issues and in order to assist me in safeguarding my constitutionally guaranteed proprietary rights which are at stake, I have deemed it expedient to seek legal advice. Where I therefore make comments or assertions of a legal nature I do so on the basis of advice provided by my legal advisors, which advice I verily believe to be true and correct.

A. THE BASIS OF THE APPLICANT'S APPLICATION

1. The information contained in the applicant's application is, apart from being repetitive, extremely terse.

2. The applicant's motive, however, is made clear: he aims to create a second erf on the back-portion of the existing Erf 713 (behind the existing dwelling thereon) in order to have an additional dwelling constructed thereon. Where precisely on this new erf this dwelling is to be erected and what the dimensions thereof would be, he does not say – one would therefore have to assume that the applicant intends to procure rights which will allow him or his successor in title to develop the erf to its fullest extent subject only to the provisions of the Overstrand Zoning Scheme and the provisions of the National Building Regulations and Building Standards Act, 1977.

3. Upon a proper reading of the application documents as a whole, it is evident that the applicant, in applying for the removal of title deed condition B(e) (which incorporated the following condition, which is described as being in favour of the Administrator, in the title deed: "*(e) That this erf shall not be subdivided except with the consent in writing of the Administrator*"), apart from mentioning in passing that the erf is located in an area that has experienced similar subdivisions in the past, in reality relies exclusively on the provisions of the spatial planning initiative of the Overstrand Municipality, as contained in the document titled Overstrand Municipal Growth Management Strategy. (The reference to title deed condition B(e) in the applicant's application papers is erroneous – as is evident from the title deed itself there is another condition marked "B" and the condition concerned actually correlates with condition E(B)(e) which appears on

pages 3 and 4 of the said title deed). Without conceding that it is permissible for the applicant to proceed with the application in its present form – where the title deed restriction which he seeks to impugn is incorrectly identified – I will herein continue to refer to the (erroneous) description employed by the applicant.

4. What is also clear from the documents is that the applicant contends, and proceeds from the premise, that the approval of the removal of the title deed restriction and subsequent subdivision of Erf 713 will not result "*in negative impacts on existing land use rights*". As will be explained in due course, this statement is patently wrong.

5. In paragraph 15 of the application it is stated that the subject property (being Erf 713) is located further than 100 metres from the high water mark of the sea. This statement, however, is contradicted by the express admission elsewhere (in paragraph 13 of the application) that by approximation Erf 713 is located within a distance of 100 metres from the high water mark of the sea and that certain listed activities as identified in the National Environmental Management Act, 1998 ("NEMA") "*may have been triggered*" by the application. In this paragraph the applicant then expresses the opinion that the intended development of the erf will not fall foul of these provisions. I will demonstrate hereinbelow that this opinion is based on speculation and is without substance.

B. MY PROPERTY – CONTEXTUAL SETTING

6. Before I proceed to discuss my objections to the application in more detail, I wish to furnish some contextual and background information about my property (being Erf 712, De Kelders) and the circumstances surrounding my acquisition thereof.

7. As can be gleaned from the General Plan of De Kelders Extension No 1 Township, as approved by the Surveyor-General on 28 July 1939, a copy of which is annexed hereto, marked "ElaG1" (a copy of this plan was

apparently annexed to the application – the copy which had been furnished to me, however, is illegible) erven 700 to 722 (i.e those bounded by Steyn Street, Barnard Street and Front Street) are considerably bigger and more spacious than those forming part of the balance of De Kelders, Extension 1 Township development. When regard is had to the topography of the area, the reason for this distinction is quite clear. These erven are located on land which forms a plateau which runs to roughly the middle of the front row of erven (numbered 705 to 721), whereafter it slopes down steeply to sea level.

8. The erven in these two rows create a particular ambience – consisting of a band of spacious properties which form a buffer zone between the smaller properties further inland and the sea. These properties are characterised by their vistas and panoramic sea views – provided, however, that the building operations on the erven are restricted to a single dwelling with necessary outbuildings as stipulated in the title deeds of all the properties concerned. I will in due course refer to the fact that this restriction – as well as the prohibition against sub-division – are real rights which enure to the benefit of all erven in the whole of the De Kelders Extension 1 Township (and particularly also, my property). This real right (or praedial servitude which is registered over the applicant's property in favour of my property) forms part of my property and considerably adds to its value. The preservation of the vistas and expansive sea views of the erven in these two rows clearly was one of the purposes of the imposition of the restrictive conditions that are now at stake. For this very reason the property was more valuable than the smaller properties further inland and I was swayed to purchase it at a higher price – compared to cheaper properties further inland that were at the time available on the market.

9. This basket of amenities will be negatively affected by the removal of the restrictions which is sought by the applicant and the subdivision of Erf 713. In effect my property will be relegated to a "*third row*" property - instead of a property in the second row from the sea. As such the market value of my property (which includes a dwelling which I have in the interim erected

thereon at considerable cost – some R2 million in 2008 terms) will be substantially reduced.

10. It needs to be pointed out that the "new" erf which the applicant now wants to create on the back-portion of Erf 713 is located on the plateau part of that property and any building which is to be erected thereon will necessarily be on virtually the same level as my existing house on Erf 712. As such it will be right on my proverbial doorstep and be located directly at the centre of the sea views enjoyed from my property. It will also negatively impact on the sea views enjoyed from other neighbouring erven. Given the limited space that such a small newly created erf will provide, any building thereon will, viewed from my property, be "*in your face*" and will be most oppressive and overbearing. This is compounded by the fact that although fairly expansive measured in square metres, the erven in this area are of a narrow shape. Two dwellings squeezed onto Erf 713 will also adversely affect my privacy (as well as the privacy of those occupying neighbouring properties).

11. Before I purchased Erf 712 in 1992 I caused the title deeds of the surrounding properties to be scrutinised. In doing so I was assured by the fact that the applicant's property (Erf 713 – upon which a single dwelling had by then been erected) was a servient tenement subjected to restrictive title deed condition in favour of my property. Although I was made aware that the "Administrator" was in terms of the Removal of Restrictions Act 84 of 1967 (hereinafter "*the Act*") given the statutory power to vary or remove title deed conditions, I was also advised that this could be done only in very limited circumstances and in instances that are strictly deserving.

12. I was at the time also advised about Section 4(3) of the Act which expressly makes provision for the awarding of compensation to landowners adversely affected by the removal of restrictions. I, in the premises, purchased the property in the knowledge that, given the nature of the area, the topography and what was intended by the creation of these prime erven at the time of the establishment of the township, I could expect that the Administrator/MEC

would act reasonably and not arbitrarily and in the event of him deciding in favour of the removal of these (or any other) real rights, he would impose a condition that the holder of the rights be compensated for what he or she stands to lose. I, in the premises, maintain that I have legitimate expectation that the MEC will as a bare minimum, not consider removing the restrictive title deed conditions without also invoking the machinery provided in Section 4(3) in order to ensure that compensation be awarded to me (and other affected objectors). I, however, deny that there is any rational basis for a conclusion on the part of the MEC that the jurisdictional requirements (as stipulated in the Act) for the removal of the title deed restriction concerned have been met.

C. DISCUSSION

(a) The title deed restrictions concerned

13. It is significant to note that the applicant restricted his application for removal of a title deed restriction to condition B.(e).

13.1. . What is surprising, though, is that no mention is made therein to title deed condition E, and more importantly, condition E(A)(c), which imposed the following restrictive condition:

> *"A. As being in favour of the registered owner of each erf in the Township:*
>
> *(c) That not more than one dwelling, together with the necessary outbuildings and appurtenances be erected on this erf."*

13.2. It needs to be pointed out that the notice that was sent to me (which notice I assume is identical to the notices that the applicant was in law and also in terms of the written instructions of the Directorate: Land and Management (Region 2) dated 9 October 2014 required to serve on each and every owner of the De Kelders Township, ratepayer's or residents' association and De Kelders Syndicate

Limited) was not accompanied by the applicant's title deed wherein this condition is expressly taken up.

13.3. As no application was made for the removal of this title deed restriction, the attention of registered owners of properties in the township was not drawn to this condition and the majority of them in all probability are still ignorant about the fact that this material proprietary right (which, like condition B.(e); also attaches to each and every one of their properties) is also at stake. I will revert to this aspect in due course.

(b) <u>The nature and effect of the title deed restrictions concerned</u>

14.I have taken the trouble to cause the title conditions of various erven in De Kelders Extension 1 to be examined. Upon the mere reading of the various title deeds, it is evident that the title deed conditions B.(e) and E(A)(c) which appear in the applicant's title deed (although the numbering thereof may differ from property to property) were taken up in the registered title deeds of each and every property which forms part of the original De Kelders Extension 1 Township.

14.1. As such both these restrictive conditions are registered praedial servitudes that enure for the benefit of all other erven in (at least) the whole of the area depicted on the General Plan of De Kelders Extension No 1 Township as approved by the Surveyor-General on 28 July 1939 (Plan 1 annexed to the application, as well as Annexure "ElaG1").

14.2. As a matter of law each erf in the original De Kelders Extension No 1 Township therefore 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.

14.3. I have also been advised that it is trite law that registered praedial servitudal rights such as those covered by title deed conditions B.(e) and E(A)(c) fall within the concept of and are part and parcel of one's property, which is to be safeguarded in terms of Section 25 of the Constitution of the Republic of South Africa. As such the removal of the restrictions (or either one of them) will bring about the extinction of registered praedial servitudal rights and will amount to a deprivation of property belonging to each of the dominant tenements (being each of the properties situated in De Kelders Extension 1 Township).

14.4. Section 25(1) of the Constitution provides that no one may be deprived of property except in terms of general application, and no law may permit arbitrary deprivation of property. Where the property in question is ownership in land (such as in this instance), a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case where the property is something different.

(c) The applicant's contention that the removal of the restriction and the subdivision of Erf 713 will not result "*in negative impacts on existing land use rights*" is clearly wrong

15. The applicant's contention that the removal of title deed restriction B.(e) and the subdivision of Erf 713 will not result "*in negative impacts on existing land use rights*" is, to say the least, spurious and without any substance or foundation. It is to be noted that apart from the bald assertion that this is so, the applicant has simply failed to furnish any substantiating facts in support of this sweeping statement.

15.1. It is evident that the applicant approached the application on the assumption that the title deed condition is a mere irritation or formal obstacle to the commercial exploitation of the property which he intended purchasing. As can be gleaned from the application itself,

the applicant bought the property with the intention to create a second erf – apart from the fact that the application documents were prepared before the applicant took transfer of the property, it is expressly declared that the new "*owners*" (sic!) discovered that a restrictive title deed restriction existed which had to be removed before they could carry out their intention to subdivide the property.

15.2. It should, as a point of departure, be emphasised that the applicant's personal interest in the removal of restrictive conditions is completely irrelevant. The interest to be served by the removal is in the broader interest of the township, the area and the public. To the extent that the applicant seeks to justify his actions, it is significant to note that the reasons proffered by him in any event demonstrates that he does not have the interests of the landowners of the De Kelders area at heart, but only submitted the application under scrutiny in order to serve his own needs at the exclusion of others.

15.3. The applicant clearly failed to have any regard to or appreciate the fact that he effectively seeks to unilaterally eradicate servitudal rights enjoyed by of all the property owners of De Kelders Extension 1 Township and in the process deprive each one of them of their proprietary rights. Although it is hard to imagine a more drastic inroad on land use rights than the deprivation of existing proprietary rights, the applicant maintains that no land existing use rights will be impacted upon. This simply is untrue.

15.4. It is submitted that the applicant's failure to provide any factual basis for his assertion that "*existing land use rights*" (which can only refer to the land use rights of all of the property owners in De Kelders Extension 1 Township) will not be negatively impacted on by the removal of the restriction (for which he applies) is absolutely fatal to the application. In this regard our Courts have made it clear that it is for the applicant to put forward facts to substantiate his or her application for the removal of restrictive conditions.

15.5. Other than the say-so of the applicant, the application simply contains no information on the strength of which prospective objectors or other affected landowners could appraise themselves of the veracity of the statement of fact (that no land use rights will be impacted on negatively) upon which the applicant's application is predicated. (In this regard I reiterate that the applicant also failed to disclose to affected owners that his application is in truth also aimed at removing the restrictive title deed condition which prohibits the erection of more than one dwelling on his property). It is also not open for those adjudicating the process to later speculate about what facts the applicant had in mind when he brought his application or made factual statements.

15.6. Our Courts have over the years emphasised the importance of reciprocal praedial servitudal rights of the nature of title conditions B.(e) and E(A)(c) to owners in a township and the community which they form. In this regard it has been held that quite apart from the fact that these conditions might serve the interest of a single property owner, they are inserted into title deeds to preserve the essential character and basket of amenities of the erven for the benefit of all owners, secure the low-density single residential nature of a township and (with reference to erven such as mine) maintain the single residential sea-side suburb character of the area.

15.7. Due to the fact that praedial servitudes of this nature are the result of a contractual relationship between owners, a Court of Law will in terms of our common law not have jurisdiction to come to the assistance of a party who wants the terms of the servitude to be changed for his benefit without the consent of each and every affected owner. Should the applicant have applied to Court for the removal of the title deed restriction, he would have required the consent of each and every owner of a property in De Kelders Extension 1 Township. In this context it is a trite principle that at common law the objection or refusal to consent by a single affected

property owner is fatal to an application for the alteration or removal of such a title deed condition. The objector does not even have to motivate his objection or demonstrate that it is not unreasonable.

15.8. The practical result of the aforementioned legal principles is that, from the applicant's perspective, the obtaining a Court order for the removal of title deed conditions would not have been a viable proposition. He therefore had to resort to the administrative procedure provided for in the Act. As I will explain hereinbelow, this does not mean that the real rights created by title deed conditions are watered down or prone to be removed at the whim of a property owner who wants to commercially exploit a property (which he, to begin with, is in terms of his title deed prohibited from doing).

15.9. The applicant's application, if successful, will jeopardise the essential character and amenities of De Kelders. I repeat that the specific area where Erf 713 is located is characterised by spacious erven (almost twice the size of the erven located to the east of Steyn Street) with panoramic sea views and vistas upon which only a single dwelling can be built. The very ambience of the development as safeguarded by the restrictive conditions will be adversely affected by the creation of a new erf – with a dwelling of unknown proportions thereon to be sandwiched in between the existing house and the house on the my property directly behind it.

15.10. I am not prepared to relinquish my servitude rights which form part of my property and which had been imposed on the applicant's property with the view to safeguard the character and ambience of the area where my property is situated. There are various vacant erven for sale in the immediate vicinity of Erf 713 and there is therefore no need to create a new erf. The removal of the title deed restriction in question can clearly not be in the interest of landowners of De Kelders Extension 1 Township or its development and only serves the need of the applicant.

(d) The obligations of the MEC in terms of the Removal of Restrictions Act

16. In terms of section 2(1)(a) of the Act restrictive conditions or servitudes may be removed, conditionally or unconditionally, only once the Administrator of a province in which the land in question is situated (in the present matter, the Member of the Executive Council: Department of Environmental Affairs and Development Planning, Western Cape – "*MEC*"), is satisfied that it is "*desirable to do so in the interest of the establishment or development of any township or in the interest of any area, whether it is situate in an urban area or not, or in the public interest ...*".

16.1. Although the Act *prima facie* is a "*law of general application*" as contemplated in section 25(1) of the Constitution, the framework created by the Act for the removal of title deed conditions is such that it will only pass constitutional muster if it is properly implemented in strict accordance with the requirements of the Act and provided that decisions are arrived at with due regard to (a) the constitutional and proprietary rights of affected parties (such as the owners of the De Kelders Extension 1 Township and myself) and (b) the fact that planning policies (such as the Overstrand Municipal Growth Management Strategy) and zoning regulations are subservient to title deed conditions and cannot be resorted to or employed to wipe out such conditions.

16.2. It should be borne in mind that it is in any event also a trite principle of our law that a statute (such as the Act) should not be interpreted so as to (a) alter the common law more than is necessary and (b) allow interference with or injury to a person's rights without compensation. The MEC should therefore be mindful of the fact that although he is effectively possessed with more powers than a Court of Law under common law, he should exercise these powers with utmost care and only remove or alter title deed restrictions of this nature in matters where it clearly advances the interests of the public.

16.3. Our courts (including the Supreme Court of Appeal) have in recent years made it clear that it is unacceptable for a Municipality and/or an MEC to adopt the position that the Municipality's policies, town planning schemes and zoning regulations trump the rights of owners derived from their title deeds. In this regard it has recently also been held that the authorities should bear in mind that restrictive title deed conditions are aimed at preservation of specific ownership whereas zoning scheme regulations or planning policy serve another purpose – namely the general regulation of general town planning standards. These two goals are separate and distinct and should not be confused or rolled into one.

16.4. What this also means is that when the relevant competent authority considers an application for removal of title deed restrictions it should be mindful of the fact that the Act does not permit it to arbitrarily deprive a property owner of his servitudal rights. (The meaning of "*arbitrary*" deprivation of property in this context was determined by the Constitutional Court and held to be when there is insufficient reason for the deprivation or it is procedurally unfair).

16.5. As to how the MEC should approach the matter in order not to render its decision arbitrary, the decisions of our Courts provide clear parameters: unless the MEC is as a fact satisfied (he can only be so satisfied if his conclusion is objectively reasonable) as to the presence of one or more of the circumstances enunciated in Section 2(1), a vital jurisdictional fact for the exercise of his power to remove conditions will be absent. (In this regard it should be noted that the personal interest of the applicant for removal is completely 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 mean that such a removal is indeed desirable or in the interest of the area, township or the public. This is so because 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 to area, township or public which will be served by granting the application not the absence of a negative advantage.

16.6. Property rights are among the fundamental rights enshrined in the Constitution and the provisions of section 25(1) therefore reflect the importance of property rights and provide limitations which constrain any removal of, or interference with them.

16.7. The tenor of section 25(1) of the Constitution is that deprivation of property rights should not be resorted to lightly. In the context of section 2(1)(a) of the Removal of Restrictions Act this means that the relevant competent authority should not grant an application whereby a person other than the applicant would be deprived of his property rights, unless the grounds on which the application is based clearly and unequivocally justify a conclusion that it is desirable to do so in the interests of the township, the area, or the public. It is submitted that none of this has been demonstrated by the applicant. It is significant that the applicant himself fails to explain how on earth his declared self-centred motive (to exploit his property commercially) can serve the interest of the broader De Kelders community or the development as such. The reason for his failure to do so is obvious: he only seeks to advance his personal interests, not that of the community

(e) The allegation that the removal of the restrictive title deed condition "*is consistent with existing spatial planning initiatives and that there is a definite need for development such as this to be approved*"

17. The high water mark of the applicant's application is to be found in his repeated references to the provisions of the Overstrand Municipal Growth Management Strategy and his eventual bald statement (in paragraph 19 of the application) that there is a "*definite need for development such as this*" to be approved.

17.1. I have already pointed out that the applicant failed to take the Minister (and the affected landowners of De Kelders Extension 1 Township) into his confidence by disclosing precisely what the development plan for the newly created erf is. It, however, is to be gleaned from the application that the intention is to create yet another erf upon which a single residential dwelling – in all probability another holiday house or retirement house - is to be erected. One can also only surmise that the applicant intends putting the newly created erf on the market.

17.2. Apart from the bald statement on the part of the applicant referred to above, the application papers are silent as to how precisely the specific development envisaged by the applicant is supposed to serve the so-called densification drive or initiative on the part of the Overstrand Municipality. Again, the impression is gained that the applicant simply departed from the premise that as long as it can be said that his future plans with the property that he acquired fits into the mould of spatial development planning, he is entitled, as of right, to insist on the removal of the title deed condition concerned.

17.3. The applicant's said approach is, at a very basic level, wrong, untenable and contrary to the legal principles which apply to the adjudication of applications for the removal of title deed restrictions under the Act to which I have alluded above.

17.4. I reiterate that our Courts have time and again held that planning policies and regulations do not override title deed conditions and that it would unacceptable for a Municipality and/or an MEC to adopt the position that the Municipality's policies, town planning schemes and zoning regulations trump the rights of owners derived from their title deeds. Insofar as the generic statements concerning densification made in the application papers echo the reasoning behind the spatial planning policy of the Overstrand Municipality, it cannot serve as a basis for infringing upon the preservation of rights of the erven in the area under consideration.

17.5. In this regard it should be noted that section 16.9.2 of the Zoning Scheme Regulations of the Overstrand Municipal area specifically provide that "*(r)estrictive conditions of title take precedence over the use rights and development rules defined in terms of the zoning scheme.*" The Overstrand Municipal Growth Management Strategy should be understood to contain a similar restriction, if not expressly, then at least by necessary implication.

17.6. I, as objector, am seriously prejudiced by the applicant's failure to make out a case for and give substance to the bald contention that the existing spatial planning initiatives (I assume that the applicant here meant to refer to the Overstrand Municipal Growth Management Strategy) shows that there is a "*definite need for development such as this*" to be approved. Quite apart from the fact that this unsubstantiated allegation amounts to no more than the paying of lip service to the requirements of Section 2(1) of the Act and Section 25 of the Constitution, the statement is not borne out by the provisions of the very policy on which the applicant seeks to rely.

17.7. In this regard it should be noted that as far as De Kelders is concerned the Overstrand Municipal Growth Management Strategy expressly states that "*It is important to note that prior to any further densification of the area, the provision of the civil services need to be updated.*" To date the provision of such services have not been updated and any removal of title deed restrictions under the guise of further densification of the De Kelders area would therefore be precluded by and fall foul of the very conclusions reached in the policy document.

17.8. Before I further deal with the provisions of the Overstrand Municipal Growth Management Strategy, I wish to point out that the policy document itself makes it clear that the drafters to a great extent based their findings on the provisions of the Development Facilitation Act, 1995 ("*DFA*").

17.9. Section 3 of the DFA sets out certain general principles which apply to all "*land development*" which is defined to mean, inter alia, a "*procedure aimed at changing the use of land for the purpose of using the land mainly for residential, industrial, business, small-scale farming, community or similar purposes*". It has been held by a High Court that in accordance with the definition, therefore, the general principles contained in section 3 of the DFA only apply to future land development. It was held that the definition therefore does not cover land that has already been developed according to a town planning scheme. It is also to be observed that the long title to the DFA clearly relates to future development by providing that the purpose of the DFA is, inter alia: "*To introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land; and in so doing to lay down general principles governing land development throughout the Republic.*"

17.10. As De Kelders Extension 1 Township has been established and developed according to a town planning scheme the DFA is not applicable to the applicant's application. It would therefore be inadmissible for him to rely on a spatial development strategy (as embodied in the Overstrand Municipal Growth Management Strategy) which in turn is based on and seeks to promote the planning policy framework catered for in the DFA.

17.11. On the assumption, however, that regard can be had to the Overstrand Municipal Growth Management Strategy (which is disputed to be permissible), it should be noted that in terms thereof six ways in which densification can contribute to good-quality urban development (as motivation for densification) have been identified. The applicant simply made no effort to identify any of the listed items in order to substantiate his bald allegation that his application is "*consistent with existing planning initiatives*" and it would be

impermissible for the MEC or the Overstrand Municipality to on his behalf speculate what he had in mind.

17.12. It is ludicrous to seek to support such an application as being in the public interest by invoking the broad principles set out in the Overstrand Municipal Growth Strategy. The proposed erf and the dwelling that is to be erected thereon do not constitute affordable housing. (It in any event is not alleged to be the case). The property is not suitable for use by people reliant on public transport and will not be within the grasp of the sort of people for whom it is a priority to be close to their work (De Kelders is a rural holiday retreat, not a city), nor would the potential buyers be the sort of people who would contribute to urban sprawl if they are unable to buy expensive stands in one of the sought after areas of De Kelders. The "densification" of the area by the influx of a single well-off new land owner able to purchase an expensive erf could hardly be expected to assist in integrating our spatially and socially divided community.

17.13. When one scrutinises the six objectives (or points of motivation) raised in the Overstrand Municipal Growth Management Strategy, it is quite clear that not a single one find application in this instance:

17.13.1. "*Densification helps prevent urban sprawl and reduces the consumption of valuable / non-renewable resources.*" (Item 4.2.1).

I repeat what I have said in the preceding paragraph. The property is situated in a rural area where (according to the Overstrand Municipal Growth Management Strategy document itself) some 30% of the available erven are still vacant and therefore available for future development.

There are numerous erven in the immediate vicinity of Erf 713 that have not yet been developed – as a matter of fact, on 6 March 2015 I observed some 25 <u>vacant</u> erven within

the confines of the area bounded by Cove Street, Front Street, De la Rey Street and Main Road on which "*For Sale*" signs were posted. Apart from these erven the area is scattered with vacant lots which are not advertised to be for sale, but which are obviously available for future development.

It is to be noted that the applicant himself failed to furnish any information which can be of any assistance to ascertain on what basis he alleges that the proposed subdivision of an up-market erf can alleviate urban sprawl or "*reduce the consumption of non-renewable fuels by lessening car dependency*" – which, according to the Overstrand Municipal Growth Management Strategy is central to this requirement.

17.13.2. "*Densification supports the development of a viable public transport system by promoting the integration and intensification of land uses.*" (Item 4.2.2).

This motivation or requirement is irrelevant as it does not apply to Erf 713 or the area in which the property is situated. It is simply not located on or near an activity street or development route and there are no residents that make use of a transport system. Given the make-up of the residents (and bearing in mind that the area is generally utilised as a holiday retreat and retirement village) it is highly unlikely that such a transport system will ever see the light of day.

17.13.3. "*Densification facilitates economic opportunities and access to facilities within the urban system.*" (Item 4.2.3).

This requirement refers to high density development and is not applicable to De Kelders Extension 1 Township. There in any event simply is no urban system within which economic opportunities are available in this township. Whatever job opportunities there are will entail travelling to Gansbaai and the addition of a new erf or dwelling in De Kelders Extension 1 Township will increase traffic to and from Gansbaai rather than alleviate same.

The De Kelders Extension 1 Township is in any event situated in the greater Gansbaai area where approximately 25% of all existing dwellings are not permanently occupied.

In our specific area existing dwellings are predominantly used as holiday / week-end retreats by city dwellers or owners with primary residences situated elsewhere. All of them exploit economic opportunities elsewhere.

It also has to be borne in mind that according to the statistical data contained in the Overstrand Municipal Growth Management Strategy documentation the majority (56%) of the permanent residents of the De Kelders suburb are of retirement age. According to this data 23.6% of all residents are between ages 50 to 59 whilst 32.1% of the residents fall in the age range of 60 to 80+.

17.13.4. "*Densification supports efficient service provision*". (Item 4.2.4).

I again refer to the fact that the Overstrand Municipal Growth Management Strategy document states that the provision of the civil services needs to be updated prior to any further densification of the area. This has not been done. The applicant does not say – and can hardly be

heard to say – that the densification initiative should be fast tracked in order to attain efficient service provision in the area. To do so would be to put the cart before the horse – the policy in so many words acknowledges that the service provision in the De Kelders area does not support densification.

It is noted that in paragraph 19 of the application the applicant states, as a matter of fact, that the impact on the service infrastructure would be minimal. This statement is not supported by a certificate or letter of confirmation by the Overstrand Town Engineer or equivalent officer and amounts to nothing more than the expression of an unsubstantiated an opinion.

17.13.5. "*Densification improves the variety in housing mix and a choice of housing type.*" (Item 4.2.5).

The applicant's application was not accompanied by a development plan and he failed to disclose what type of dwelling is envisaged to be erected on the newly created erf. One can only surmise that it would be a development in terms whereof the erf is utilised to its fullest extent subject only to the provisions of the Overstrand Zoning Scheme and the provisions of the National Building Regulations and Building Standards Act.

A mere visit to the area will confirm that here is an abundance of dwellings of this nature. It is in any event clear that the applicant has no intention of contributing anything towards the variation of the housing mix or providing a choice of the type of housing. The reason for him not doing so is clear: he does not intend to provide any

variation of the housing mix or provide a choice of housing (other than that already available in the area).

17.13.6. "*Densification contributes to urban place making and improves safety*". (Item 4.2.6).

The proposed development (which detracts from the ambience and character of the area) will result in a negative urban environment (being a high-density node within a surrounding low density environment) rather than an attractive and desirable sea-side retreat.

The applicant failed to explain how the addition of another dwelling in the area can improve safety. If anything another holiday house that remains unoccupied for most of the year will attract burglars, not deter them.

17.14. As the motivation for the application upon the so-called grounds of densification has been shown to be spurious and non-existent, the application cannot be entertained on these grounds at all.

(f) <u>The applicant's failure to address title deed condition E(A)(c) – the "*one dwelling*" restriction</u>

18. I reiterate that the applicant has failed to apply for the removal of title deed condition E(A)(c) (which condition, as I have explained above, constitutes a praedial servitude in favour of my property – as well as all other properties in the original De Kelders Extension 1 Township).

18.1. I have been advised that it is a trite rule of our law that praedial servitudes are indivisible. The significance of this rule is that a praedial servitude (such as the one created by title deed condition E(A)(c)) is imposed on the servient tenement (Erf 713) <u>as a whole</u> to the benefit of the dominant tenement (my property and the other

properties in the township). The owner of a servient tenement simply cannot derogate or detract from the grant (which extends over the whole of his property) by creating two erven or subdividing the property.

18.2. The second rule, which complements the rule referred to in the preceding paragraph, is that when a servitude (such as the one contained in title deed condition E(A)(c)) is interpreted regard must be had to the circumstances which existed at the time of the execution of the grant in which it is contained (being the date of imposition of the condition in the title deed - at the time of the establishment of the township), for the extent of the servitude is only ascertainable by the circumstances existing at the time of the grant and known to the parties, and is limited to those circumstances.

18.3. The prohibition against the erection of more than one dwelling etc. is expressly stipulated in condition E(A)(c) to apply to "*this erf*" – being the whole of Erf 713 as it was carved out of the parent property and as it was brought into being at the time of the establishment of the township. "*This erf*" therefore means "*Erf 713 De Kelders ... in extent 1398 (one thousand three hundred and ninety eight square metres)'* as described in the applicant's title deed

18.4. This meaning cannot be altered or changed to "*these two erven*" (or words to that effect) by the later subdivision of Erf 713. To the contrary, the praedial servitude remains defined by the circumstances that existed at the time of its creation and will survive the subdivision and effectively continue to prohibit the erection of more than one dwelling on the servient tenement (being the whole of Erf 713 - regardless in how many portions it has subsequently been subdivided).

18.5. The applicant's application is therefore fatally flawed and should for this reason alone be dismissed. The application for subdivision should likewise have to fail as it will simply be impermissible for the

applicant to erect a dwelling on such subdivided erf in order to utilise same for "*residential purposes*".

(g) The applicant's opinion that the intended development of Erf 713 will not trigger the listed activities as identified in NEMA.

19. I reiterate that the applicant made contradictory statements regarding the location of the property in relation to the high water mark of the sea and the applicability of the provisions of NEMA which deals with activities to be carried out within the 100 metre limit concerned

19.1. It is to be noted that the applicant failed to produce a certificate by or letter from the Department of Environmental Affairs and Development Planning or other relevant authority to certify or confirm that the restricted activities are not triggered or due to be triggered by the development.

19.2. The applicant's contradictory remarks about the exact location of Erf 713 is not surprising, given the fact that instead of employing a surveyor to establish the actual distances in order to substantiate his allegations, he sought to rely on a Google Map image which has been prepared by town planners, Messrs WRAP. That Messrs WRAP did not profess to be expert surveyors and worked on a mere approximation is borne out by paragraph 13 of the application itself wherein it is stated that the "*subject property is located approximately 98 metres from the high water mark*".

19.3. I dispute the veracity of the approximation. The only available reliable surveyed source for establishing the distance between the high water mark of the sea and Erf 713 is the official General Plan of De Kelders Extension No 1 Township as approved by the Surveyor General on 28 July 1939, a copy of which is annexed hereto marked "ElaG1". It is to be noted that on this plan the high water mark has been drawn in (and identified by the words "*High Water Mark*") by the land

surveyor. This document shows that the distance from the high water mark to the sea-side boundary of Erf 713 is less than the length of the erf (as measured along its lateral boundary).

19.4. If regard is had to the fact that on the proposed subdivision diagram which accompanied the application documents the length of the lateral boundary of Erf 713 is recorded to be 73.94 metres, the 100 metre mark in question must be located at a point at least 30 metres away from the sea-side boundary of the erf – well into the property, up to a point not far away from the proposed new boundary between the proposed "*Remainder of Erf 713*" and "*Portion A*", as depicted by the line "*bc*" on the proposed subdivision diagram.

19.5. The applicant's contention in paragraph 13 of his application that although certain listed activities as identified in NEMA "*may have been triggered*" future construction on the proposed "*Portion A*" will not be within the 100 metres mark is not entirely true. If regard is had to the topography of the area, it is abundantly clear that the proposed 3m servitude right of way by means of which access is to be gained to the proposed "*Portion A*" will entail the excavation and removal of soil or sand (and even shells or shell grit) of more than 5 cubic metres at a distance of less than 100 metres inland of the high-water mark of the sea. For one, activity 18 of GN No R544 will thereby be activated.

19.6. As the road that will have to be constructed (there is no such road at present) will entail the expansion of infrastructure by more than 50 square metres within the 100 metre zone, Activity 45 of GN544 will also be triggered. The fact that the activities will be carried out over the proposed "*Remainder of Erf 713*" and not the proposed "Portion A" does not assist the applicant – the activities in question are brought about by and triggered as a direct result of the proposed subdivision and erection of a second dwelling on the original erf which in part falls within the 100 metre limit.

(h) Similar subdivisions have been granted in the past

20. The approval of subdivision of erven in the area where my property is situated was given many years ago – between 1974 and 2000 – at a time before certain definitive judgments, which condemned the practice of removing title deed restrictions for unconvincing reasons, were handed down by our Courts. From these judgments it is clear that the local authorities for many years laboured under the impression that title deed restrictions were a relic of the past and departed from the premise that applications for the removal of title deed restrictions that were at odds with their planning regulations should be favourably entertained.

21. From 2001 onwards, however, our Courts, through a series of judgments, have pronounced that this perception on the part of the authorities was wrong, unacceptable and that the sanctity of title deed restrictions should be respected. (The judgment that ruled that the removal of a restrictive condition in the nature of a praedial servitude amounts to the deprivation of property within the meaning of Section 25(1) of the Constitution was only handed down towards the end of 2001. Following upon this judgment, and in order to save the process from unconstitutionality, it became obligatory to notify each and every landowner in a township of an application of removal of title deed conditions of this nature. (Which explains why it was necessary to require of the applicant to serve the application papers on all landowners in De Kelders Extension 1 Township).

22. I, in the premises, deny that the fact that similar applications were met with success at a time when the legal requirements for removing title deed restrictions were perceived to be less stringent, can serve as a precedent for the granting of this application. I deny that any one of those applications would have been able to withstand the scrutiny of the tests formulated by our courts in the interim.

23. It in any event significant that the applicant only mentions the fact that the area has experienced similar subdivisions in passing. What he does not say

– clearly because he knows that it would not be true – is that the character and ambience of the area had thereby been altered to such an extent that the title deed restrictions can no longer serve the purpose for which it was originally taken up in the title deeds. The fact that subdivisions have been approved is regrettable, but makes it all the more important that the *status quo* should be jealously guarded and preserved – in order to protect the area from any further onslaught on its ambience an character.

24. I do not know whether the applicant has given notice to all affected parties as he was required to do by the Directorate: Land Management in terms of their instruction dated 9 October 2014. I, however, reserve the right to object to the procedural fairness of this application, should it eventuate that these instructions have not been carried out in full.

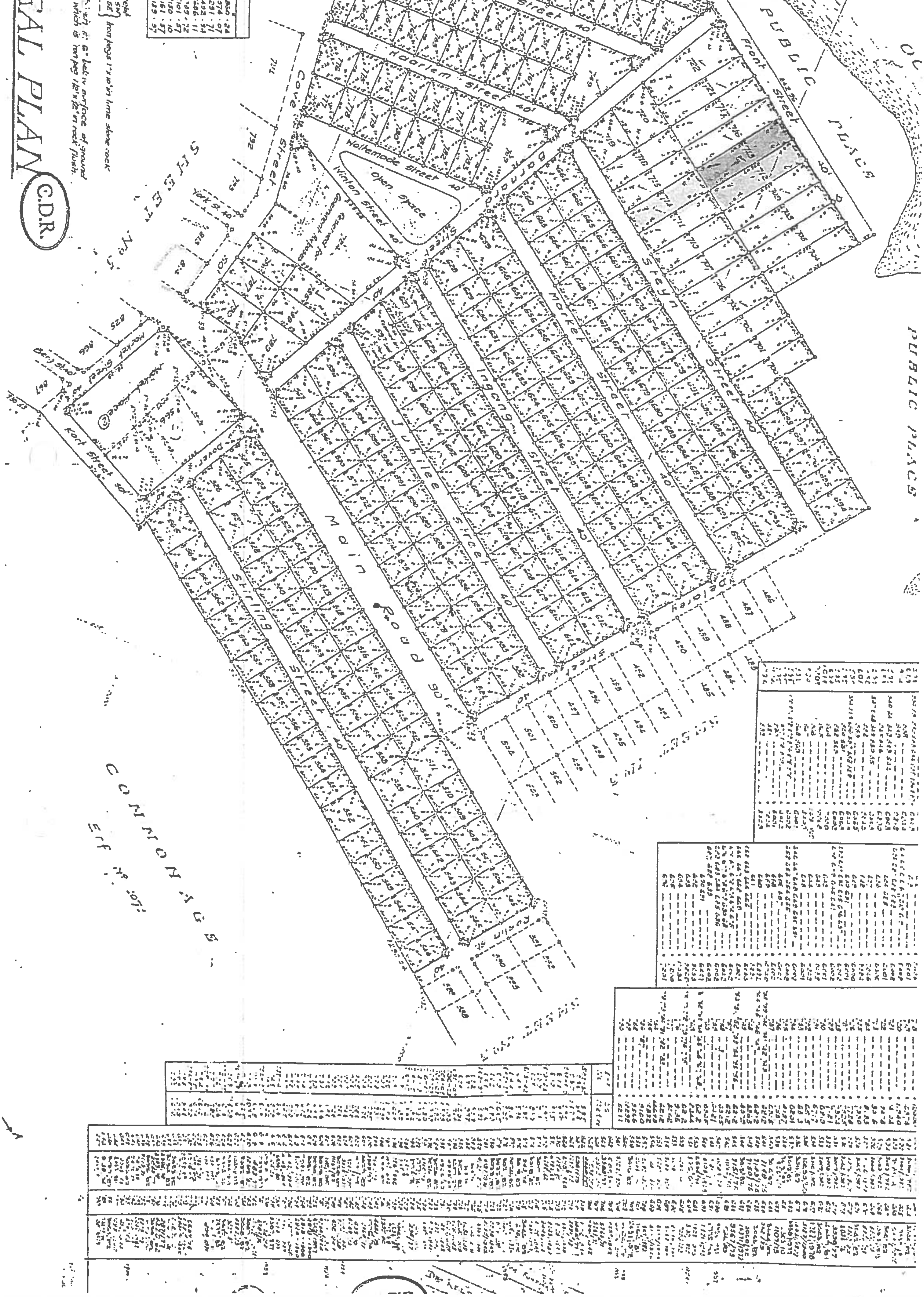
25. For all of the above reasons it is submitted that the removal of the restrictive title deed condition is undesirable as it is detrimental to the interests of the De Kelders Extension 1 Township, the area and the public. No positive advantage to the community which will be served by granting the application has been shown (or even alleged) to exist. I therefore request that the application for the removal of the restrictive title deed condition be refused.

Yours sincerely

E la Grange

ELNA LA GRANGE

ANNEXURE D 37/124



FILE NO: EL 713DK
SCAN NO: 38
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OVERSTRAND MUNISIPALITEIT
16 MAR 2015
OVERSTRAND MUNICIPALITY

11 March 2015

DIRECTOR: INTEGRATED ENVIRONMENTAL MANAGEMENT
Provincial Government of the Western Cape
Private Bag X9086
CAPE TOWN
Ref: 15/3/1/4/E2/5/Erf 713, De Kelders (G Cambell))

REMOVAL OF RESTRICTIONS ACT, 67 (ACT 84 OF 1967): ERF 713 DE KELDERS (OVERSTRAND MUNICIPALITY)

The notice by registered mail dated 29 January 2015, as prepared by Messrs WRAP on behalf of Mr JV Meintjies refers.

We, Albert Johannes Malan and Estelle Hester Malan, are the registered owners of Erf 814, De Kelders (situated at 140 Main Road, De Kelders). We hereby note an objection to the application for the removal of the title deed restriction concerned and the application for subdivision of Erf 713, as set forth in the notice referred to above. The basis of this objection will be made clear hereinbelow.

1. The information contained in the applicant's application is, apart from being repetitive, extremely terse.

13 MAR 2015

17 MAR 2015

2. The applicant's motive, however, is made clear: he aims to create a second erf on the back-portion of the existing Erf 713 (behind the existing dwelling thereon) in order to have an additional dwelling constructed thereon. Where precisely on this new erf this dwelling is to be erected and what the dimensions thereof would be he does not say – one would therefore have to assume that the applicant intends to procure rights which will allow him or his successor in title to develop the erf to its fullest extent subject only to the provisions of the Overstrand Zoning Scheme and the provisions of the National Building Regulations and Bulding Standards Act, 1977.

3. Upon a proper reading of the application documents as a whole, it is evident that the applicant, in applying for the removal of title deed condition B(e) (which incorprated the following condition, which is described as being in favour of the Administrator, in the title deed: "*(e) That this erf shall not be subdivided except with the consent in writing of the Administrator*"), apart from mentioning in passing that the erf is located in an area that has experienced similar subdivisions in the past, in reality relies exclusively on the provisions of the spatial planning intitative of the Overstrand Municipality, as contained in the document titled Overstrand Municipal Growth Management Strategy.

4. What is also clear from the documents is that the applicant contends, and proceeds from the premise, that the approval of the removal of the title deed restriction and subsequent subdivision of Erf 713 will not result "*in negative impacts on existing land use rights*". As will be explained in due course, this is patently wrong.

5. It is significant to note that the applicant restricted his application for removal of a title deed restriction to condition B.(e). No mention, however, is made therein to title deed condition E(A)(c), which imposed the following restrictive condition:

> "*A. As being in favour of the registered owner of each erf in the Township:*

(c) That not more than one dwelling, together with the necessary outbuildings and appurtenances be erected on this erf."

5.1. It needs to be pointed out that the notice that was sent to us was not accompanied by the applicant's title deed wherein this condition is expressly taken up.

5.2. As no application was made for the removal of this condition, the attention of registered owners of properties in the township was not drawn to this condition and the majority of them in all probability are still ignorant about the fact that this material proprietary / servitudal right (which like condition B.(e), also attaches to each and every one their properties) is also at stake.

6. According to information at hand it is clear that title deed conditions B.(e) and E(A)(c) which appear in the applicant's title deed (although the numbering thereof may differ from property to property) were taken up in the registered title deeds of each and every property which forms part of De Kelders Extension 1 Township.

6.1. I have been advised and verily believe that both these restrictive conditions are registered praedial servitudes that enure for the benefit of all other erven in (at least) the whole of the area depicted on the General Plan of De Kelders Extension No 1 Township as approved by the Surveyor-General on 28 July 1939.

6.2. Each erf in the De Kelders Extension No 1 Township therefore 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.