do certain things on and with his/her property and if he/she fails to comply with such a condition either has to demolish the structure(!) – without the "seller" apparently having to follow "due process", i.e. in terms of a Court Order, or to have the property revert back to the "seller" at his/her/its behest and again without due process apparently having to be followed? This is impossible in terms of our current constitutional dispensation where property rights are guaranteed?.

I am not satisfied that the objectors have made out convincing arguments as to why the application should be denied and in fact, nowhere in the "objections" is it stated or even mentioned or referred to that said objectors would take kindly to have to obtain the consent of some or other not-defined "seller" before they may

enjoy their constitutionally guaranteed rights to their properties, yet they expect of the applicant to take kindly to this?

I am also not convinced that the objectors' interpretation of the Van Rensburg judgement, **although <u>correct</u> in that peculiar context of Summerstrand,** is applicable to the facts, circumstances, information and reasons vis a vis **this matter under consideration** – it is after all a simple exercise to read into a judgement what you want to read into it, albeit incorrect.

What should be taken into account when considering the matter is that should the application fail the applicant will forever be denied any rights he/she and successors in title may have in terms of the Zoning Scheme, because the Conditions of Title will always prevail over the Scheme.

4. SUMMARY OF APPLICANT'S MOTIVATION

The motivation for the removal of the applied conditions is as follows:

The owner is desirous of having options available to him to execute the rights as per the Overstrand Zoning Scheme. The proposed removal of the conditions is limited to the extent where they are more restrictive than the Overstrand Zoning Scheme. It does not propose to deviate from the rights as per the Zoning Scheme. Building plans will be submitted to the Overstrand Municipality in the future should the owner make use of the rights as determined in the Overstrand Municipality Zoning Scheme.

5. ADMINISTRATIVE COMPLIANCE

Methods of advertising		**Date published**	**Closing date for comments**
Press	**Yes**	10 August 2018	14 September 2018
Gazette	**Yes**	10 August 2018	14 September 2018
Notices	**Yes**	8 August 2018	14 September 2018
Ward councillor	**Yes**	8 August 2018	14 September 2018
Total comments	**Seven (7)**		
Total letters of support	**One (1)**		

Was public participation undertaken in accordance with Section 46 - 50 of the By-law on Municipal Land Use Planning?	**Yes**
Was the application processed correctly (if no, elaborate below):	**Yes**
Is the proposal consistent with the principles referred to in Chapter 2 of SPLUMA and Chapter VI of LUPA? (can be elaborated further below)	**Yes**

6. SUMMARY OF COMMENTS FROM ORGANS OF STATE AND/OR MUNICIPAL DEPARTMENTS

Name	Date received	Summary of comments
Engineering Services	28/09/2018	No municipal services are available to the subject property.
Environmental Section	20/09/2018	No objection to the removal of restrictions, however any further development the property will trigger NEMA regulations.
Building Department	17/08/2018	Subject to the submission of building plans in compliance with SANS 10400 when plans are submitted.
Fire Department	10/10/2018	No objection provided that the property is not utilised for Tourist Accommodation and associated activities unless in compliance with the National Fire Protection Regulations SANS10400T:2011

7. SUMMARY OF COMMENTS RECEIVED DURING PUBLIC PARTICIPATION

Seven (7) letters of objection were received *(See Annexure D*). The objections may be summarized as follows:

1. Objection - Mr & Ms TR & M Lambert

- ***Portion 47 is linked to Portions 48, 49, 50, 51, 52 and 53 with two rivers and a wetland running across all of them.***
- ***Should the biosphere be adversely disturbed in any part, it will negatively impact on the whole system.***
- ***When these properties are purchased, all buyers are informed about the biosphere.***
- ***We are gravely concerned should any big developments take place.***
- ***The only conditions applicable to the intention of the owner that needs to be removed are Condition Clause D (b) and (d). Condition D(i) should not be considered due to the locality of the property in relation to the Biosphere.***

Town Planner's response

The wetland and two (2) rivers applicable to the property is noted, however the application does not propose any new development, but should any new development of structures be submitted the relevant legislation will be applicable.

The Kogelberg Biosphere Framework is a guideline document consisting of portions of land with various zonings and land uses. The Biosphere Framework has no legal standing which can take or give rights to any of the properties within the Biosphere. This aspect was dealt with extensively in the compilation of the Kogelberg Biosphere. In order to deal with property rights of the properties in the Biosphere various categories were established with proposed land use rights most appropriate for the specific area in which a property is located.

The objector does not elaborate on the notion of the adverse disturbance of the Biosphere. The mere fact that people resides in and around the Biosphere does disturbed and impact the Biosphere.

The applicant did not propose any big development, but intends to exercise the primary rights of the Zoning Scheme, 2013, which are the following; conservation use, dwelling house, guest rooms and home occupation as primary rights. The consent uses will trigger an application and none were requested. Thus in order to make use of the primary rights, the conditions applied for needs to be removed or amended as follows:

Condition D.(b)

The "no wood and iron and no corrugated roofs" clause for the 1940's was applicable to ensure that the structures are built properly. The reason to remove the wood and iron clause is not substantiated and is difficult to ascertain how it will influence the primary rights of the owner.

The removal of corrugated iron as a type of roofing should be removed, since it is commonly used today in some or other form. As to the consequences pertaining the removal of this condition, there is no adverse consequences that can be identified pertaining to "public interest, amenities and character of the township".

It is recommended that the condition be amended to remove "corrugated iron for roofing purposes" only, be removed.

Condition D.(d)

It relates to the fact that the Seller can request demolishing or re-purchasing if the structures are not of good design and/or sound construction. This condition is not relevant since the seller (as previous owner) can be a requirement, since 1977 the National Building Regulations came into being that regulates good design and sound construction and is a municipal function.

An owner of property - be it movable or immovable - is entitled to deal with the said property as he/she pleases - not in terms of the whims and fancies of a previous owner, but in terms of the law. In order for a previous owner to enforce this condition of title he will have to prove that the condition was breached and this will only be possible to gain access to said property and with that he will have to obtain consent of the current owner.

The condition also impacts negatively on the principle of "willing buyer, willing seller" in that it will nullify the said principle by a condition of title. ***Raymond McCreath INC (objector points 6&7)*** quoted the dictum if the Court in Van Rensburg and it is unclear what amenities will be preserved by the retention of this condition or prejudiced by the removal? The objector does not indicate or elaborate on the aforementioned. A non-owner cannot be prescriptive as to what an owner may and may not do with his/her property since property rights are enshrined in the Constitution.

With regard to public interest, the removal will have no impact because the condition in fact has nothing to do with the "public interest". It would appear that since the condition has nothing to do with public interest it was simply an attempt by

the previous owner to retain control over his previous and to negative the rights of the current registered owner.

The condition must be removed to in order to protect the property rights of the current registered owner imposed by a non-owner i.e. the previous owner as seller.

Condition D.(e)

It relates to signs, advertisement, etc., which in a conservative sense will mean that nobody may erect the ownership and or property description. In present day terms this is very important for security purposes.

The condition be amended to replace “seller” with “local authority”.

Condition D.(i)

It relates to camping on the property or lighting of open fires. This will entail that it may be possible as owner and family members to camp on the property. In terms of the scheme, no camping is allowed. The open fires have the implication that nobody in the area may have an open braai, which is not the case.

The condition cannot be enforced due to the following reasons: If the seller cannot be contacted and his consent be obtained, the current owner will be in breached of the condition. The same apply to the “open fire”, if the current owner lights a fire for a braai, he complies with the condition, however if his friend lights a fire for the braai, he will be in breached of the condition. In view of the aforementioned, should the seller be available and does not give his consent, he does not need to give reasons. The condition also does not give the seller or current owner any recourse should there be a breach of the condition or withheld consent without any reasons.

Raymond McCreath INC (Objector points 6&7) indicated that the removal of the condition will affect public interest, amenities, sea view or the character of the township, but does not elaborate. Due to the fact that the objector did not elaborate, it is impossible to address the objection.

It is recommended that the condition be removed, since it is impossible to police and the fact that a breached does not constitute a crime.

Condition D.(n)

It relates to agricultural purposes and breeding of domestic animals, poultry/ bees, but excludes pigs and goats. The condition is unclear, whether it is only cattle and sheep farming is not specifically mentioned, thus can it be read into agricultural purposes? The impact of poultry batteries has an enormous footprint and pollution impact and in terms of the condition the use is allowed, the same applied for breeding of dogs, bird’s etc. The aforementioned activities allowed in terms of the title deed, will negatively affect the area in terms of pollution.

In terms of the Zoning Scheme this is not allowed as a primary right and is thus more restrictive than the title deed.

It is recommended that the condition be removed.

Condition D.(o)

It relates to the structures that may be erected, relating to residential and agricultural. The condition is vague that it should be considered void, especially with reference to "farm buildings". The buildings are not defined, the condition is also silent on how many buildings or structures are permitted. This raises the question whether a "shack" qualifies as a structure, since it is used by people to live in, i.e. "dwell" in. In terms of the Zoning Scheme, agriculture is allowed as a consent use with development parameters but is more restrictive in terms of activity and extent of structures.

It is recommended that the condition be removed, since extensive agriculture will be more detrimental to the environment.

Condition D.(r)

It relates to the prohibition of any other land use save residential and agricultural. However, for a home occupation and the two (2) lettable rooms, it is interpreted as business and thus will not comply with the Zoning Scheme's primary rights available to the applicant.

It is recommended that the condition be retained, but be amended to include the following; "with the exception of a home occupation and guest rooms" since this has clear development parameters, which can only be exercised in the existing structures and will not impact on the present zoning or the character of the area.

Conditions E.(i), E.(ii) and E.(iii)

These conditions must be cross referenced with Condition D.

That the abovementioned conditions be removed, since the latter is being dealt with under Condition D.

The Conservation Usage is in line with the Kogelberg Biosphere Framework and the primary land use is not out of sync with the current uses in the area. Should the applicant intend to consider the consent uses, an application in terms of the Zoning Scheme and NEMA would be applicable.

2. ***Objection - E Brink***
   (The objection was submitted in Afrikaans and has been translated to English.)

- ***Court Cases in the Supreme Court and Appeal Court: Judge Revelas in Van Rensburg vs Equus Training (Revelas) and Camps Bay ratepayers and Residents Association v Minister of Planning 2001(4) SA 294 (C). In both cases it was argued that the title deed conditions are at odds with the zoning scheme e.g. praedial servitudes.***

Town Planner's Response:

The Municipality does not dispute of the importance of Title Deed conditions and the purpose the serve may not be the same as the zoning scheme. It is also recognizing the title conditions trumps the Zoning Scheme.

The court cases made reference to the -

- ***The purposes and legality of Title Deed Conditions: although permanent conditions in terms of Section 45(6) SPLUMA may be amended or removed with the approval of the Municipality, it cannot be amended or removed with due consideration of its intent.***

  Revelas para 62 reads: " In Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration Western Cape, and Others Griesel J had the following to say about branding title deed conditions as relics of the past and abolishing them in favour of the applicable zoning scheme: However, this is not the philosophy of the (Removal) act and it was inappropriate and irregular for the Minister to have allow himself to be swayed by this consideration. In my view the Ministers' approach in this regard is fundamentally unsound."

  The objector agrees and feels that it is also not the philosophy of SPLUMA.

  Revelas para 84 reads: Case No 1440/07

  "Praedial servitudes: "The conditions are registered not only against the neighbouring property title, but also against the title deeds of a number of properties in Summerstrand Area. These are praedial servitudes that ensure for the benefit of all other erven in the designated area. Each erf is simultaneously both servient tenement and a dominant tenement. It is servient in the sense of being encumbered by the title deed condition in favour of all the other similar erven and dominant in the sense of being favoured by the title deed condition in respect of the similar erven" This view point was confirmed by the Supreme of Appeal in the Naidoo matter".

Town Planner's Response:

The Municipality does not dispute the fact that Title Deed Conditions carries more with than the zoning scheme. The court case made reference to the character of the area namely Summerstrand Extension 1. The application property is not part of Rooi Els Township and also not directly adjacent to the town and therefore the residential character of Rooi Els is not in jeopardy. The Summerstrand case cannot be made applicable since the title deed conditions may be similar to the Rooi Els Township, since the land belong to the same developers, however it has no bearing on the township of Rooi Els residential character per se.

It should also be noted that the objector does not clearly indicate how each and every condition will be to the detriment to the area, but submitted the comments on another application that has similar conditions, but not the same numbering and therefore cannot be addressed.

- ***Error of Law: The title deed conditions are obsolete and be replaced by the zoning scheme:***

  Revelas para 73 reads:

"The zoning scheme regulations do not adequately cover the preservation of essential characteristics of Summerstrand Extension 1. Even though there are several guest houses in the area, the township retained its residential character irrespective of the assertions to the contrary. The zoning scheme regulations do not adequately cover the preservation of essential characteristics of Summerstrand Extension 1"

The objectors have the same concerns that the removal will detract from the residential character of the area and does not agree with the town planner that the removal of the conditions will have no impact on the residential character of the area since the development will remain in the residential parameters of the zoning scheme.

Town Planner's Response:

The Municipality does not dispute the fact that Title Deed Conditions carries more with than the zoning scheme. The court case made reference to the character of the area namely Summerstrand Extension 1. The application property is not part of Rooi Els Township and also not directly adjacent to the town and therefore the residential character of Rooi Els is not in jeopardy. The Summerstrand case cannot be made applicable since the title deed conditions may be similar to the Rooi Els Township, since the land belong to the same developers, however it has no bearing on the township of Rooi Els residential character per se.

- ***The action is procedurally unfair as it will result in a "Blanket Removal". The training document (Provincial Support Document: Restrictive Conditions) is based on the Navsa appeal court case, which indicate that there can be no automatic removal of title deed conditions. Therefore, the procedure is not valid and should not be approved.***

Town Planner's Response:

The conditions requested to be removed and comments are discussed in detail in the response below:

Condition D.(b)

The "no wood and iron and no corrugated roofs" clause for the 1940's was applicable to ensure that the structures are built properly. The reason to remove the wood and iron clause is not substantiated and is difficult to ascertain how it will influence the primary rights of the owner.

The removal of corrugated iron as a type of roofing should be removed, since it is commonly used today in some or other form. As to the consequences pertaining the removal of this condition, there is no adverse consequences that can be identified pertaining to "public interest, amenities and character of the township".

It is recommended that the condition be amended to remove "corrugated iron for roofing purposes" only, be removed.

Condition D.(d)

It relates to the fact that the Seller can request demolishing or re-purchasing if the structures are not of good design and/or sound construction. This condition is not relevant since the seller (as previous owner) can be a requirement, since 1977 the National Building Regulations came into being that regulates good design and sound construction and is a municipal function.

An owner of property - be it movable or immovable - is entitled to deal with the said property as he/she pleases - not in terms of the whims and fancies of a previous owner, but in terms of the law. In order for a previous owner to enforce this condition of title he will have to prove that the condition was breached and this will only be possible to gain access to said property and with that he will have to obtain consent of the current owner.

The condition also impacts negatively on the principle of "willing buyer, willing seller" in that it will nullify the said principle by a condition of title. ***Raymond McCreath INC (Objector, points 6&7)*** quoted the dictum if the Court in Van Rensburg and it is unclear what amenities will be preserved by the retention of this condition or prejudiced by the removal? The objector does not indicate or elaborate on the aforementioned. A non-owner cannot be prescriptive as to what an owner may and may not do with his/her property since property rights are enshrined in the Constitution.

With regard to public interest, the removal will have no impact because the condition in fact has nothing to do with the "public interest". It would appear that since the condition has nothing to do with public interest it was simply an attempt by the previous owner to retain control over his previous and to negative the rights of the current registered owner.

The condition must be removed to in order to protect the property rights of the current registered owner imposed by a non-owner i.e. the previous owner as seller.

Condition D.(e)

It relates to signs, advertisement, etc., which in a conservative sense will mean that nobody may erect the ownership and or property description. In present day terms this is very important for security purposes.

The condition be amended to replace "seller" with "local authority".

Condition D.(i)

It relates to camping on the property or lighting of open fires. This will entail that it may be possible as owner and family members to camp on the property. In terms of the scheme, no camping is allowed. The open fires have the implication that nobody in the area may have an open braai, which is not the case.

The condition cannot be enforced due to the following reasons: If the seller cannot be contacted and his consent be obtained, the current owner will be in breached of the condition. The same apply to the "open fire", if the current owner lights a fire for a braai, he complies with the condition, however if his friend lights a fire for the braai, he will be in breached of the condition. In view of the aforementioned, should

the seller be available and does not give his consent, he does not need to give reasons. The condition also does not give the seller or current owner any recourse should there be a breach of the condition or withheld consent without any reasons.

Raymond McCreath INC (Objector points 6,7) indicated that the removal of the condition will affect public interest, amenities, sea view or the character of the township, but does not elaborate. Due to the fact that the objector did not elaborate, it is impossible to address the objection.

It is recommended that the condition be removed, since it is impossible to police and the fact that a breached does not constitute a crime.

Condition D.(n)

It relates to agricultural purposes and breeding of domestic animals, poultry/ bees, but excludes pigs and goats. The condition is unclear, whether it is only cattle and sheep farming is not specifically mentioned, thus can it be read into agricultural purposes? The impact of poultry batteries has an enormous footprint and pollution impact and in terms of the condition the use is allowed, the same applied for breeding of dogs, bird's etc. The aforementioned activities allowed in terms of the title deed, will negatively affect the area in terms of pollution.

In terms of the Zoning Scheme this is not allowed as a primary right and is thus more restrictive than the title deed.

It is recommended that the condition be removed.

Condition D.(o)

It relates to the structures that may be erected, relating to residential and agricultural. The condition is vague that it should be considered void, especially with reference to "farm buildings". The buildings are not defined, the condition is also silent on how many buildings or structures are permitted. This raises the question whether a "shack" qualifies as a structure, since it is used by people to live in, i.e. "dwell" in. In terms of the Zoning Scheme, agriculture is allowed as a consent use with development parameters but is more restrictive in terms of activity and extent of structures.

It is recommended that the condition be removed, since extensive agriculture will be more detrimental to the environment.

Condition D.(r)

It relates to the prohibition of any other land use save residential and agricultural. However, for a home occupation and the two (2) lettable rooms, it is interpreted as business and thus will not comply with the Zoning Scheme's primary rights available to the applicant.

It is recommended that the condition be retained, but be amended to include the following; "with the exception of a home occupation and guest rooms" since this has clear development parameters, which can only be exercised in the existing structures and will not impact on the present zoning or the character of the area.

Conditions E.(i), E.(ii) and E.(iii)

These conditions must be cross referenced with Condition D.

That the abovementioned conditions be removed, since the latter is being dealt with under Condition D.

- ***Unconstitutional or Unlawful: Section 25(1) of the Constitution provides: No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property" In ex Parte Optimal Property Solutions CC it was held that "property" a meant in section 25(1) of the Constitution includes any right to or in property, including registered praedial*** *servitudial rights. The total removal of such rights* ***for insufficient reason is therefore equal to the arbitrary removal of such rights.***

SPLUMA section 47(2) indicates certain aspects to be taken into consideration for a removal of restrictive conditions, which has not been complied of in this application.

Town Planner's Response:

The applicant has complied with the minimum requirements of Section 47 as procedurally required by the Municipality. Each and every condition requested to be removed were motivated, irrespective of whether the objector deemed it desirable or undesirable.

- ***Other Issues: Removal of permanent title conditions: Revelas para 72: Judge Griesel: the fact that the removal may not undesirable does not in logic mean that such a removal is as a fact desirable. The test is the presence of a positive advantage which will be served by granting the application, not the absence of a negative advantage.***

Town Planner's Response:

The conditions to be removed has been evaluated carefully and conditions relating to the location of the property pertaining to Kogelberg Biosphere has been recommended for amendment and not total removal e.g. Conditions D(b), (e) and (r).

The conditions to be removed complies with the test of a positive advantage which will be served by granting the application. The positive advantage is that the property not be given the right for agricultural activities, camping on the property and trading from the property. In this case the restrictions of the Zoning Scheme are much more stringent and to the benefit of the area.

- ***Creating a precedent: should the application be approved; it will be difficult to disapprove similar requests from property owners in Rooi Els.***

Town Planner's Response:

Every application is been evaluated on its own merit and thus can the creation of a precedent be used as a reason for non-approval of an application. The application

property is not located in the township of Rooi Els and thus has no bearing on requests from residents of Rooi Els.

3. Objection - A Scholtz

- ***The owner indicated that he only wishes to exercise his primary rights and therefore only Condition D.(b)and D.(d) do impact on his wish to exercise his right.***
- ***Given that this property lies within a declared Critical Biodiversity Area, any development more than the primary right would be unacceptable.***
- ***The owner has already proven his lack of sensitivity and illegally constructed a road right through the wetland.***
- ***The owner initially wishes to construct a bush pub; however, the application was turned down.***
- ***Condition D.(i) i.e., camping and fires surely cannot be encouraged.***

Town Planner's response

The conditions applicable to the application the reasoning to be removed has been discussed in detail, refer to point 2, under Town Planners response.

The property is located in the buffer zone in accordance with the Kogelberg Biosphere Framework, 2012. The Framework does allow favourable compatible land uses, Chapter 5, Point 5.1, subject to certain criteria, which is not limited to the primary rights.

The road was in place in 2013 and the new owner purchased the property during 2017 and has therefore not constructed any new road. As indicated, it is hereby confirmed that the present owner did not apply for a bush pub.

4. Objection - MW Harrison

- ***The conditions are a reflection of the historical and cultural frame of reference. And no practical reasons were given on why the conditions need to be removed.***
- ***Association with slavery: The report indicated that the property has no history of slavery, this smallholding and others have all played a prominent role in the history of slavery as this whole area was once a refuge for runaway slaves, such as the Battle of Rooiels in 1805. The applicant needs to be prosecuted in terms of SPLUMA for making a false declaration by the Municipality and if not, the objector will refer the matter to the Public Protector and Auditor General.***
- ***The applicant fails to disclose what it intends to do with the property once the limiting title conditions have been removed. Interested and affected parties are prejudiced as insufficient information is given to enable them to decide whether or not the application is desirable and in the public interest.***
- ***The property is located in the UNESCO Kogelberg Biosphere Reserve, in a virtually important Buffer Zone, immediately bordering on the Core, the non-disclosure of the applicant's consulting firm's development aims with the application is shocking.***
- ***The conditions are common to the conditions in my Title Deed, as well as other smallholdings, and to allow the removal of the conditions from just***

a single property in isolation is unjust. In any community the individual must conform to the conditions pertaining to that community and not vice versa.

- ***I received no notification and could also not see a notice at the entrance to the property as required by law.***

Town Planner's response

The applicant motivated that he intends to make use of his primary rights and should he want to make use of the consent uses, it will be by means of an application. The matter has. been dealt with extensively under point 2, Town Planners response.

It is correct that the Rooi Els caves were used as hiding places and or residences of sailors, runaway slaves. However, no record could be found of slavery being part of daily practise by residents in the area or on the application property.

The SPLUMA principles have been addressed in the application. It should be made clear that Town Planning Legislation is contained in acts of Parliament similar to Environmental Legislation. The applicant clearly indicated that its intention is to make use of the primary rights eg conservation use, dwelling house, guest rooms and home occupation.

It is correct that the property is located in the Kogelberg Biosphere, and the Municipality was involved when the Framework was drafted. A category of Conservation Usage was created to accommodate the undetermined zoned properties to accommodate the locality within the Biosphere. The Framework makes provision for land uses as per the primary and consent uses as per the Conservation Usage Category. This was extensively discussed during the compilation of the Framework and the Zoning Scheme and therefore it is unclear what non-disclosure the objector is referring to. The applicant motivated that he intends to make use of the primary rights and in future of the possible consent uses, the latter per application. The community was part and parcel of the compilation of the Framework and the Zoning Scheme and these issues were not raised at all.

A notice was displayed at the entrance of the property abutting and facing the R44 and was displayed until 27 September 2018, thirteen (13) days in excess of what is required, it was advertised in the newspaper and Provincial Gazette. The applicant was requested to only serve notices to the direct adjacent properties. The application was submitted to the Ratepayers of both Rooi Els and Pringle Bay as well as the Ward Councillor.

5. Objection - Friends of Rooi Els

- ***There is no motivation by the applicant for the removal of the title deed restrictions as being in the public interest. Any ad hoc removal of title deed conditions would create precedents, imbalances and injustices. The conditions were imposed to create and protect a certain sense of place and character in respect of the smallholdings.***
- ***It is clear that the application is not in keeping of the principles of integrated development, spatial justice and upholding consistency of***

land use measures in accordance with environmental management instruments.

- ***Blanket removals are unlawful and irregular.***
- ***The application is irregular and flawed as no substantive details are given regarding proposed development of the property.***
- ***This specific area has been associated with runaway slaves who used to live along the Rooiels River Valley and thus the contention that the property has not in any way been associated with slavery is wrong.***

Town Planner's response

The points raised by the objector has been addressed extensively under points1 to 4.

6. Objection - FHL Raymond

- ***No notice was annexed to the front of the gate as legally required.***
- ***Concern about the ad hoc removal of restrictive conditions as per Appeal Court Case WE van Rensburg and Others vs P Naidoo and Other 26/5/10***

Town Planner's response

The points raised by the objector has been addressed extensively under points1 to 4.

7. Objection - Raymond McCreath INC on behalf of Ms H Claassens

- ***All applications for the removal of title deed restrictions must be in accordance with SPLUMA. The relevant principles underpinning SPLUMA are inclusive development, sustainable development, integration of social, economic and environmental considerations, integrated development plans, spatial justice upholding consistency of land use measures in accordance with environmental management instruments, integrated approach to land use and land development and must be in public interest.***
- ***The test of public interest was determined by Judge Griesel in the Camps Bay Ratepayers case [Camps Bay Ratepayers and Residents' Association and Other vs Minister of Planning, Culture and Administration Western Cape 2001(4)294(C)]. Judge Griesel said that title conditions as "relics of the past" and abolishing them in favour of the applicable Zoning Scheme is not the philosophy of the Removal Act and it was inappropriate and irregular for the Minister to have allowed himself to be swayed by the consideration. This principle was followed in the Whale vs City of Cape Town and others 2008 (6) SA 120(C).***
- ***The matter concerning similar title deed conditions as Portion 47 was decided by the Eastern Cape courts in Van Rensburg N.O. and Other vs MEC for Housing Local Government and Traditional Affairs (Case No. 3399/2010). Judge Revelas found that the insertion of restrictive conditions into the Title Deed could be for no other reason than to preserve the amenities of the other erven as low density, single residential properties with sea views and to maintain the character of the township. This matter was confirmed by the Appeal Court.***

- ***The applicant makes no case for its application. It also does not set out the consequences of the removal of the title deed conditions.***
- ***The property is located in the buffer zone of the Kogelberg Biosphere. No further development should take place on Portion 47 before an Environmental Impact Assessment has been positively concluded.***

Town Planner's response

The points raised by the objector has been addressed extensively under points1 to 4.

One (1) letter of support was received from the Pringle Bay Ratepayers' Association *(See Annexure F).*

Internal Departments

No negative comments were received.

8. SUMMARY OF APPLICANT'S REPLY TO COMMENTS

The applicant dealt with the objections in a summarised manner *(see Annexure E)* as follows:

Due cognisance is taken of the fact that the small holding is within an area of natural beauty. No wetlands are mapped in this specific farm portion.

Should the owner wish to develop the property within his primary rights and trigger any listed activities, an Environmental Assessment will have to be done as per the applicable legislation. Should the owner intend to make an application for any of the consent uses, an application will have to made.

The title deed conditions are more restrictive than the Zoning Scheme and are out-dated and have a negative impact on the owners of erven and farm portions in the area. There are many examples of transgressions such as houses constructed of wood and metal and also of outdoor braais, but in contrast to the restrictive conditions high-quality houses with corrugated roofs are not allowed. The same applies for outdoor braais, which in accordance of the Title Deed are not allowed. In the case of the small holdings, the Title Deed does allow for agricultural activities, which is more lenient in terms of activities allowed. The structures allowed for agricultural activities under the Zoning Scheme are also more extensive up to 5000m². The Title Deed has no restriction pertaining to limit either the agricultural activities and or the extent of structures to be erected.

The restrictions contained in the Title Deed in general will prohibit the following:

- Construction of high-quality timber frame homes or making use of corrugated iron for roofing, even if it is colour treated.
- You may not as a professional person, run a business even though provision is made for this as a primary right albeit within the allowable parameters.
- You may not have outdoor braais
- The property may only be used for agricultural purposes. The current zoning is more prohibitive.
- You may not have two (2) guest rooms as per primary right.

The removal of the restrictive conditions is only to enable the owner to make use of his primary rights. These uses are compatible with the surrounding land uses.

A notice was displayed at the entrance of the property abutting and facing the R44 and was displayed until 27 September 2018, thirteen (13) days in excess of what is required.

9. MUNICIPAL ASSESSMENT OF COMMENTS (Town Planner's comment on objections/and response thereon)

The Town Planner's response to the objections received was discussed under Paragraph 7.

10. MUNICIPAL PLANNING EVALUATION (REFER TO RELEVANT CONSIDERATIONS GUIDELINE)

10.1 Background

N/A

10.2 <u>(In)consistency with the Spatial Planning and Land Use Management Act, 2013 (Act 16 of 2013)</u>

The application is in line with the planning objectives applicable to this application.

<u>Spatial Justice</u>
The application is not to the detriment of previously disadvantaged groups since it is an existing development.

<u>Spatial Sustainability</u>
The impact on the removal of the restrictive conditions will have no impact on the agricultural or environmental value of the land. All the uses applied for as per the Zoning Scheme can only be located in existing buildings and footprints, thus eliminating disturbance of the CBA.

<u>Efficiency</u>
Firstly, the property is not depended on municipal services, thus optimizes the use of existing resources and infrastructure. Similarly, the decision-making procedure is focussed on the public participation process to minimize negative financial, economic, social and environmental impacts.

<u>Spatial Resilience</u>
The principle is to withstand disasters and environmental shocks. The application is in line with the principle since the activities proposed are located in existing structures already, thus limiting the impact on the environment.

<u>Good Administration</u>
The application has followed due procedure and the relevant organisations and departments were involved.

10.3 (In)consistency with the principles referred to in Chapter VI of the Land Use Planning Act, 2014 (Act 3 of 2014)

Same as Point 10.2 above.

10.4 (In)consistency with the IDP/Various levels of SDF's/Applicable policies

The portion of land is located in Agricultural/Conservation corridor. The primary rights are in line with the SDF corridor and rural landscape activities as indicated in the SDF.

10.5 (In)consistency with guidelines prepared by the Provincial Minister

N/A

10.6 Impact on Municipal engineering services

N/A

10.7 Outcomes of investigations/applications i.t.o other legislation

N/A

10.8 Existing and proposed zoning comparisons and considerations

N/A

11. ADDITIONAL PLANNING EVALUATION FOR REMOVAL OF RESTRICTIONS

The financial or other value of the rights

The applicant does not accrue any financial value.

The personal benefits which will accrue to the holder of rights and/or to the person seeking the removal

The applicant will accrue personal benefit in as far as the primary rights are concerned.

The social benefit of the restrictive condition remaining in place, and/or being removed/ amended

There is no social benefit for the community should the conditions remain in place. The Title Deed makes provision for agricultural activities in a very sensitive area. The Title Deed also makes provision for a dwelling and agricultural structures, which can definitely have an impact on the character of the area as well as place making.

Will the removal, suspension or amendment completely remove all rights enjoyed by the beneficiary or only some of those rights?

The application will remove in part the rights enjoyed by the applicant. The Title Deed provides more rights versus the Zoning Scheme's primary rights.

12. THE DESIRABILITY OF THE PROPOSAL

In evaluating the application, the following is of importance:

The area between Rooi Els and Pringle Bay consist of small holdings, which was created by the subdivision of Portions 133 and 45 of the Farm 559. Portion 45 was approved by the Surveyor General in 1956. Portion 47 is a portion of Portion 45 and is not included in the townships of Rooi Els and or Pringle Bay.

In 2016 an appeal was lodged to the Department of Environmental Affairs and Development by various owners of the small holdings, including Portion 47 on the basis that the zoning "Undetermined" as per the Zoning Scheme is incorrect and should be zoned Agriculture 1. The appeal was dismissed by the Western Cape Government: Environmental Affairs and Development Planning, dated 9 May 2016, based on the Supreme Court Judgement (Case No.7139/03). See attached Annexure G. The judgment is clear that the condition in title that allocate the portions for agricultural purposes, is a third-party condition and not that of the Administrator, therefore it cannot be the substance of the allocation of zoning.

In order to deal with this matter, a category was created namely Rural Zone 2: Conservation Use, to enable owners to build dwellings and associated outbuildings and take due cognisance of the environmental sensitivity of the area.

The application is to remove restrictive conditions not in line with the Zoning Scheme and an applicant's rights to choose the building material used to erect a dwelling and associated outbuilding.

The conditions are third party conditions namely the Hangklip Beach Estates Limited Company which prescribes building materials and land uses, which are in most respect more lenient than the Zoning Scheme. The condition is a third-party condition, of which the last living member, MS Wallace, did not object.

The applicant bought the property in 2017 with the relevant structures in existence. The applicant did not construct new roads and or new structures, which the objectors refer to.

The property was zoned "Undetermined". During the amalgamation of the different Zoning Schemes into one (1) scheme for the Overstrand, the Overstrand Municipality created a category of Rural Zone 2 Conversation Usage. This category was created due to various requests from holding owners in 2012. The reasons were that many owners, mostly elderly, who could not sell their properties due to the undetermined zoning. During this period in 2012, the Kogelberg Biosphere Framework was in the process of compilation. Due to the sensitivity of the area, the newly created category would fit the best into the framework's objectives. The category and its uses were the result of discussions with the community of Rooi Els/Pringle Bay and the biosphere consultants.

Conclusion:

The application is not a blanket removal application, the applicant did indicate his intention to exercise these primary rights which consist of home occupation and guest rooms. The aforementioned can only be exercised in existing buildings of

which building plans have been approved. Therefore, the applicant can only apply for the removal of restrictions conditions.

The remainder of the conditions to be removed are either more lenient than the zoning scheme and or unconstitutional as per the legal opinion and not possible to implement.

13. RECOMMENDATION

1. that the application in terms of Section 16(2)(f) of the Overstrand Municipality By-Law on Municipal Land Use Planning, 2015 (By-Law) for the removal of restrictive title conditions D.(d), D.(i), D.(n), D.(o), E.(i), E.(ii) and E.(iii) of Title Deed T3920/2017 applicable to Portion 47 of the Farm Hangklip No. 559, **be approved** in terms of the provisions of Section 61 of the By-Law, subject to the following conditions:

   (a) that building plans be submitted to the Building Department for approval, and that all conditions of the Building- and the Fire Department be complied with at that stage;

   (b) that all other development parameters as prescribed in the relevant Zoning Scheme be complied with, and

   (c) that this approval does not absolve the owner/applicant from compliance with any other relevant legislation.

2. that the application in terms of Section 16(2)(f) of the By-Law for the removal of restrictive title conditions D(b), D.(e) and Condition D.(r) of Title Deed T3920/2017 applicable to Portion 47 of the Farm Hangklip No. 559 **be amended** as follows:

   - Condition D.(b) remove “corrugated iron for roofing purposes”
   - Condition D.(e) replace “seller” with Local Authority”
   - Condition D.(r) amend to read as follows: “… with the exception of a home occupation and guest rooms”

3. that the applicant and objectors be notified of their right of appeal in terms of Section 78 of the Overstrand Municipality By-Law on Land Use Planning, 2015 with regard to the above decision.

14. REASONS FOR RECOMMENDATION

- The removal of the restrictive conditions will have no impact on the character of the area and/or the environment.
- The Overstrand Zoning Scheme is more restrictive than the Title Deed restrictions.
- The buildings are in existence and is there no impact on the CBA area.
- The use category is in line with the Kogelberg Biosphere Framework.
- The application is not a blanket removal, since not all the conditions have been applied for to be removed.
- The application indicates that the applicant intends to make use of the primary rights in terms of the Zoning Scheme.
- The objectors assume that the removal of the restrictive conditions may impact on the area and the environment, however since the primary rights can only be

accommodated in the existing structures, it is unclear how it will impact on the area.

- ❖ The objectors were part of the compilation of the amalgamated Zoning Scheme, and the primary rights of Conservation Usage were not objected against.
- ❖ The objectors did not elaborate on the assumptions being made in terms of character on the township, public interest etc. Thus, the negativity of the application could not be established.
- ❖ The application site is not part of Rooi Els and or Pringle Bay Township and thus should be evaluated in the context of holdings and not a residential erf.

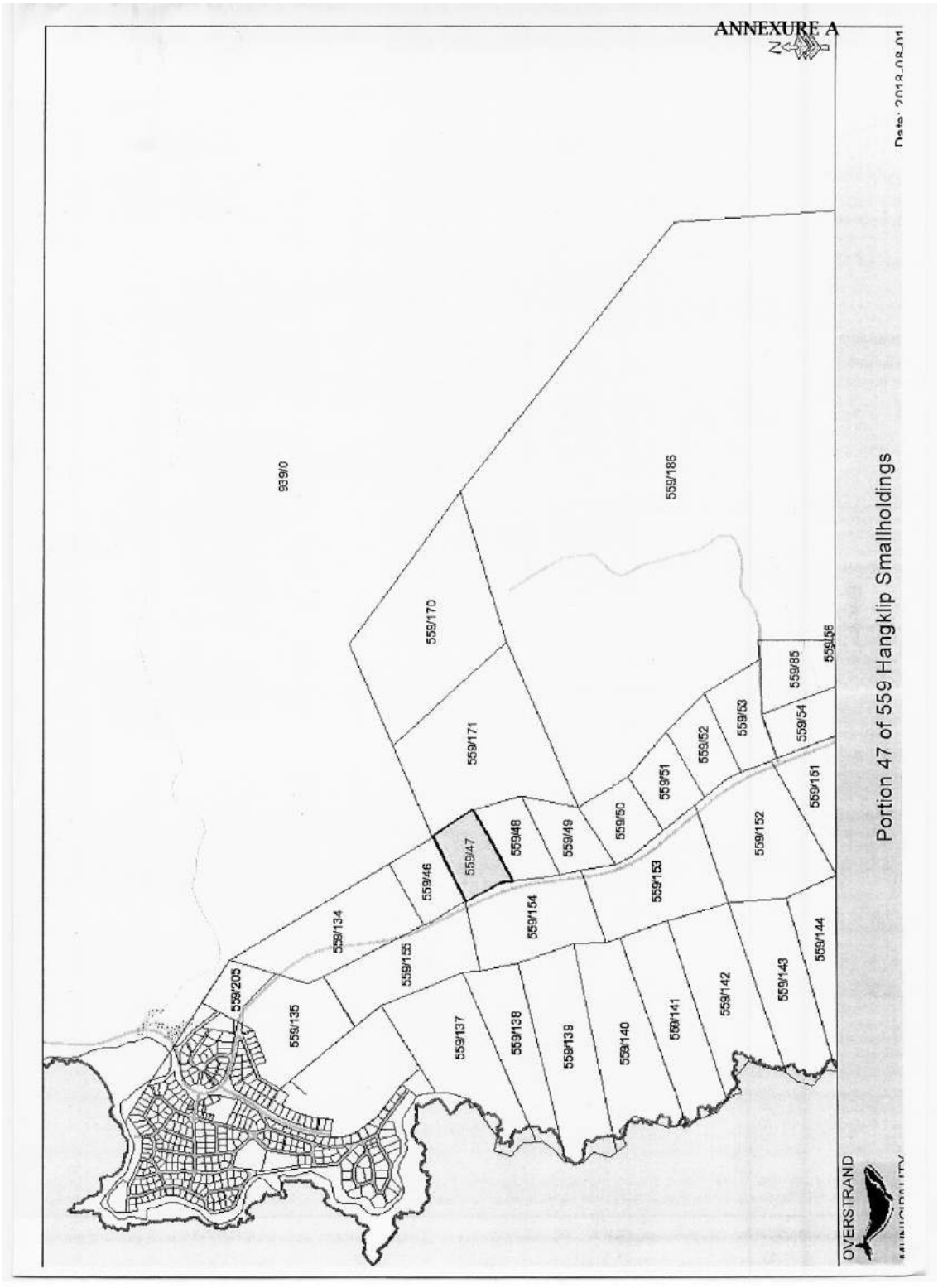
15. ANNEXURES

Annexure A:	Locality Plan
Annexure B:	Motivation Report
Annexure C:	Title Deed T3920/2017
Annexure D:	Objections received
Annexure E:	Applicant's response to objections received
Annexure F:	Letter of support (Pringle Bay Ratepayers' Association)
Annexure G:	Western Cape Government: Environmental Affairs and Development Planning dated 9 May 2016

SIGNATURE

REGISTERED PLANNER

Name:	**H VAN DER STOEP**
SACPLAN Reg No:	**A/1708/2013**
Signature:	_____
Date:	_____


ANNEXURE A
N
Portion 47 of 559 Hangklip Smallholdings
OVERSTRAND
559/0
559/186
559/170
559/171
559/47
559/48
559/49
559/50
559/51
559/52
559/53
559/85
559/86
559/54
559/151
559/152
559/153
559/154
559/155
559/46
559/134
559/205
559/135
559/137
559/138
559/139
559/140
559/141
559/142
559/143
559/144

PROPOSED REMOVAL OF RESTRICTIVE TITLE DEED CONDITIONS

PORTION 47 OF THE FARM HANGKLIP NO. 559

DIVISION: CALEDON OVERSTRAND MUNICIPALITY

MOTIVATION REPORT

1. BACKGROUND

Mr. J. de Jager on behalf of the Trio-Data Security Services BK as owner of Portion 47 of the Farm No. 559 has instructed the company Plan Active to apply for the removal of restrictive Title Deed conditions applicable to the subject farm portion.

The owners want to develop Portion 47 of the Farm Hangklip No. 559 in the future to its full potential in terms of the primary land use rights as prescribed under the Rural zone 2: Conservation Usage (R2) zoning. The Title Deed applicable to Portion 47 of the Farm Hangklip No. 559 contains a number of outdated restrictions that prohibits the owners to utilise the subject property to its full potential. The owners intend to remove the restrictive Title Deed conditions as they are more restrictive than the current land use rights and development parameters prescribed in the Overstrand Municipality Zoning Scheme.

Portion 47 of the Farm Hangklip No. 559 is 8.9317ha in extent and is held by title deed number T3920/2017

2. APPLICATION DETAILS

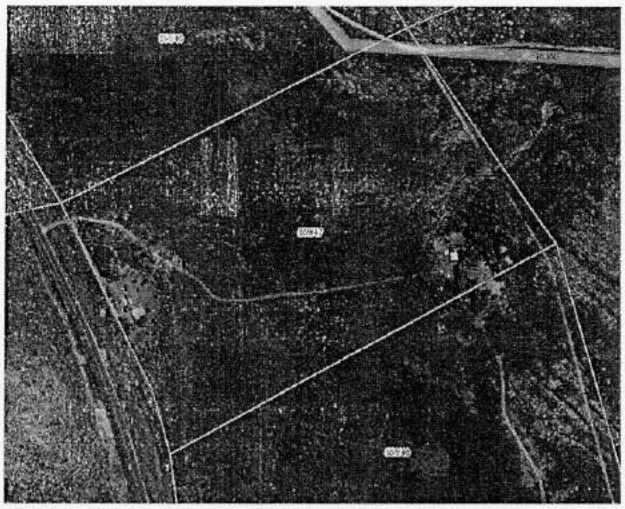
Application is made in terms of:

- Chapter 4, Section 16(2)(f) of the Overstrand Municipality's By-law on Municipal Land Use Planning, 2016, for the removal of restrictive Title Deed conditions.

3. DESIRABILITY

3.1 PROPERTY DESCRIPTION

The subject property is situated adjacent to the R44 (Clarence Drive) approximately 2km in a south eastern direction from Rooi-Els. Please refer to the enclosed locality plan. Portion 47 of the Farm Hangklip No. 559 is 8.9317ha in extent. A dwelling and outbuilding are established on the farm portion and are located on the western portion of the site. Please refer to the aerial photograph below:



The structure that is visible on the above aerial photograph, located in close proximity of the eastern corner of the farm, has been demolished.

3.2 ZONING

Portion 47 of the Farm Hangklip No. 559 is zoned Rural Zone 2: Conservation Usage (R2). Surrounding properties are also zoned for conservation usage purposes.

3.3 LAND USE

A dwelling with a double garage is located on Portion 47 of the Farm Hangklip No. 559 as mentioned above previously.

Land uses that surround Portion 47 of the Farm Hangklip No.559 are vacant undeveloped land and small holdings being used for residential purposes. It is therefore evident that Portion 47 of the Farm No. 559 is within a predominantly rural residential area.

3.4 PROPOSAL

- Chapter 4, Section 16(2)(f) of the Overstrand Municipality's By-law on Municipal Land Use Planning, 2016, for the removal of restrictive Title Deed conditions.

It is the intention of the owners of Portion 47 of the Farm Hangklip No.559 to have the options available to them to develop the farm portion within the current land use rights as prescribed in the Overstrand Municipal Zoning Scheme Regulations under the zoning Rural Zone 2: Conservation Usage (R2). In order to do so it would be required that we apply for the removal of restrictive Title Deed conditions that are more restrictive than the Overstrand Municipal Zoning Scheme Regulations.

The detail of the application can be described as follows:

3.4.1 Proposed Removal of Restrictive Title Deed Conditions

Portion 47 of the Farm Hangklip No.559 Hangklip is 8.9317ha in extent and the owners intend to remove the more restrictive Title Deed Conditions within the said Title Deed.

The enclosed Title Deed, T3920/2017 contains the following Title Deed restrictions:

- Page 3, paragraph (D)(b): "No wood and iron buildings or works of any descriptions shall be erected nor shall corrugated iron be used for roofing purposes ".
- Page 3, paragraph (D)(d): "all buildings and other constructional works, including all fences and garden or other gates, shall be of good design and sound construction and plans thereof must be approved by the seller before construction is commended. In the event of a breach of this Clause the Seller shall have the right to require the Purchaser to demolish such unauthorised buildings or works and/or shall have the option to re-purchase the land upon payment of the cost price thereof without compensation for improvements."
- Page 3, paragraph (D)(e): "no Signs, advertisements, advertisement hoardings or other lettering shall be erected on the land hereby sold and purchased, nor shall any advertisements, signs or lettering be painted on any buildings, wells or fence erected or to be erected on the said land save and except with the written approval of the Seller."
- Page 4, paragraph (D)(i): "No Person other than the registered owner and his immediate family shall camp overnight or light open fires on the said land save with the written consent of the Selier which shall have the right to refuse such consent without assigning any reason therefore or to give such consent subject to such conditions as it thinks fit".
- Page 4, paragraph (D)(n): "the land shall be used only for agricultural purposes and the breeding and keeping of domestic animals, poultry and/or bees provided that no goats or pigs may be kept except with the special written consent of the seller".

- Page 4, paragraph (D)(o): "only buildings and structures to be used as dwellings and farm buildings shall be erected on the land".

- Page 4, paragraph (D)(r): "No boarding houses, flats, maisonettes, hotel, shops, public garage or filling station business premises, canteen, restaurant, bioscope, factory or industrial buildings shall be erected on the land nor shall any such business or entertainment be conducted on the land".

- Page 5, paragraph E: ENTITLED to the benefit of the conditions referred to in the Servitude Endorsements appearing on said Certificate of Registered Title No. T589/1957 which said endorsements are dated and read as follows:

(i) 17th December 1959:

"By D.T. No. 18344/59dd. This day Portion 59 thereby conveyed is subject to conditions relating to (a) building (b) restriction against trade (d) prohibition against making of bricks, tiles and pipes (e) prohibition against deposit of debris, scrap, etc (g) camping (h) access (i) sewage (j) water (k) sub-division, and (use of land i.f.s the remainder of within portion 45 meas. 250, 8309 hectares held hereunder. As will more fully appear on reference to the said D.T."

(ii) Dated 10th May 1960

"By Deed of Transfer No. 6799/1960 dated this day Portion 62 = 9.2831 hectares thereby conveyed as is (A) not entitled to conditions referred to in certain endorsements and (B). Subject to conditions relating to (a) (b) (c) and (d) buildings and design (e) advertising (f) trade (g) and (h) building materials and scrap (j) camping (k) access to roads (l) sewage (m) use of water (n) subdivision (o) (p) (q) (r) & (s) use of land and buildings in favour of the remainder of portion 45 = 242, 1473 hectares held hereunder, as will more fully appear on reference to the said Deed of Transfer."

(iii) Dated 20th of November 1961

"By Deed of Transfer No. 16184/1961 dd. This day, Portion 58 meas. 9,6944 hectares thereby conveyed is (A) Not entitled to conditions referred to in certain endorsements and (B) Subject to conditions (a) (b) (c) and (d) buildings and design (e) advertising (f) trade (g) & (h) building materials and scrap (j) camping (k) access to roads (l) sewage (m) use of

water (n) sub-division (o) (p) (q) (r) & (s) use of land and buildings held hereunder as will more fully appear on reference to the said Deed of Transfer."

Please take note that the proposed removal of the restrictive Title Deed conditions is mainly because they are more restrictive than the land use restrictions under the current zoning of the property that is Rural Zone 2. It is not proposed that we depart from any land use restrictions or development rules as prescribed in the Overstrand Municipality Zoning Scheme, under a Rural Zone 2 zoning. The owner intends to remove these restrictions in order to have the freedom to make use of its land use rights as mentioned above. The primary rights and development rules (street building line) referred to are as follows:

5.3 RURAL ZONE 2 : CONSERVATION USAGE (R2)

Use of the property

5.3.1 The following use restrictions apply to property in this zone:

(a) **Primary** uses are: conservation use, dwelling house, guest rooms, home occupation;

(b) Consent uses are: agriculture, aquaculture, day care centre, harvesting of natural resources, intensive animal farming, intensive horticulture, place of assembly, place of entertainment, place of instruction, plant nursery, recreational facilities, second dwelling unit, tourist accommodation, tourist facilities, transmission apparatus, utility services.

Development rules

5.3.2 The following development rules apply:

(a) **Floor space**

The total floor space of all buildings on the land unit may not exceed 800m²; provided that Council may relax this requirement if it is satisfied that such accommodation is required for genuine conservation and/or farming activities on the land unit.

(b) **Coverage**

The maximum coverage for all buildings on the land unit is 25%.

(c) **Building lines**

(i) The building lines shall be 10,0 m;
(ii) Where the configuration of the land unit, is of such a nature that alternative building lines need to be considered, Council may approve such alternative building lines to permit the use of the property as defined in this zone, provided that where Rural Zone 2 abuts an urban area the building lines of the adjacent property shall apply along the shared boundary; and
(iii) The general building line exemptions in 16.1 shall apply.

(d) **Height**

(i) The maximum height of a building, measured from the base level to the top of the structures 8,0 m; provided that;
(ii) Where Council is satisfied that a greater height is necessary for the agricultural function of the building, it may permit such greater height; and

6

(e) Parking

Parking and access shall be provided on the land unit in accordance with 17.1.

Minimum subdivision size

5.3.3 The following development rules apply:
(a) No new subdivision or any remainder to be zoned Rural Zone 2 shall be less than:
(i) 5.0 ha, if no minimum subdivision size is specified on the zoning map; or
(ii) Where Council has specified a minimum subdivision size, as indicated on the zoning map in terms of an overlay zone for the area concerned and concern/read together with the SDF and related documents that minimum subdivision size applies.

Building plans will be submitted to the Overstrand Municipality in the future should the owner make use of his rights as determined in the Overstrand Municipality Zoning Scheme. The building plans will conform to all land use restrictions and development rules as prescribed under the current zoning, Rural Zone 2, as prescribed in the Overstrand Municipality Zoning Scheme Regulations.

3.5 ACCESS

The property is situated adjacent to the R44, Clarence Drive. Access to the subject property is gained via a gravel road which connects directly from the R44. This access will be retained and no additional access will be required.

3.6 SERVICES

Portion 47 of the Farm Hangklip No.559 is already developed. A dwelling and double garage are constructed and are serviced. We are not applying for any additional land use rights, but only to have the restrictive Title Deed conditions removed in order to utilise the farm portion as prescribed in the Overstrand Municipality Zoning Scheme Regulations. Because we are not applying for a change of land use by means of a rezoning or consent use or creating additional portions the current services provided to the subject property are sufficient.

3.7 TITLE DEED

The title deed T3920/2017 has restrictions that need to be removed in order for the owners to utilise the subject property to its full potential.

The Title Deed restrictions that we are applying for to have them removed are:

- Page 3, paragraph (D)(b): "No wood and iron buildings or works of any descriptions shall be erected nor shall corrugated iron be used for roofing purposes ".
- Page 3, paragraph (D)(d): "all buildings and other constructional works, including all fences and garden or other gates, shall be of good design and sound construction and plans thereof must be approved by the seller before construction is commended. In the event of a breach of this Clause the Seller shall have the right to require the Purchaser to demolish such unauthorised buildings or works and/or shall have the option to re-purchase the land upon payment of the cost price thereof without compensation for improvements."
- Page 3, paragraph (D)(e): "no Signs, advertisements, advertisement hoardings or other lettering shall be erected on the land hereby sold and purchased, nor shall any advertisements, signs or lettering be painted on any buildings, wells or fence erected or to be erected on the said land save and except with the written approval of the Seller."
- Page 4, paragraph (D)(i): "No Person other than the registered owner and his immediate family shall camp overnight or light open fires on the said land save with the written consent of the Seller which shall have the right to refuse such consent without assigning any reason therefore or to give such consent subject to such conditions as it thinks fit".
- Page 4, paragraph (D)(n): "the land shall be used only for agricultural purposes and the breeding and keeping of domestic animals, poultry and/or bees provided that no goats or pigs may be kept except with the special written consent of the seller".
- Page 4, paragraph (D)(o): "only buildings and structures to be used as dwellings and farm buildings shall be erected on the land".

- Page 4, paragraph (D)(r): "No boarding houses, flats, maisonettes, hotel, shops, public garage or filling station business premises, canteen, restaurant, bioscope, factory or industrial buildings shall be erected on the land nor shall any such business or entertainment be conducted on the land".

- Page 5, paragraph E: ENTITLED to the benefit of the conditions referred to in the Servitude Endorsements appearing on said Certificate of Registered Title No. T589/1957 which said endorsements are dated and read as follows:

(i) 17th December 1959:

"By D.T. No. 18344/59dd. This day Portion 59 thereby conveyed is subject to conditions relating to (a) building (b) restriction against trade (d) prohibition against making of bricks, tiles and pipes (e) prohibition against deposit of debris, scrap, etc (g) camping (h) access (i) sewage (j) water (k) sub-division, and (use of land i.f.s the remainder of within portion 45 meas. 250, 8309 hectares held hereunder. As will more fully appear on reference to the said D.T."

(ii) Dated 10th May 1960

"By Deed of Transfer No. 6799/1960 dated this day Portion 62 = 9.2831 hectares thereby conveyed as is (A) not entitled to conditions referred to in certain endorsements and (B). Subject to conditions relating to (a) (b) (c) and (d) buildings and design (e) advertising (f) trade (g) and (h) building materials and scrap (j) camping (k) access to roads (l) sewage (m) use of water (n) subdivision (o) (p) (q) (r) & (s) use of land and buildings in favour of the remainder of portion 45 = 242, 1473 hectares held hereunder, as will more fully appear on reference to the said Deed of Transfer."

(iii) Dated 20th of November 1961

"By Deed of Transfer No. 16184/1961 dd. This day, Portion 58 meas. 9,6944 hectares thereby conveyed is (A) Not entitled to conditions referred to in certain endorsements and (B) Subject to conditions (a) (b) (c) and (d) buildings and design (e) advertising (f) trade (g) & (h) building materials and scrap (j) camping (k) access to roads (l) sewage (m) use of water (n) sub-division (o) (p) (q) (r) & (s) use of land and buildings held

hereunder as will more fully appear on reference to the said Deed of Transfer."

The reasons for the removal of the restrictive Title Deed conditions have already been covered as per paragraph 3.4.1 above.

3.8 FORWARD PLANNING

Overstrand Municipal Wide Spatial Development Framework

The ***Overstrand Spatial Development Framework (2006)*** earmarks the area where Portion 47 of the Farm Hangklip No. 559 is situated, as an Agricultural Core area. The application consists of the Removal of Title Deed Restrictions and the existing Rural Zone I zoning will be retained.

Overstrand Growth Management Strategy

The ***Overstrand Municipal Growth Management Strategy (OMGMS, 2010)*** does not address areas outside the urban edge and is therefore not applicable.

From the above it is evident that the proposed removal of restrictive Title Deed conditions adheres to the spatial planning policies for the area.

3.9 OTHER RELEVANT LEGISLATION FOR CONSIDERATION OF THE APPLICATION

3.9.1 HERITAGE VALUE

Portion 47 of the Farm Hangklip No.559 is not situated within the Heritage Overlay Zone as determined by the Overstrand Municipality Growth Management Strategy (2010). The property is developed and not earmarked for heritage conservation purposes in terms of the Overstrand Heritage Survey Report (2009).

The subject property is not associated with any important persons or groups or important events and activities. The subject property has no association with the history of slavery and is not used for living heritage.

In the light of the above mentioned it is evident that the proposed removal of restrictive Title Deed conditions will not have a negative impact on the heritage value of the subject property or the greater Hangklip area.

3.9.2 IMPACT ON THE BIOPHYSICAL ENVIRONMENT

The proposed removal of restrictive Title Deed conditions do not trigger any listed activities in terms of the National Environmental Management Act (NEMA), 1998 (Act no. 107 of 1998).

3.10 PLANNING PRINCIPLES

The planning principles of spatial justice, spatial sustainability, efficiency and spatial resilience of this application can be described as follows:

Spatial Justice: The proposed removal of restrictive Title Deed conditions will be in line with the current land use tendencies. The restrictive Title Deed conditions to be removed are more restrictive than the land use restrictions prescribed in terms of the Overstrand Municipality Zoning Scheme under the current zoning that is Rural Zone 2. It is therefore proposed that only the land use restrictions in terms of the Overstrand Municipal Zoning Scheme under a zoning of Rural Zone 2 apply and not the restrictions prescribe in the Title Deed.

Spatial sustainability: The proposed removal of restrictive Title Deed conditions is in line with the current character of the established rural area. The proposed application will have no impact on the conservation worthy areas of Hangklip. Spatially the land use will be in line with the rural character of the area.

Efficiency: The restrictive Title Deed conditions to be removed are more restrictive than the land use restrictions prescribed in the Overstrand Municipality Zoning Scheme under the current zoning that is Rural Zone 2. It is therefore proposed that only the land use restrictions in terms of the Overstrand Municipal Zoning Scheme under a zoning of Rural Zone 2 apply and not the restrictions prescribed in the Title Deed.

Spatial Resilience: Spatial resilience is not applicable to this application.

Good administration: Our Company is committed to the principle of good administration and will cooperate with the Overstrand Municipality to ensure a time efficient, uncomplicated land use planning process. The land use application will follow due process as stipulated in the relevant municipality's bylaw and related provincial and national land use planning legislation. All measures will be taken to ensure an efficient and streamlined process within the applicable timeframes as stipulated by the Overstrand Municipality's By-law on Municipal Land Use Planning, 2016.

4. RECOMMENDATION

When this application is evaluated it is important to take note of the following:

- The proposed removal of restrictive Title deed conditions of Portion 47 of the Farm Hangklip No. 559 falls within the existing land use tendencies in the area;
- There will be no impact on services;
- The proposed removal of restrictive Title Deed conditions will not have a negative impact on the current character and land values of the surrounding properties.

With regards to the above mentioned it would be appreciated if the application for the removal of title deed restrictions of Portion 47 of the Farm Hangklip No. 559 would be approved.

ANNEXURE C

OFFICE COPY
KANTOOR AFSKRIF

SUBDIVISIONAL DIAGRAM.
Sect. 24(b) of Act 9/1929.

General Plan 1339 LD.

SIDES Cape Feet		ANGLES OF DIRECTION	SYSTEM to 19° CO-ORDINATES	Y	X
		Constant		0.0	+12033600.0
AB	1130.45	241.06.00	A	+49514.35	+ 29534.43
BC	780.52	328.28.40	B	+48524.68	+ 28988.11
CD	1227.97	62.08.30	C	+48116.62	+ 29653.46
DE	151.77	161.05.30	D	+49202.28	+ 30227.26
EA	608.92	154.25.20	E	+49251.46	+ 30083.68

S. G. No. 4717/61

Approved

Surveyor-General.

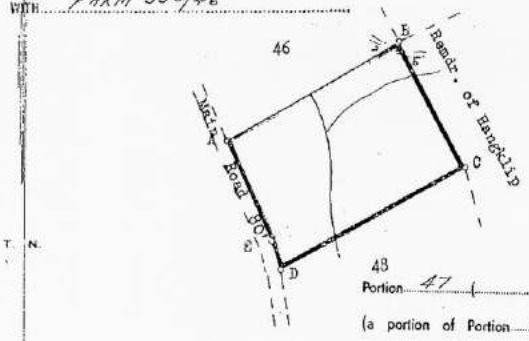
11-10-1961

Description of Beacons.

A.B.C.D.E. : Iron standards projecting 6" with cairns.
B. : ½" round iron peg and cairn.

The ~~curved~~ dotted line ab represents the ~~Southern edge~~ middle of a Servitude Road 30 C.Ft. wide. Vide Dgm. No. 4718/1961 annexed to D/T.

SERVITUDE DIAGRAM AFFECTING THIS PROPERTY FILED WITH FARM 559/46



Portion 47 (
(a portion of Portion 45) of the farm
Hangklip No 559
CALEDON

Scale 1 : 7500.

The Figure A. B. C. D. E.

represents 10.4278 Morgen of land being

PORTION 47 (a portion of Portion 45)
of the Farm HANGKLIP,

situate in the Division of Caledon, Province of Cape of Good Hope.

Surveyed in Oct.1945-May 1947 ~~as~~ & Feb.-Dec.1955

Land Surveyors.

This diagram is annexed to	The original diagram is	File No. S.13048/3
C.R.T. 19184/1962.	No. 4/1956 annexed to	S. R. No. E. 2/56
	Cert.of Registered	Gen. Plan 1339LD.
	Title	Noting Plan AH-4B
Registrar of Deeds		

Arterial O.T. 559/47

ANNEXURE D 1/37

Loretta Gillion - OBJECTION: RE: APPLICATION FOR REMOVAL OF TITLE DEED RESTRICTIONS OF PORTION 47 OF THE FARM HANGKLIP NO.559

From: Todd Lambert <Toddl@hotmail.co.za>
To: "loretta@overstrand.gov.za" <loretta@overstrand.gov.za>
Date: 06 September 2018 09:39 PM
Subject: OBJECTION: RE: APPLICATION FOR REMOVAL OF TITLE DEED RESTRICTIONS OF PORTION 47 OF THE FARM HANGKLIP NO.559

TP - A Theart (Hvld Stoep)

OVERSTRAND MUNISIPALITEIT 10 SEP 2018 OVERSTRAND MUNICIPALITY

Overstrand Municipality

To Whom it May concern

RE: APPLICATION FOR REMOVAL OF TITLE DEED RESTRICTIONS OF PORTION 47 OF THE FARM HANGKLIP NO.559

We own Portion 48 of Farm Hanglkip No. 559 , the neighbouring portion to 47 and we want to place on record the following objection:

- Since Portion 47 of Farm Hangklip No.559 is linked to Portions 48, 49, 50, 51, 52 and 53 of Farm Hangklip No. 559, with two rivers and a wetland running across all of them.
- Should the biosphere be adversely disturbed in any part, it will negatively impact the whole system.
- When these properties were purchased, all buyers are informed about the biosphere and the importance of the eco system surrounding it.
- Therefore we are gravely concerned about the biosphere, should any big developments take place on Portion 47 of Farm Hangklip No.559.

Hence we are objection to the following clause being removed under Paragraph 3.4.1. Proposed Removal of Restrictive Title Deed Conditions

Page 4, paragraph (D)(r): "No boarding houses, flats, maisonettes, hotel, shops, public garage or filling station business premises, canteen, restaurant, bioscope, factory or industrial buildings shall be erected on the land nor shall any such business or entertainment be conducted on the land"

This objection is mainly due to the above-mentioned reasons.

Regards
Mr & Mrs TR & M Lambert

FILE NO: Ptn 47 | 559
SCAN NO: 26
COLLABORATOR NO: 1206361

Contact Details:
Mrs M Lambert
Cell: 0836576006
Email: MLambert@sars.gov.za

Mr Todd Reginald Lambert
Cell: 0833531589
Email: Toddl@hotmail.co.za / Todd@mobilesolarpower.co.za

MUNISIPALITEIT OVERSTRAND 06 SEP 2018 TOWN PLANNING OVERSTRAND MUNICIPALITY

OVERSTRAND MUNISIPALITEIT
14 SEP 2018
OVERSTRAND MUNICIPALITY

TP-A Theart (Hvld Stoep)

Overstrand Munisipaliteit
Patersonstraat 16
Hermanus
7200
loretta@overstrand.gov.za

Posbus 12772
Meulstraat
Kaapstad
8010
eldie.brink@gmail.com

FILE NO: Ptn 47 | 559 Hangklip
SCAN NO: BRINK
COLLABORATOR NO: 1209224

13 September 2018

Geagte Heer,

AANSOEK VIR OPHEFFING VAN TITELVOORWAARDES OP GEDEELTE 47 VAN PLAAS NO 559 HANGKLIP.

1. Ek is die eienaar van erf 237 Rooiels. Die erfeienaars van Rooiels het bepaald 'n belang by enige ontwikkeling wat op die kleinhoewes aangrensend aan ons dorp in die biosfeer beplan word.

2. Die aansoeker verduidelik sy aansoek soos volg:

> The owners want to develop Portion 47 of the Farm Hangklip No. 559 in the future to its full potential in terms of the primary land use rights as prescribed under the Rural zone 2: Conservation Usage (R2) zoning. The Title Deed applicable to Portion 47 of the Farm Hangklip No. 559 contains a number of outdated restrictions that prohibits the owners to utilise the subject property to its full potential. The owners intend to remove the restrictive Title Deed conditions as they are more restrictive than the current land use rights and development parameters prescribed in the Overstrand Municipality Zoning Scheme.

3. Die aard en motivering van die aansoek is soortgelyk aan die onlangse aansoek vir die algehele opheffing van titelvoorwaardes op erf 106 Rooiels, en wat deur u raad goedgekeur is.

4. U raadsbesluit is tans op appèl deur myself asook ander eienaars van Rooiels. Indien die appèl van die hand gewys word, sal die saak waarskynlik in die Hoë Hof verder gevoer word.

Sien asseblief derhalwe my versoek in paragraaf 8 hieronder.

5.1. Die onderhawige aansoek is vir 'n algehele ("blanket") verwydering van titelvoorwaardes. So-iets is nie vir ons howe aanvaarbaar nie.

5.2. Die aansoek is vir die verwydering van titelvoorwaardes op grond daarvan dat die grondgebruikbeplanning van die munisipaliteit die gebruik van die grond ook reël. Ons howe het

MUNISIPALITEIT OVERSTRAND
14 SEP 2018
TOWN PLANNING
UMASIPALA MUNICIPALITY

reeds bevestig dat titelvoorwaardes nie om hierdie rede opgehef mag word nie, omdat die titelvoorwaardes en munisipale grondgebruikbeplanning verskillende beskerming verleen.

6. Ek heg vir u aan my appel ten opsigte van erf 106. Dit sit die regspraak deur ons howe oor die kwessies waarna in 5.1 en 5.2 verwys word, uiteen.

7. Ek heg ook vir u aan 'n koerantberig van Junie 2018 oor 'n reeling van die Hoë Hof in Junie vanjaar, op grond daarvan dat die vroeër hofbeslissings waarna ek in my appel verwys, steeds geld onder die jongste grondgebruikwetgewing.

8. Ek versoek derhalwe asseblief dat u nie die aansoek sal oorweeg tot tyd en wyl die appèl ten opsigte van die soortgelyke geval van erf 106 Rooiels gefinaliseer is, en nie meer onderhewig aan hersiening deur die Hoë Hof is nie.

Die uwe,

E Brink

Die Appélbeampte (Uitvoerende Burgemeester)
Patersonstraat 16
Hermanus
7200
Loretta@overstrand.gov.za

Posbus 12772
Meulstraat
Kaapstad
8010
eldie.brink@gmail.com

24 April 2018

Geagte Heer,

ERF 106 PERSPICUAWEG ROOIELS: APPéL TEEN DIE BESLUIT VAN DIE MUNISIPALE BEPLANNINGSTRIBUNAAL (MBT) VAN 28 MAART 2018

Ek is die eienaar van erf 237 Rooiels. Ek het beswaar gemaak teen die gevraagde opheffing van titelvoorwaardes en apélleer nou teen die besluit van die MBT om nie die besware van die Rooiels Belastingbetalersvereniging en die verskeie individuele beswaarmakers te handhaaf nie.

OPSOMMING

Die opheffing van titelvoorwaardes deur die MBT en om dit te vervang met die soneringskema is, in die lig van die appélhofbeslissing en die hooggeregshofbeslissing wat hieronder onder u aandag gebring word, onregmatig ("unlawful").

1. VERSOEK.

Ek versoek graag dat u asseblief die besluit van die MBT vervang met die volgende:

"Die aansoek vir die opheffing van titelvoorwaardes ten opsigte van erf 106 Rooiels word van die hand gewys."

2. OPSOMMING VAN GRONDE VAN APPEL IN TERME VAN DIE PROMOTION OF ACCESS TO JUSTICE ACT (PAJA).

2.1 "The action is procedurally unfair" –Art 6(2)(c)

Sien para 6 hieronder.

2.2 Die besluit is wesenlik beinvloed deur deur 'n regsdwaling ("error of law") - Art 6(2)(d)

Sien para 5 hieronder.

2.3 Die uitoefening van die besluitneming was so onredelik ("unreasonable") dat geen redelike persoon so 'n besluit sou geneem het nie – Art 6(2)(h)

Sien para 8.2.2 en 9 hieronder.

2.4 Die besluit is andersins onkonstitusioneel of onregmatig ("unconstitutional or unlawful") – Art 6(2)(i)

Sien para 7 hieronder

2.5 Die aksie is op arbitrêre ("arbitrarily or capriciously") wyse uitgevoer – Art6 (2)(e)(vi)

Sien paragrawe 7, 8 en 10 hieronder.

3. TOEPASLIKE UITSPRAKE VAN DIE HOOGGEREGSHOF EN DIE APPELHOF

Ek heg vir u aan die uitspraak in die hooggeregshof deur Regter Revelas in Van Rensburgh vs Equuus Training (Revelas), en die appélhofuitspraak van Appélregter Navsa in Van Rensburgh vs Naidoo (Navsa). In die uitsprake word met goedkeuring verwys na Camps Bay Ratepayers and Residents Association v Minister of Planning 2001(4) SA 294(C) en word daarop gesteun.

Hoewel altwee uitsprake voor die inwerkingtreding van die Spatial Planning and Use Management Act (SPLUMA) of die Overstrandse Verordening op Munisipale Grondgebruikbeplanning , wat tans geld, gelewer is, geld die regters se uitsprake oor die doel, aard en regskrag van titelvoorwaardes onveranderd onder die nuwe wette.

Die twee sake skep belangrike regspresedente waaraan, indien die onderhawige besluit tot 'n hooggeregshofsaak kan lei, die hooggeregshof (respekvol) gebonde sal voel om die besluit van die MBT omver te werp.

Die twee sake hierbo is nie onderskeibaar van die onderhawige besluit nie, al het verskillende wette gegeld. In beide die besluit van die MBT en die twee sake is geargumenteer deur die owerhede dat die titelvoorwaadres teenstrydig is met die soneringskema. Revelas para 63 lees "The MEC argued that the Camps Bay Ratepayers case is distinguishable from the present matter. I disagree. It was also argued that the title deed conditions relied upon were 'at odds' with the zoning scheme in that case."

3.1 Die belangrikste titelvoorwaardes wat die sogenaamde saaklike regte ("praedial servitudes") skep (en waaroor die sake handel)is vergelykbaar met Deel F(D) van die titelakte in die onderhawige geval (en wat deur die MBT opgehef is):

Navsa para 7 lees: "At the time of the establishment of Summerstrand Township the following restrictive conditions were inserted in title deeds in favour of all erf-holders:

'C. SUBJECT FURTHER to the following conditions contained in Deed of Transfer T999/1944

imposed by the Municipality of the City of Port Elizabeth in terms of the provisions of Township Ordinance No 13 of 1927 in favour of itself and any erf-holder in the Summerstrand Extension Township (and subject to alteration and amendment by the Administrator):

(a) That this erf shall be for residential purposes only.

(b) That only one house designed for the use as a dwelling for a single family, together with such outbuildings as are ordinarily required to be used therewith, be erected on this erf.

(c) That no more than half the area of this erf shall be built on.

(d) That no building or structure or any portion thereof except boundary walls and fences shall be erected nearer to the street line which forms a boundary of this erf than the building indicated on the diagram of this erf.' "

Ensovoorts verder.

3.2 In die onderhawige geval lees titelvoorwaardes F(D)soos volg:

F.D. This erf shall be subject to the following further conditions, provided especially that where, in the opinion of the Administrator after consultation with the Townships Board and the local authority, it is expedient that the restrictions in any such condition should at any time be suspended or relaxed, he may authorise the necessary suspension or relaxation subject to compliance with such or conditions as he may impose.

(a) It shall not be subdivided;

(b) It shall be used for residential purposes only;

(c) Not more than one building, excluding a licensed hotel, maisonettes and semidetached houses, together with such outbuildings as are ordinarily required to be used therewith, shall be erected thereon;

(d) Not more than half the area thereof shall be built upon;

(e) No building or structure except boundary walls and fences shall be erected nearer than 4.72 meters to the street line which forms a boundary of this erf, nor within 3.15 meters of the rear or 1.57

meters of the lateral boundary common to any adjoining erf,

provided that with the consent of the local authority an outbuilding

not exceeding 3.05 meters in height measured from the floor to the

wall plate and no portion of which will be used for human habitation

may be erected within the above prescribed rear space, and

provided further that a garage may be erected up to such street line

if in the opinion of the local authority the level of the erf is such as to

make that necessary;

Ensovoorts verder.

4. DIE DOEL, AARD EN REGSKRAG VAN TITELVOORWAARDES.

4.1 PERMANENTE VOORWAARDES.

Al die voorwaardes in die titelakte van erf 106 was bedoel as permanente voorwaardes, behalwe die voorwaardes in Deel F, wat onderhewig gemaak is aan verandering of opheffing deur die Administrateur (funksie tans gedelegeer aan die Overstrand Munisipaliteit).

Revelas para 31 lees:

"At pp 228-229 of Rossmaur the following appears:

'Where an application to establish a township has been granted subject to a requirement, imposed on the recommendation of the Townships Board, that restrictive conditions as to the use of lots are to be included in the titles, such conditions, when once included in the titles of the lot holders, if not framed in terms which expressly render them subject to future cancellation or variation, must be regarded as conferring rights of a permanent nature, which cannot be cancelled or varied either by the Townships Board itself, or by any other authority, by virtue of powers of "administration" exerciseable over the township concerned."

Alhoewel die permanente voorwaardes wel onder 45(6) SPLUMA gewysig of opgehef kan word met die verlof van die munisipaliteit, kan die permanente voorwaardes nie sonder meer gewysig of opgehef word nie.

Revelas para 62 lees:

"In Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration Western Cape, and Others Griesel J had the following to say about branding title deed conditions as relics 'of the past' and abolishing them in favour of the applicable zoning scheme: 'However, this is not the philosophy of the [Removal] Act and it was inappropriate and irregular for

the Minister to have allowed himself to be swayed by this consideration. In my view the Minsters' approach in this regard is fundamentally unsound'."

Dit is na my mening ook ook nie die filosofie agter SPLUMA nie.

4.2 SAAKLIKE SERWITUTE ("PRAEDIAL SERVITUDES")

Die voorwaardes in Deel F was bedoel as saaklike serwitute.

Die voorwaardes op erf 106 in Deel F is eiendom wat behoort aan al die ander erwe in Rooiels, nie net aan die bure van 106 nie.

Revelas para 84 lees:

"In his judgment of 29 March 2008 (under case number 1440/07),

Froneman J held the following in paragraph 21: "The title deed conditions are registered not only against the neighbouring property title, but also against the title deeds of a number of properties in the Summerstrand area. There is no dispute between the parties about their legal nature. They are praedial servitudes that enure for the benefit of all other erven in the designated area. Each erf is simultaneously both a servient tenement and a dominant tenement. It is servient in the sense of being encumbered by the title deed condition in favour of all the other similar erven, and dominant in the sense of being favoured by the title deed condition in respect of the other similar erven."

Revelas para 85 lees met verwysing na die Navsa-saak:

"The aforesaid view as to the nature of restrictive conditions was also confirmed by the Supreme of Appeal in the Naidoo matter."

5. "DIE BESLUIT IS WESENLIK BEINVLOED DEUR 'N REGSDWALING" – Sien para 2.2 hierbo

Die stadsbeplanner motiveer die opheffing van titelvoorwaardes soos volg aan die einde van para 4 van die agenda vir 28 Maart:

"The removal of the conditions will have no impact on the residential character of the area since the development will remain in the residential parameters of the Zoning Scheme. The removal will provide for a singular set of land use management rules and also allow for more updated and appropriate statutory legislation taking the current needs into consideration."

5.1 REGDWALING NO 1 – DAT DIE TITELVOORWAARDES VEROUDERD IS EN VERVANG EN OPGEDATEER KAN WORD DEUR DIE SONERINGSKEMA

Revelas para 58.3 haal met goedkeuring die volgende grond vir tersydestelling van die opheffing aan:

"Reviewable .... because...incorrectly considered the restrictive conditions to be "obsolete" and that they were supplanted by the third respondent's zoning scheme regulations. The applicants relied on the fact that the Supreme Court of Appeal held that the aforesaid stance was unacceptable and invalid on more than one occasion."

Die stadsbeplanner motiveer hierbo die opheffing van titelvoorwaardes soos volg:

"The removal will provide for a singular set of land use management rules

and also allow for more updated and appropriate statutory legislation taking the

current needs into consideration."

Revelas para 70 lees:

"In my view, it was incumbent upon the MEC to recognize that restrictive conditions and zoning scheme regulations serve different purposes. The first is aimed at the preservation of specific ownership rights, and the second is the general regulation of general town planning standards."

Die motivering deur die stadsbeplannner is derhalwe 'n "error of law".

Revelas para 64 lees :

" In the Camps Bay matter the Minister also relied on reports denouncing title deed conditions, which informed his reasoning as in the present case. The remarks of Griesel J therefore find equal application here. The learned judge reasoned that if it were in the interest of the public or the interest of all properties to be subject to zoning restrictions, the legislature would have abolished all restrictive conditions by Statute. Instead, it has laid down a procedure, in the Removal Act (nou Spluma) , whereby such conditions can be removed if it were in the public interest to do so."

Dit is derhalwe nie binne die magte van die MBT om alle of feitlik alle titelvoorwaardes op te hef, behalwe diesulkes wat nie deur die soneringskema gedek word nie

(Die stelling van die stadsbeplanner waarop die MBT in verband met die titelvoorwaarde wat nie deur die soneringskema gedek word nie, gesteun het, was:

"Non-approval

* the Policy documents of the Overstrand do not explicitly make reference to the

prohibition of subdivision;")

Die MBT se besluit, om alle titelvoorwaardes op te hef, bots lynreg met geldende regspraak.

5.2 REGSDWALING NO2 – DAT DIE RESIDENSIëLE KARAKTER VAN ROOIELS NET SO GOED DEUR DIE SONERINGSKEMA BESKERM KAN WORD.

Beide die Revelas- en Navsa- uitsprake het gehandel met eiendome in 'n strandoord, naamlik Summerstrand in Port Elizabeth.

Revelas para 73 lees:

"The zoning scheme regulations do not adequately cover the preservation of essential characteristics of Summerstrand Extention 1. Even though there are several guest houses in the area, the township retained its residential character irrespective of the assertions to the contrary. The zoning scheme regulations do not adequately cover the preservation of essential characteristics of Summerstrand Extention 1."

Die beswaarmakers van Rooiels het dieselfde bekommernisse as Regter Revelas hierbo in hul besware geopper. Die stelling hierbo van die stadbeplanner: "The removal of the conditions will have no impact on the residential character of the area since the development will remain in the residential parameters of the Zoning Scheme." is 'n regsdwaling.

Bogenoemde dek ook sommer enige argument waarom 'n opheffing nie vir erfr 106 geweier kan word nie, omdat die munisipaliteit moontlik reeds presedente geskep het in Rooiels deur toestemmings in stryd met die titelvoorwaardes te verleen.

6. "THE ACTION IS PROCEDURALLY UNFAIR" ("BLANKET REMOVAL") (Sien para 2.1 hierbo)

Die oorsprong van die term blanket removal is, sover ek kon vasstel, soos volg:

6.1 Navsa para 40 lees:

".....Steps have apparently been taken by the Municipality in an attempt to engineer a **blanket removal** of restrictive conditions in the Summerstrand area."

6.2 Revelas para 87 lees ten opsigte van die opheffing van die saaklike serwitute in Summerstrand (sien para 3.1 hierbo), wat vergelykbaar is met die saaklike serwitute in Rooiels (sien para 3.2 hierbo):

".....Counsel for the applicants, is with respect, correct in submitting that the MEC's decision resulted in a total deprivation of property and the extinction of the registered praedial servitudal rights, of the dominant tenements".

Dit is die "blanket removal" waarna in Rooiels se besware verwys is.

6.3 Ek het die volgende stelling in die opleidingstuk (PSD) van die Wes-Kaapse Regering (Provincial Support Document:Restrictive Conditions) wat my beswaar vergesel het, pas uitgeklaar met die outeur daarvan as synde ontleen aan die Revelas-saak, wat op sy beurt gesteun het op die Navsa-appelhofsaak:

6.4 PSD para 2 lees: "There can be no automatic removal of title deed restrictions. ("Blanket Removals")".

By die naslaan van "Blanket" se betekenis word dit beter verklaar as "fullscale, overall, global, total".

Die aansoek vra die volskaalse verwydering van alle titelvoorwaardes.

6.5 Dit is dus nie 'n prosedureel geldige aansoek nie en moet asseblief geweier word.

6.6 Ek kon geen grondslag opspoor vir die alternatiewe betekenis wat die stadsbeplanner aan die woord heg nie, naamlik dat, as al die titelvoorwaarde een-een hanteer word, dit nie 'n totale opheffing van titelvoorwaardes is nie.

7. DIE AKSIE IS ANDERSINS ONKONSTITUSIONEEL OF ONREMATIG ("UNCONSTITUTIONAL OR UNLAWFUL) (Sien para 2.4 hierbo)

7.1 Revelas para 86 lees:

"Section 25(1) of the Constitution provides: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

7.2 Revelas para 87 lees:

"The meaning of 'arbitrary' deprivation of property was determined by the Constitutional Court and held to be when there is insufficient reason for the deprivation or it is procedurally unfair. In Ex Parte Optimal Property Solutions CC it was held that 'property' as meant in section 25(1) of the Constitution includes any right to, or in property, including registered praedial servitudal rights. The total removal of such rights **for insufficient reason** is therefore equal to the arbitrary removal of such rights. Counsel for the applicants, is with respect, correct in submitting that the MEC's decision resulted in a total deprivation of property and "the extinction of the registered praedial servitudal rights, of the dominant tenements".

7.3 Revelas para lees:

"The reasons given by the MEC for the removal of the conditions in question are hardly sufficient in my view, ..., and therefore their removal constitutes an arbitrary deprivation of the registered praedial servitudal (property) rights of the dominant tenements."

7.4 SPLUMA Artikel 47 lees: Restrictive Conditions "Section 47(2) A removal, amendment or suspension of a restrictive condition contemplated in subsection (1) must, in the absence of the contemplated written consent, be effected— (a) in accordance with section 25 of the Constitution and this Act; (b) with due regard to the respective rights of all those affected, and to the public interest; and (c) in the prescribed manner, if such removal, amendment or suspension will deprive any person of property as contemplated in section 25 of the Constitution."

7.5 Ek behandel vervolgens in para 8 of daar in die onderhawige geval "insufficient reason for the deprivation" is, soos bedoel deur Revelas para 87

8. "INSUFFICIENT REASON FOR THE DEPRIVATION" (Sien para 7.5 hierbo)

8.1 Op die datum 28 Maart 2018 toe die MBT die besluit geneem het was die bou van die woonhuis ver gevorder en het dit voltooiing genader.

8.2 In Maart 2018, in antwoord op die besware, en veral na aanleiding van die beswaar van Me Anette van der Merwe dat die huis se bouplanne reeds binne die bestaande titelvoorwaardes

goedgekeur was en dat die huis reeds in Februarie 2017 in aanbou was, met gevolglike geen voldoende rede vir opheffing van al die titelvoorwaardes nie, het die aansoeker soos volg geantwoord in sy reaksie op die besware:

"It should clearly be mentioned that the removal of especially condition F.D (e) alone, the owner will achieve his objective which is to allow him to extend the proposed dwelling house up to the 4m building line. As previously mentioned, the application for the removal of the other conditions was solely made to simplify the title deed for the current and future interpretation and understanding of the title deed. "

Na ontvangs van opheffing van al die titelvoorwaardes is die is die eienaar volgens 'n stelling elders in sy respons slegs voornemens om aanbouings binne die boulyn te doen.

Daar is derhalwe, volgens eie erkenning deur die aansoeker, "insufficient reason" vir die algehele opheffing van titelvoorwaardes.

8.3 Die aansoeker se respons gaan soos volg voort:

"These conditions have no impact whatsoever on the application property and the removal of the applied conditions will have no implication on any other property or the heritage or the history of the town."

Dit is genoeg om daar te stop en om nie die res van die antwoord te kwoteer nie. Die antwoord getuig van 'n aansoek wat lynreg indruis teen die geldende regspraak ten opsigte van saaklike serwitute soos hierbo uiteengesit.

GEGROND OP BOSTAANDE STELLINGS VAN DIE AANSOEKER WAS DIE UITOEFENING VAN DIE BESLUITNEMING SO ONREDELIK ("UNREASONABLE") DAT GEEN REDELIKE PERSOON SO 'N BESLUIT SOU GENEEM HET NIE. DIT IS 'N GROND VIR HERSIENING IN TERME VAN PAJA - SIEN PARA 2.2 HIERBO.

9 ENKELE ANDER KWESSIES WAT DAAROP DUI DAT DIE MBT SY BESLUITNEMING NIE REDELIKERWYS UITGEOEFEN HET NIE (Sien para 2.3 hierbo)

9.1 "URBAN BULLYING" - OPHEFFING VAN BOULYNE PER F.D (e)

Die MBT keur die opheffing van die meer beperkende boulyne in die titelakte goed ten gunste van die minder beperkende boulyne in die soneringskema.

Revelas para 96 lees:

"Equus maintained that no landowners in the area are, as of right, entitled to a sea view. However, the preservation of a sea view of the erven between Seventh and Fourth Avenues must be one of the purposes of the condition that maintains the street frontage building line at 30 Cape Feet. This condition clearly maintains wide avenues which gives the area expansive unhindered views of the sea. The reasoning of Equus and theMEC, taken to its logical conclusion, envisages that only the landowners who have the largest and highest dwellings will have a sea view. The photographs of the house built by Equus reveals a disproportionately large structure, covering almost the entire

area on which it is built which will ensure it a sea view. This seems to be a form of **urban bullying**, in my view."

In die onderhawige geval word ook 'n baie groot huis op die seefront gebou. Die handhawing van die meer beperkende boulyne per die titelvoorwaardes is essensieel vir die handhawing van die bestaande karakter van Rooiels en die genieting van ander inwoners van 'n see-uitsig.

Ek versoek asseblief dat hierdie opheffing van die boulyn per die titelakte spesifiek afgewys word.

9.2 Deel F.D (g) (e) – "no building (excluding outbuildings) shall be erected on this erf for a superficial area of less than 99 square meters" Tikfout: Moes lees 93 square meters.

Die kommentaar van die stadsbeplanner is soos volg: "**The** condition was to ensure that the character of the area maintain a certain standard in terms of buildings to be erected, thus to ensure that inhabitants have certain financial means to build and reside in the area. This condition is contrary to the Constitution ensuring that all people have access to property in the town."

9.2.1 Die aanhef van die Housing Act no 107 van 1997 lees: "To provide for the facilitation of a sustainable housing development process; for this purpose to lay down general principles applicable to housing development in all spheres of government,…."

SANS10400- C gaan dan voort om minimum groottes vir huise voor te skryf. **As dit nie ongrondwetlik is nie, waarom sou Rooiels se minimum grootte van 93 vierkante meter dan ongrondwetlik wees?**

9.2.3 Dit is interessant dat die Royal Institute of Building Architects in 'n werkstuk getiteld "Space Standards for Homes", gedateer Desember 2015, daarop wys dat die gemiddelde grootte van nuutgeboude huise in die Verenigde Koninkryk in 2011 gekrimp het tot 8 vierkante meter !

Dit is om hierdie rede dat minimum grootte-standaarde tans in die VK ingestel word om "sustainable housing",net soos deur Suid-Afrika se Housing Ac,t te bewerkstellig.

Dit is eweneens opvallend dat die minimum aanbevole grootte vir 'n huis van drie slaapkamers met 5 inwoners deur die Instituut voorgestel word op 93 vierkante meter, soos in Rooiels.

Die stadsbeplanner is korrek na my mening dat Rooiels se minimum grootte daarop gemik is om 'n sekere minimum standaard te verseker. Dit is egter niks groter as die voorstel vir die VK nie.

Die 93vk m vereiste word skynbaar elders in die wêreld ook gebruik, maar dit het niks te doen met "financial means" soos wat die stadsbeplanner beweer nie.

Ek kon geen gesag vind vir die stadsbeplanner se mening dat die minimum grootte van 93vk meter ongrondwetlik is nie.

9.3 Deel F.D(c) : "Not more than one building,……., together with such outbuildings as are ordinarily required to be used therewith, shall be erected thereon."

Die afskaffing van die titelvoorwaarde sal meebring dat 'n tweede wooneenheid op 'n erf aangebring kan word.

In die sake hierbo was die kwessie van 'n tweede wooneenheid ter sake.
Die howe het die saaklike reg van die ander erfeienaars, dat net een woonheid gebou mag word, gehandhaaf ooreenkomstig die algemeen geldende beginsel dat titelvoorwaarde nie vervang kan word met die soneringskema nie, omdat die doelstellings van die soneringskema en die titelvoorwaardes verskillend is en ook omdat hulle nie dieselfde beskerming verleen nie .

9.4 Deel F.D (g) – "no wood and iron buildings of any description shall be erected on this erf nor shall corrugated iron be used for roofing purposes; "

Die verbod op hout-en-ystergeboue het 'n lang geskiedenis. In die sewentigerjare is 'n advokaatsopinie verkry deur die destydse afdelingsraad. Die opinie was dat dit 'n verbod was op huise wat van hout gebou was, met 'n sinkplaatbedekking, en dat dit nie die gebruik van moderne materiaal, soos houtgeboue en bedekkings wat deur die SA Buro vir Standaarde destyds nog goedgekeur is, verhinder nie.

Die verbod mag in hedendaagse tye weer relevant word, indien daar grondbesetting sou plaasvind en die eienaar strukture van letterlik hout-en-sink as huise sou toelaat, soos wat gewoonlik met grondbesettings opgerig word.

9.5 OPHEFFING VAN DIE "PERMANENTE" TITELVOORWAARDES (Sien para 2.4)

9.5.1 Die agenda vir die MBT-vergadering van 28 Maart het soos volg gelees:

"The owner intends to develop the property by erecting a dwelling house and subsequently wishes to first remove all potential restrictive, non-applicable and irrelevant conditions, which could potentially restrict the future development of the erf. The applicant requests the removal of the conditions based on the following:
- The conditions are no longer applicable;
- Potentially restrictive;
- Parties mentioned no longer exist;
- The conditions are out-dated, and
- Regulated by other legislation and serves no purpose."

9.5.2 Die stadsbeplanner stem saam (ten opsigte van die "permanente voorwaardes"):

"The Title Deed reflects the era in which the town was established. Since the original establishment of the town, the environment and needs of the area and its inhabitants has changed and the forward planning documents do take the character of the area into consideration, but still has to take due cognisance of change."

9.5.3 **Die eenstemmigheid van die stadbeplanner is uit lyn uit met die regspraak en is derhalwe onregmatig ("unlawful" :**

Revelas para 62 lees:

"In Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration Western Cape, and Others Griesel J had the following to say about branding title deed conditions **as relics 'of the past'** and abolishing them in favour of the applicable zoning scheme:

'However, this is not the philosophy of the [Removal] Act and it was inappropriate and irregular for the Minister to have allowed himself to be swayed by this consideration. In my view the Ministers' approach in this regard is fundamentally unsound'.

Ek kan byvoeg dat dit ook nie die filosofie van die huidige wetgewing is nie.

Revelas para 64 lees:

"In the Camps Bay matter the Minister also relied on reports denouncing title deed conditions, which informed his reasoning as in the present case. The remarks of Griesel J therefore find equal application here. The learned judge reasoned that if it were in the interest of the public or the interest of all properties to be subject to zoning restrictions, **the legislature would have abolished all restrictive conditions by Statute**. Instead, it has laid down a procedure, in the Removal Act, whereby such conditions can be removed if it were in the public interest to do so."

Revelas para 72 haal vir Regter Griesel soos volg aan:

".....2. **The fact that the removal may not be undesirable does not in logic mean that such a removal is as a fact desirable.** The test laid down by section 2(1) is a positive one, not a negative one. In other words, the test is the presence of a positive advantage which will be served by granting the application, not the absence of a negative advantage".

Ek kan byvoeg dat die huidige wetgewing, art 35(4) van die Overstrand by-Law on Municipal Land Use Planning en Spluma ook positiewe voordeel vereis, nie blote aanvaarding dat afskaffing van voorwaardes nie onwenslik is nie.

10. DIE AKSIE IS OP ARBITRêRE ("ARBITRARILY OR CAPRICIOUSLY") WYSE UITGEVOER (Sien para 2.5 hierbo)

10.1 DIE SKEP VAN 'N PRESEDENT

Die meeste van die Rooiels beswaarmakers het hul besorgdheid uitgespreek dat die opheffing van die titelvoorwaardes op erf 106 'n presedent sal skep omdat die MBT nie 'n soortgelyke ander versoek vir 'n erfeienaar in Rooiels sal kan weier nie.

Die dorpsbeplanner se antwoord hierop is: "Any person has a right to lodge an application to remove restrictive conditions."

Dit is geen antwoord nie. Natuurlik kan enigiemand aansoek doen, maar sal die MBT dan nie verplig wees om die aansoek goed te keur weens die presedent wat dit geskep het nie (veral ten opsigte van onderhawige eiendom waarop die huis reeds in terme van die bestaande titelvoorwaardes gebou is)?.

10.2 Bostaande antwoord is illustrerend van die "arbitrary or capricious " wyse waarop die dorpsbeplanner die indruk skep dat al die besware behoorlik oorweeg is.

In werklikheid word, in 'n poging om 'n "blanket removal" te "engineer" soos die appélhof daarna verwys het:

- Die besware van die tafel gevee;

- Die hofuitsprake, wat direk op die onderhawige geval van toepassing is en waarop Raymond McCreath Ing namens Me H Claassens wys, geïgnoreer. (Sien asseblief ook my para 3 hierbo).

11. TEN SLOTTE

Ek kan my besorgdheid nie beter formuleer as die Camps Bay Ratepayers and Residents Association in hul oorpronklike beswaar aan die Kaapstadse Munisipaliteit nie:

"Should the authorities approve this application (vir gastehuis en verwydering van titelvoorwaardes), it will be setting a very dangerous precedent that will be eagerly copied by other developers, thus causing untold damage to this extremely beautiful suburb, which really needs protection from such abuses. It is the Province, City and CBRRA's duty to protect the built environment from being damaged in such a manner, particularly when in contravention of the law and praedial rights".

Die Camps Bay Ratepayers was suksesvol in hul hofaansoek.

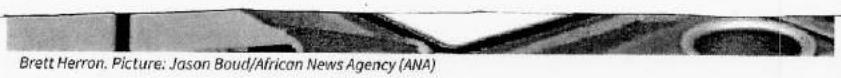
Die uwe,

E BRINK

AANHANGSEL 1

Court rules against City

By SINAZO MKOKO June 21, 2018



Brett Herron. Picture: Jason Boud/African News Agency (ANA)

The Western Cape High Court has ruled in favour of the application by the Camps Bay and Clifton Ratepayers' Association (CBCRA) to have reviewed and set aside, a decision by the City to remove title deed restrictions applicable to 96 Camps Bay Drive and approve plans for a block of four apartments.

In his report, delivered at a public meeting of the CBCRA on May 7, chairperson Chris Willemse, explained that the erf was zoned GR2, which allowed for multiple dwellings and taller buildings. The title deed restrictions, however, did not allow for this type of development.

Mr Willemse explained that in 2015 existing legislation had changed, with the enactment of the Spatial and Land Use Management Act (SPLUMA) at national level, Land Use Planning Act (LUPA) at provincial level and the Municipal Planning By-Law (MPB) at local level.

The Removal of Restrictions Act was repealed and planning decisions at local level devolved upon a Municipal Planning Tribunal (MPT). Mr Willemse accused the City, its planners and those in private practice, of exploiting the situation by entertaining applications that removed all relevant title deed restrictions from the deed, allowing single dwellings to be converted into multiple units.

The argument from the City and the MPT was that all case law protecting property rights fell away with the new laws and that they had total discretionary powers in deciding such matters. CBCRA disagreed.

Mr Willemse said the MPT had rejected all the objections from the CBCRA and surrounding neighbours, and approved the development. The CBCRA then lodged an appeal with Mayor Patricia de Lille, but she dismissed their appeal in July last year.

"By this stage, inexplicably, the developer was already busy with construction on site," said Mr Willemse.

It was then that the CBCRA filed an application before the Western Cape High Court to review and set aside the MPT's decision, the City's dismissal of the appeal and the planning approval,

on November 18 last year. This initial application by the CBCRA for an urgent interdict was set down for November 22, but was postponed at the request of the developer.

The matter was heard by the High Court on Monday June 18, with Judge Siraj Desai ruling in CBCRA's favour.

Mr Willemse said the City had submitted to the court that the CBCRA should pay the City's costs, on the basis that the CBCRA had insisted that the matter be heard rather than being settled, but the counsel for the City could not explain why it had failed to file its notice to abide by the decision of the court until late April 2018.

The City was ordered to pay CBCRA's costs incurred in bringing the application and the developer, Schaefer Partnership, was ordered to pay its own costs.

"In our opinion, this is damning of the conduct of the City, as, usually, costs are borne jointly and severally by all parties on the losing side. It has been established by the court that the City is entirely responsible for the whole mess. Will they hold anyone accountable or will they simply continue with business as usual?" asked Mr Willemse.

The City's mayoral committee member for transport and urban development, Brett Herron said: "All parties involved in this matter agreed that this decision should be set aside and the City notes the order relating to costs."

The director of the Schaefer Partnership, Friedrich Schaefer, declined to comment on the matter.

SINAZO MKOKO

Loretta Gillion - Beswaar Gedeelte 47 van Plaas 559 Hangklip

From:	Eldie Brink <eldie.brink@gmail.com>
To:	<loretta@overstrand.gov.za>
Date:	13 September 2018 11:29 PM
Subject:	Beswaar Gedeelte 47 van Plaas 559 Hangklip
Attachments:	Gedeelte 47 van Plaas 559 Hangklip P1 van 2.jpg; Gedeelte 47 van Plaas 559 Hangklip P2 van 2.jpg; Erf 106 Appel se motivering.docx; Camps Bay article in Atlantic Sun P1 of 2.jpg; Camps Bay article in Atlantic Sun P2 0f 2.jpg

Ek heg hiermee by beswaar aan vir u oorweging asseblief.

Loriaan Isaacs - Objection

From: Loriaan Isaacs
To: eldie.brink@gmail.com
Date: 14 September 2018 08:41 AM
Subject: Objection

Dear Sir / Madam

We hereby acknowledge receipt of your mail.
Formal communication will follow in due course.

Regards

Loriaan Isaacs
Senior Clerk: Town & Spatial Planning
Overstrand Municipality
A: 16 Paterson Street, Hermanus, 7200 **P:** P O Box 20
T: 028 313 8900 | **F:** 028 313 2093 | **E:** loriaanisaacs@overstrand.gov.za

TP-A Theart
(Hvld Stoep)

PROPOSED REMOVAL OF RESTRICTIVE TITLE DEED CONDITIONS
PORTION 47 OF THE FARM HANGKLIP NO. 559
DIVISION: CALEDON OVERSTRAND MUNICIPALITY

I wish to lodge the following objections to this application:

Mr de Jager, the owner of said property, states that he only wishes to exercise the right to the primary use of the property. That is: "conservation use, dwelling house, guest rooms, home occupation". If this is his true intention, then all the restrictive conditions he wishes to have removed, except for (D) (b) and (D) (d), do not impact on his wish to exercise this right.

It would seem that the applicant is attempting to smooth the road to further development into the future. Given that this property lies within a declared Critical Biodiversity Area, any development more than the primary right, would be unacceptable. The planning department would be well advised to consult the conditions attached to the CBA zoning. The owner has already proven his lack of sensitivity to current legislation and illegally constructed a road right through the wetland, potentially blocking or causing disruption to the flow of water through the valley which would have negative environmental impacts.

I also understand that this owner initially wished to construct a "bush pub" on the property and that this application was turned down.

The proximity of the property to the core zone of the Kogelberg Biosphere Reserve is another reason it may not be developed into anything more than the primary use. For example, camping and open fires (D) (i) surely cannot be encouraged?

We appeal to the Municipal Planning Department to take a look at the greater picture and recognise the fact that these close-to-pristine areas abutting the core zone of the KBR are essential in protecting the integrity of the Reserve – a responsibility which is legally binding.

I thank you for the opportunity to lodge this objection.

A. Scholtz
222 Harveya Rd, Rooiels
anutascholtz@gmail.com

FILE NO: Ptn 47 | 559
Hangklip
SCAN NO:
Farm 559
COLLABORATOR NO:
120987

Alida Conradie - Re: PROPOSED REMOVAL OF RESTRICTIVE TITLE DEED CONDITIONS

From: Alida Conradie
To: Anuta Scholtz
Date: 2018/09/14 09:04 AM
Subject: Re: PROPOSED REMOVAL OF RESTRICTIVE TITLE DEED CONDITIONS

Good day,

Receipt is hereby acknowledged of your letter of objection.

Best Regards

Alida Conradie
Administrator, Town & Spatial Planning Department
Overstrand Municipality
A: 16 Paterson Street, Hermanus, 7200 **P**: P O Box 20
T: 028 313 8900 | **F**: 028 313 2093 | **E**: alida@overstrand.gov.za

>>> "Anuta Scholtz" <anutascholtz@gmail.com> 2018/09/13 03:17 PM >>>
To whom it may concern.

Please confirm receipt of my objection to proposed removal of title deed conditions.

Thank you.

Michael W Harrison, PO Box 82, Betty's Bay, 7141

OVERSTRAND MUNISIPALITEIT
14 SEP 2018
OVERSTRAND MUNICIPALITY

The Municipal Manager
Overstrand Municipality
16 Paterson Street
Hermanus
7200

TP-A Theart (Hvld Stoep)

14 September 2018

FILE NO: Ptn 47,559 Hangklip
SCAN NO: HARRISON
COLLABORATOR NO: 1209337

Email: loretta@overstrand.gov.za

NOTICE 103/2018: PORTION 47 OF THE FARM HANGKLIP NO 559 OBJECTION TO THE "BLANKET" REMOVAL OF RESTRICTIVE TITLE DEED RESTRICTIONS

I am the owner of a nearby smallholding (portion 137 of the farm Hangklip 559). I have resided here for more than 28 years and know the area well.

I object to the application for removal of title deed conditions pertaining to Portion 47 of the Farm Hangklip 559 and request that the application be turned down on the following grounds:

1) Historical Value of Title Deed Conditions

Many of the title deed conditions included in this application are completely innocuous, but serve as a reflection of the history and development this area. As such they are of historical importance and very much part of the heritage and character of the area. The applicant has advanced NO compelling practical reasons whatsoever for the removal of these title deed conditions which provide an important historical and cultural frame of reference.

2) Association with Slavery

It is patently untrue that the "*property has no association with the history of slavery*". This smallholding and other adjoining smallholdings have all played a prominent role in the history of slavery as this whole area was once a refuge for runaway slaves and as such forms an important part of our history. These facts have been well documented in various historical and other publications,

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see for example the references to "Drostersgat", Rooiels cave, the Rooiels River Kloof and the numerous battles that occurred in this immediate area, including the Battle of Rooiels in 1805.

The Applicant has obviously not commisioned any expert archeological and heritage studies on the property .

The Applicant needs to be prosecuted in terms of SPLUMA for making a false declaration in this application. Please advise before 31 October 2018 in writing whether or not Overstrand Municipality will be laying such charges, failing which I will refer this matter to the Public Protector and Auditor General.

3) Non disclosure of vital information to Interested and Affected Parties

Title deed conditions are not a fashion items which become "*outdated*" as stated in the Application.

Title deed conditions are always removed for a reason. It is inconceivable that an Applicant will pay a town planning consultant in the region of R10,000 to R50,000 simply to bring an application for the removal of so-called "*outdated*" provisions without some very real benefit accruing to the Applicant.

The Applicant fails to disclose what it (a company) intends to do with the property once the limiting title deed conditions have been removed. This is not transparent and renders the process flawed and illegal. Interested and affected parties are prejudiced as insufficient information is given to enable them to decide whether or not the application is desirable and in the public interest. This is clearly not what was intended by SPLUMA.

Overstrand Municipality's town planning department should never have allowed this vague and incomplete application which does not comply with SPLUMA to be advertised. The relevant town planning officials need to be investigated and disciplined for unprofessional conduct and dereliction of duty.

4) The Application can clearly not be "in the public interest" as no substantive case is made for this. It is not even suggested by the Applicant that it is in the public interest. How will the public benefit?

5) Lack of disclosure of possible environmental impacts

The property is situated **IN** the UNESCO Kogelberg Biosphere Reserve, in the vitally important Buffer Zone, immediately bordering on the Core. The Buffer Zone is **AS** important a part of the Reserve as the Core, the only difference being that the Buffer is privately owned. In the light of the international

significance of this particular property (on which a wetland is situated) which adjoins the Core, the glaring non-disclosure of the Applicant company's development aims with this application is shocking!

6) Disparity, Unjust and Anomaly

Most of these title deed conditions are common to the conditions in my title deed as well as that of the other smallholdings which used to be part of the Farm Hangklip. To allow the removal of these from just a *single* property in isolation is unjust. It would result in an anomalous situation with regard to the rest of the community. In any community the individual must conform to the conditions pertaining to that community and not *vice versa*.

7) Lack of proper advertisement

I received no notification of the Application as a fellow owner of the farm Hangklip 559. I could also not see any notice at the entrance to the property as required by law. The application must be withdrawn and re-advertised.

8) An application for "blanket" removal of title deed conditions is highly irregular and unlawful in terms of the enabling legislation and directives.

In the light of the above, I trust that the application will be turned down.

Yours faithfully

Michael W Harrison

26/37

TP-A Theart
(Hvld Stoep)

OVERSTRAND MUNISIPALITEIT
14 SEP 2018
OVERSTRAND MUNICIPALITY

• FRIENDS OF ROOIELS

FriendsofRooiels@gmail.com

14 September 2018

Municipal Manager

Overstrand Municipality

HERMANUS

7200

EMAIL TO: loretta@overstrand.gov.za

MUNISIPALITEIT OVERSTRAND
TP 14 SEP 2018
TOWN PLANNING
U MASOPALA U MUNICIPALITY

FILE NO: Pth 47/559
Hangklip
SCAN NO:
ESTERHUYSE
COLLABORATOR NO:
1209349

MN 103/2018 OBJECTION TO APPLICATION FOR REMOVAL OF TITLE DEED CONDITIONS PERTAINING TO PORTION 47 OF THE FARM HANGKLIP 559

Friends of Rooiels is a non profit community based organisation established during March 2018 in terms of our constitution. We object to the above application on the following grounds:

1. There is no motivation by the Applicant for the removal of the title deed restrictions as being in the Public Interest as is required by law

The courts have been clear; the reason for the insertion of title deed restrictions should always be taken into account when considering an application.

The reason why reciprocal title deed conditions were imposed was to create and protect a certain sense of place and character in respect of all the smallholdings.

Any *ad hoc* removal of title deed conditions would create precedents, imbalances and injustices. Such removal will certainly not be to the public benefit and nor in the public interest.

Section 47 of the Spatial Planning and Land Use Management Act (SPLUMA), specifically stipulates that due regard must be given the public interest as opposed to merely the owner's interest. As a community organisation, Friends of Rooiels, places on record that it is not in the public interest to remove these title deed conditions.

2. No integrated development, no spatial justice, no upholding consistent land use measures

It is clear that this is an *ad hoc* application which is not in keeping with the principles of "integrated development", "spatial justice" and "upholding consistency of land use

measures in accordance with environmental management instruments" – all of which is legally required by SPLUMA and binding on the planning tribunal.

3. Blanket removals are unlawful and irregular.

4. The Application is irregular and flawed as no substantive details are given regarding the proposed development of the property.

This is manifestly unfair to prospective objectors and concerned citizens who can now only speculate as to the nature and extent of the development envisaged by the applicant.

5. This specific area has been associated with runaway slaves who used to live along the Rooiels river valley. The contention in the Application that the property has not in any way been associated with slavery, is wrong.

In summary, this application is highly irregular and should not be entertained by the Planning Tribunal.

Please keep us advised.

On behalf of the Friends of Rooiels

D Esterhuyse

Loretta Gillion - FOR Objection MN 103 of 2018 Portion 47 of farm Hangklip 559

From: Friends of Rooiels <friendsofrooiels@gmail.com>
To: <loretta@overstrand.gov.za>
Date: 14 September 2018 09:07 AM
Subject: FOR Objection MN 103 of 2018 Portion 47 of farm Hangklip 559
Attachments: Portion 47 FOR.docx

Please confirm receipt of our objection to this application.

Thank you.

Loriaan Isaacs - MN 103/2018 OBJECTION TO REMOVAL OF TITLE DEED CONDITIONS PORTION 47 FARM 559

From: Loriaan Isaacs
To: Friends of Rooiels
Date: 14 September 2018 10:18 AM
Subject: MN 103/2018 OBJECTION TO REMOVAL OF TITLE DEED CONDITIONS PORTION 47 FARM 559

Dear Sir / Madam

We hereby acknowledge receipt of your mail.
Formal communication will follow in due course.

Regards

Loriaan Isaacs
Senior Clerk: Town & Spatial Planning
Overstrand Municipality
A: 16 Paterson Street, Hermanus, 7200 **P**: P O Box 20
T: 028 313 8900 | **F**: 028 313 2093 | **E**: loriaanisaacs@overstrand.gov.za

OVERSTRAND MUNISIPALITEIT
14 SEP 2018
OVERSTRAND MUNICIPALITY

TRA Theart
(Hoofstroop)

FHL RAYMOND
ERF 282, ROOI ELS
Frankraymond35@gmail.com

Our Ref: Municipal Notice 20/2018

14 September 2018

Municipal Manager Overstrand Municipality

BY E-MAIL: loretta@overstrand.gov.za

RE: MUNICIPAL NOTICE NO 103/2018
REMOVAL OF TITLEDEED CONDITIONS PORTION 47 OF THE FARM HANGKLIP 559 HANGKLIP SMALLHOLDINGS

Please take notice that the writer objects to this Application to remove all the Title Deed conditions in the property portion 47 of the Farm Hangklip 559.

The writer is a resident at erf 282 Rooiels, a close adjacent property to portion 47 of the Farm Hangklip 559.

a. **Publication of Section 39, 43 and 44 of the Western Cape Land Use Planning Act 2014.**

No notice was annexed to the front gate of the property as legally required.

b. **Removal of title deed restrictions**

I am concerned about the hap hazard and AD Hoc way the removals of title deed restrictions are being dealt with by your Municipality. It appears that your planning tribunal do not have any regard for care law and regard for care law and legal principals.

I again refer to the Appeal Court Case of:

WE Van Rensburg and others v P Naidoo and other 26/05/10.

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FILE NO: Ptn 47/559 Hangklip
SCAN NO: 06
COLLABORATOR NO: 1209446

Title deed restrictions can only be removed if it can be proved that it is in the public interest. The Applicant does not even refer to the concept of "public interests" and as such the Application must be dismissed.

I wish to address the tribunal in this matter and trust you find this in order.

Yours faithfully

FRANK RAYMOND

Loretta Gillion - MUNICIPAL NOTICE PORTION 47

From: "Lenay Aysen" <admin@raymcc.co.za>
To: "loretta@overstrand.gov.za" <loretta@overstrand.gov.za>
Date: 14 September 2018 02:25 PM
Subject: MUNICIPAL NOTICE PORTION 47
Attachments: portion 47.pdf

LENAY AYSEN
LEGAL SECRETARY
RAYMOND McCREATH INC.
UNIT 304, CROSSFIRE PLACE
GARDNER WILLIAMS AVENUE
PAARDE VLEI
SOMERSET WEST
Tel.: (021) 852 7660
Fax.: (021) 852 7661

Loriaan Isaacs - MUNICIPAL NOTICE PORTION 47

From: Loriaan Isaacs
To: admin@raymcc.co.za
Date: 14 September 2018 03:03 PM
Subject: MUNICIPAL NOTICE PORTION 47

Dear Sir / Madam

We hereby acknowledge receipt of both emails.
Formal communication will follow in due course.

Regards

Loriaan Isaacs
Senior Clerk: Town & Spatial Planning
Overstrand Municipality
A: 16 Paterson Street, Hermanus, 7200 **P:** P O Box 20
T: 028 313 8900 | **F:** 028 313 2093 | **E:** loriaanisaacs@overstrand.gov.za

RAYMOND McCREATH INC. ING.
ATTORNEYS, CONVEYANCERS & ADMINISTRATORS OF ESTATES
PROKUREURS, AKTEBESORGERS & BOEDELBEREDDERAARS

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Franklyn Heinrich Lincoln Raymond BA LL.B LL.M (Stell)
Robert William McCreath BA LL.B LL.M (Stell) (International Accredited Mediator)
Accredited Arbitrators of the Arbitration Forum of South Africa
Associate: Caryn Bergstedt B. Com Law & LLB (UWC)

REG. NO. 2000/031645/21 | VAT REGISTRATION NUMBER: 4240211740

TP-A Theart
(CH vd Stoep)

Your Ref: 103/2018

OVERSTRAND MUNISIPALITEIT
14 SEP 2018
OVERSTRAND MUNICIPALITY

Our Ref: H Claassens
14 September 2018

Overstrand Municipality
Hermanus

By Fax 0283132093
Email: loretta@overstrand.gov.za

Municipal Notice 103/2018

Dear Sir or Madam

OBJECTION TO THE APPLICATION TO REMOVE EVERY TITLE DEED RESTRICTION RELATING TO ERF PORTION 47 OF THE FARM HANGKLIP 559

We have been instructed by our client, Ms H Claassens, the owner of erf 179 Rooiels to lodge a formal objection to the above application on her behalf.

We are instructed as follows:

Locus standi

1. Our client is a long standing resident of Rooiels and the registered owner of erf 179 Rooiels.

2. The owner of erf portion 47 has applied to have every title deed restriction removed because it wishes to develop the property.

3. Nowhere in the said application does the applicant state how it intends to develop the property, what the scale and nature of the development is, when the development is to take place and what its reasons/motivations for the development are.

4. The applicant does not even aver that the Application is in the public intrest.

SPATIAL PLANNING AND LAND USE MANAGEMENT ACT, 2013 (SPLUMA)

5. All applications for the removal of title deed restrictions must be in accordance with SPLUMA.

6. The relevant principles underpinning SPLUMA are , *inter alia*:

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FILE NO: Ptn 47/559 Hangklip
SCAN NO: 10
COLLABORATOR NO: 20945

6.1 inclusive development (preamble)

6.2 sustainable development (preamble)

6.3 integration of social, economic and environmental considerations (preamble)

6.4 integrated development plans (section 5)

6.5 spatial justice (section 7)

6.6 upholding consistency of land use measures in accordance with environmental management instruments (section 7)

6.7 integrated approach to land use and land development (section 7)

7. In terms of Section 47 of SPLUMA any removal, amendment or suspension of a restrictive condition must have due regard to the respective rights of all those affected and to the **public interest.**

"PUBLIC INTEREST"

8. Judge Griesel in the Camps Bay Ratepayers case, laid down the test for "public interest" as follows:
"... the personal interest of the applicant for removal is irrelevant. The interest which must be served by the removal are the broader interests of the township, area or public. ...The fact that the removal may not be undesirable does not in logic mean that such a removal is as a fact desirable."

The test is the presence of a positive advantage to the community which will be served by granting the application, not the absence of a negative.

{See Camps Bay Ratepayers and Residents' Association and Other v Minister of Planning, Culture and Administration Western Cape 2001(4)294 (C) }

9. Judge Griesel had the following to say about branding title deed conditions as "relics of the past" and abolishing them in favour of the applicable zoning scheme:

"However, this is not the philosophy of the Removal Act and it was inappropriate and irregular for the Minister to have allowed himself to be swayed by this consideration."

{See324 E to G of the Camps Bay Ratepayers case]
The same principle still applies under SPLUMA.

10. This principle was also followed in Walele v City of Cape Town and others 2008 (6) SA 129 (C)

11. A matter concerning very similar title deed conditions to those pertaining to portion 47, was decided by the Eastern Cape courts in Van Rensburg N.O. and another v MEC for Housing, Local Government and Traditional Affairs (Case no 3399/2010).

Judge Revelas found that the insertion of restrictive conditions into the title deed could be for no other reason than to preserve the amenities of the other erven as low-density, single residential properties with sea views and to maintain this character of the township. This matter was confirmed by the Appeal Court.

APPLICATION IS IRREGULAR AND FATALLY FLAWED

12. The application simply ignores the fundamental principles of integrated development. (See principles of SPLUMA).

13. The applicant makes no case for its application. (See paragraph 9 re public interest above).

14. The application totally ignores the principle of public interest as well as the reasons why these title deed conditions were imposed in the first place on all the Small holders of the Farm 559.

15. The application does not set out what the consequences of removal of the title deed conditions will be.

16. Any approval given by a tribunal on a procedurally and/or substantively flawed application before a tribunal will likewise be contaminated and irregular.

NATIONAL ENVIRONMENTAL MANAGEMENT ACT

17. The property in respect of which the application is brought is situated on in the buffer zone of the Kogelberg Biosphere.

18. The property is situated in a Biodiversity hotspot and is protected in terms of an international treaty.

19. No further development should take place on portion 47 before an Environmental Impact Assessment has been positively concluded.

RECORDAL

20. Our client objects to the removal and/or amendment and/or suspension of any of the title deed restrictions applicable to portion 47.

21.All our client's rights are reserved; including the right to fair hearing before the Planning Tribunal, the right of appeal and/or review of any decision.

Kindly acknowledge receipt of this letter and keep our offices advised of any developments in this matter.

Yours faithfully

RW McCREATH

Loretta Gillion - PORTION 47 OF THE FARM HANGKLIP 559

From: "Lenay Aysen" <admin@raymcc.co.za>
To: "loretta@overstrand.gov.za" <loretta@overstrand.gov.za>
Date: 14 September 2018 02:28 PM
Subject: PORTION 47 OF THE FARM HANGKLIP 559
Attachments: PORTION 47...pdf

ANNEXURE E 1/3

Plan Active Town & Regional Planners
Stads-en Streeksbeplanners

6 Magnolia St / Str
PO Box / Posbus 296
HERMANUS
7200
Tel: (028) 313 1673
Fax / Faks: (028) 312 1351
Email: planactive@hermanus.co.za
Website: www.planactive.co.za

OVERSTRAND MUNISIPALITEIT / OVERSTRAND MUNICIPALITY
09 OCT 2018

Our reference: PA18021

THE MUNICIPAL MANAGER
OVERSTRAND MUNICIPALITY
HERMANUS
7200

For attention: Mrs. H. van der Stoep

TR-A Theart (C H vd Stoep)

FILE NO: Pln 47/559 Hangklip
SCAN NO: FARM 559
COLLABORATOR NO: 1219370

Sir,

COMMENTS ON OBJECTIONS: PORTION 47 OF THE FARM HANGKLIP NO.559: PROPOSED REMOVAL OF RESTRICTIVE TITLE DEED CONDITIONS

The letter from the Overstrand Municipality dated 18 September 2018 with the objections from 7 objectors and a letter of support from the Pringle Bay Ratepayers Association refers. Our comments on the objections can be summarised as follow:

- We take cognisance of the fact that the small holding is within an area of natural beauty located on the border of the Kogelberg Biosphere Reserve consisting of natural vegetation and non-perennial rivers. No wetlands are mapped on this specific farm portion.

  It is proposed with this application that the Title Deed restrictions be removed that are more restrictive than the primary land use rights in terms of the property's zoning that is Conservation Usage (R2). No development of the property has been proposed with this application.

  Should the owner wish to develop the property within its primary land use rights that could possibly trigger any listed activities in terms of the National Environmental Management Act, he will have to go through the required application processes that will ensure that the environment enjoys preference. The same would apply if the owner wish to apply for any of the consent uses listed in the Overstrand Municipality Zoning Scheme under the last mentioned zoning.

- It is our opinion that each application should be dealt with on its own merit. It is becoming more and more cumbersome to develop and use small holdings and erven in the area of Hangklip, Rooi Els, Pringle Bay and Betty's Bay due to these restrictive Title Deed conditions that were imposed that are outdated and that have a negative impact on the owners of erven / farm portions in the area. There are many examples of owners transgressing these

restrictions knowingly and unknowingly. For example, many houses have been constructed making use of a wooden structure, metal roofs, have outside braai areas etc. These houses are of high quality, corrugated iron roofs have made a comeback and are available in many pre pigmented colours that are not allowed to be used. We come from a culture that enjoy the outdoors and having a braai. According to the Title Deeds the lighting of open fires are prohibited. It should also be noted that the Title Deeds also stipulate that the small holdings shall be used for agricultural purposes that if applied would have great impact on the natural state of the small holdings in questions.

These restrictive Title Deed conditions were imposed in order to govern the use of the small holdings. In the past people erected wood and iron structures that were used as temporary holiday accommodation and were unsightly. This was the reason why the restrictions have been imposed. Now we have a Municipality governing land uses by means of the Overstrand Municipal Zoning Scheme in the municipal area, National Building Regulations, the National Environmental Management Act etc. As mentioned in our motivation report, the restrictions are outdated. The Overstrand Municipality with its Bylaws and the Department of Environmental Affairs and Development Planning are well equipped to manage the land uses of the subject farm portion and surrounding farms.

The restrictions in terms of the Title Deed in general will prohibit the following common land uses associated with dwellings:

- May not construct a high quality timber frame home or make use of corrugated iron roof sheets, even if it has been colour treated;
- Should you be a professional person you may not run your business from home as being provided for as a primary right (home occupation) or have a small sign outside the dwelling;
- You may not have an open fire outside to have a braai;
- The property shall only be used for agricultural purposes. The current zoning is more restrictive regarding this land use that is beneficial to the area;
- You may only erect a dwelling which in essence prohibits you from even operating a home based business from you house if you are a professional person.
- You may not have guestrooms (2) that was made part of the primary rights in terms of the property's current zoning.

- It should be noted that the application for the removal of restrictive Title Deed conditions will only make provision for the owner to exploit the current primary land use rights that are conservation use (more restrictive than agriculture), dwelling house, guest rooms (2) and home occupation. These uses are all compatible with the surrounding land uses of which some owners have been making use of knowingly & unknowingly that contradict the restrictions imposed in their Title Deeds as we have mentioned earlier.

  We are therefore of the opinion that our motivation is sufficient and in line with Town Planning Legislation and provides good reasons for the removal of the restrictions that can be supported.

- A notice was erected at the entrance of the farm portion facing the R44. We have provided the municipality with proof of the notice. The notice was displayed until 27 September 2018 (13 days longer than required)

We trust that you would find our comments on the objections in order and trust that the application will be dealt with favourably.

Yours faithfully

John Mc Lachlan

ANNEXURE F

Loretta Gillion - Title Deed Restrictions Portion 47 of Farm Hangklip No 559 Pringle Bay

From: Dave Muirhead <dmuirhead@telkomsa.net>
To: <loretta@overstrand.gov.za>
Date: 14 September 2018 09:56 AM
Subject: Title Deed Restrictions Portion 47 of Farm Hangklip No 559 Pringle Bay
Cc: Zirkia Fourie <zirkiafourie@gmail.com>, Ilse Meyer <ilsemeyer0211@gmail....

Attention Ms H van der Stoep

The Pringle Bay Ratepayers Association hereby acknowledge receipt of the application dated 8 August for removal of specific title deed restrictions on Portion 47 of Hangklip Farm 559 situated in the district of Pringle Bay.

We have examined the application. Provided there is no deviation from what is stated in the Motivation Report provided by Plan Active Town Planners we have no objection to the requested change to title deeds.

OVERSTRAND MUNISIPALITEIT
14 SEP 2018
OVERSTRAND MUNICIPALITY

Faithfully

D H Muirhead
Vice Chairman
Pringle Bay Ratepayers' Association

14 September 2018

TP - A Theart
(H v d Stoep)

PLEASE ACKNOWLEDGE RECEIPT OF EMAIL

FILE NO: Ptn 47/559
Hangklip
SCAN NO:
Farm 559
COLLABORATOR NO:
1209333

MUNISIPALITEIT
OVERSTRAND
14 SEP 2018
TOWN PLANNING
U-MASOPALA * MUNICIPALITY

ANNEXURE G 1/2

TP-A Theart (Hvld Stoep)

Western Cape Government
Environmental Affairs and Development Planning

OVERSTRAND MUNISIPALITEIT / OVERSTRAND MUNICIPALITY
16 MAY 2016

DIRECTORATE LAND MANAGEMENT: REGION 1
Samela.Kwetana@westerncape.gov.za
Tel: +27 21 483 5897 Fax: +27 21 483 3633
Private Bag X9086, Cape Town, 8000
1 Dorp Street, Cape Town, 8000
www.westerncape.gov.za/eadp

REFERENCE: 15/3/1/3/E2/1/PTNS 47, 56, 72, 73, 76, 134 & 157 FARM HANGKLIP 559/VOL1
ENQUIRIES: S Kwetana

Plan Active
P O Box 296
HERMANUS
7200

FILE NO: Ptns 47, 56, 72, 73, 76 & 134 / 559
SCAN NO: 58
COLLABORATOR NO: 901963

Sir/Madam

OVERSTRAND MUNICIPALITY: APPEALS IN TERMS OF SECTION 44(1) OF THE LAND USE PLANNING ORDINANCE, 1985 (ORDINANCE 15 OF 1985); PORTIONS 47, 56, 72, 73, 76, 134 AND 157 OF THE FARM HANGKLIP NO. 559, IN THE DIVISION OF CALEDON (BETTY'S BAY)

1. Your letters of appeal dated 7 and 8 June 2012 refers.

2. The Competent Authority for the administration of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985), has resolved on 4 April 2016, that your appeal against the Municipality's decision to make a zoning determination of Undetermined for portions 47, 56, 72, 73, 76, 134, and 157 of the Farm Hangklip 559, in the Division of Caledon (Betty's Bay), **be dismissed**, in terms of section 44(2) of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985).

3. The above recommendation is based on the following reasons:

3.1 A zoning of Agriculture I can only be allocated to the properties upon the presentation of such factual evidence regarding its agricultural use on 1 July 1986 (the date LUPO came into force), which the appellants have failed to produce so far. The Supreme Court Judgment (Case No. 7139/03), delivered by Thring J states that neither the Municipality nor the Minister has any discretion in this regard and both are bound by the ruling.

3.2 It is recommended that the Minister provides a supporting comment to the Municipality indicating that the matter can only be given further consideration by the Municipality upon

17 MAY 2016

submission of "factual evidence" regarding the agricultural use of the said Portions as at 1 July 1986. Alternatively, the owners would be free to apply for a more appropriate zoning of their properties and the normal procedure as provided for in the Western Cape Land Use Planning Act, 2014 (Act 3 of 2014) will need to be followed in the latter instance.

4. Access to Information

4.1 Please be advised that since the Minister has discharged of his decision-making powers when making the decision, he is *functus officio* in this regard. In the circumstances he cannot reconsider the decision taken in this matter.

4.2 You are reminded that you may apply to view the file in question in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000). The contact person in this regard is Mrs A. de Villiers on telephone number: (021) 4838315 should you wish to make the necessary arrangements.

Yours faithfully

HEAD OF DEPARTMENT:
DATE: 09/05/2016