

**AGENDA of the
Portfolio Committee : Infrastructure and Planning
22 March 2016
(Also the agenda for the Mayoral Committee Meeting: 30 March 2016)**

11.

**ERF 2228, 71 TENTH STREET, VOËLKLIP, HERMANUS, OVERSTRAND
MUNICIPAL AREA : REMOVAL OF RESTRICTIONS ACT, 1967 (ACT 84 OF 1967)
AND DEPARTURE : MESSRS TOMMY BRUMMER TOWN PLANNERS ON BEHALF
OF ONSHELF PROPERTY EIGHTY SEVEN (PTY) LTD**

2228 HVK (2962)

P Roux

28 January 2016

(028) 313 8900

Hermanus Administration

1. Executive Summary

An application has been received on 26 June 2015 from Messrs Tommy Brummer Town Planners on behalf of the owners, Onshelf Property Eighty Seven (Pty) Ltd, for the removal/amendment of restrictive title conditions applicable to Erf 2228, 71 Tenth Street, Voëlklip, Hermanus to enable the owner to construct a second dwelling on the property

The application also consist of a departure from the relevant Scheme Regulations on Erf 2228, Voëlklip, Hermanus in order to relax the lateral building lines from 2m to 1m respectively to accommodate additions.

A Locality Plan of the property concerned is attached as Annexure A. The proposed Site Development Plan is attached as Annexure B, and the Motivation Report from the applicant in support of the proposal is attached as Annexure C.

2. Service Delivery and Budget Implementation Plan - IGNITE

Infrastructure and Planning
Town- and Spatial Planning

3. Compliance with Strategic Priority

Provision of democratic, accountable and ethical governance

4. Delegated Authority

Executive Mayor

5. Legal Requirements

- Removal of Restrictions Act 84 of 1967
- Section 15 of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985)

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6. Background/Discussion/Evaluation

Background

Erf 2228, is situated in Tenth Street, Voëlklip, Hermanus.

The property is developed with an existing dwelling and is zoned Residential Zone I. The property measures approximately 991m² in extend.

The applicant wants to construct a second dwelling on the northern side of the property and to extend the existing dwelling. However, a servitude is registered against the property in favour of Erf 2226 which is listed in Title Deed No. T10151/2000, which refers to Deed of Servitude 3/1949 which states:

- “3. *Margert’s Trust (Proprietary) Ltd does hereby agree that Erf No. 2228 Hermanus to a depth of 100 Feet, from its boundary on Tenth Street, shall not be built upon but shall be and remain vacant and shall be kept clear of any obstruction thereon save for natural growth.*
4. *Margert’s Trust (Proprietary) Ltd does hereby agree that no building or other structure whatsoever shall be erected or places on the remainder of Erf No. 2228 other than a dwelling house and its customary appurtenances.*
5. *The dwelling house and appurtenances permitted under Clause 4 hereof shall: -*
 - (a) *have a thatch roof.*
 - (b) *be single-storeyed.*
 - (c) *not exceed twenty-one (21) feet in height from the ground.*
 - (d) *have outside walls of face brick or of local stone or of plastered brick or plastered concrete or of any one or more of these. ”*

The applicant proposes to delete Clause 3 and to amend Clause 4 and 5 in order to construct a second dwelling.

Furthermore, the applicant wishes to extend the existing dwelling. This extension will encroach over the lateral building line and the 100ft servitude as stated in Clause 3.

The application was advertised in the local press and Government Gazette, and registered notices were also sent to all surrounding affected property owners. One objection was received from the property owner of Erf 2226, Hermanus.

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The application was also circulated to relevant departments. The legal department gave comment against the application which is considered through the evaluation.

Discussion

An objection is received from SL Reillys on behalf of the owner on Erf 2226 and can be summarised as follows:

- (a) (Paragraph 10 to 23 of the objection letter) The repeal of Removal of Restrictions Act 84 of 1967.

The objector states that in accordance with Section 59 of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA, No 16 of 2013) that commenced on 1 July 2015 determines in Schedule 3 that the Restrictions Act was repealed. Therefore the application made for the removal of Title Deed restrictions was done in terms of a non-existent legislation.

- (b) (Paragraph 24 to 36 of the objection letter) In terms of Section 39(5) and Section 42(1) SPLUMA, No 16 of 2013 the considering and deciding an applicant, including an application for the removal, amendment or suspension of a restrictive condition, a Municipal Tribunal must take into account the principals, norms, standards and requirements as listed in SPLUMA. In terms of Section 25(2) of the Constitution, property may be expropriated only in terms of law of general application:

- for a public purpose or in the public interest; and
- subject to compensation, the amount of which and the time and manner of the payment of which have either been agreed to by those affected or decided or approved by a Court

The objector states that the applicant did not provide the correct motivation that the requirements and considerations as set out in SPLUMA were considered. Further, the owner of Erf 2226 did not receive compensation for the deprivation of his property.

- (c) (Paragraph 37 to 65 of the objection letter) Motivation in support of removal and amendment of Title Deed restrictions

- The applicant creates the impression that the owners of Erven 2228 and 2226 reached an agreement in 2003 in order to remove or amend the servitude. No agreement was reached. Proof of the correspondence from 2000 to 2004 is part of the objection which is attached as Annexure E.
- The applicant uses the Spatial Development Framework (SDF) (Provincial and Local) to motivate that the removal of the servitude will lead to densification which is in line with the SDF. The objector

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states that this contention must be rejected, as Erf 2226 is not located next to the R43 as the Overstrand SDF refers to and that densification is achieved through the subdivision of existing properties.

- Restrictive conditions take precedence over the Zoning Scheme, therefore the motivation to remove the servitude in order to apply the inherent rights received with the zoning is flawed.
- The additional unit will be used for the applicant's own interest and therefore it is not in the interest of the public.
- The applicant states that desirability is not a matter for consideration. This is clearly not correct.
- The objector states that the removal of the servitude will have an adverse effect on the property owner of Erf 2226 due to the lack of financial compensation and secondly for the protecting on privacy and protection, the views of Erf 2226 and thirdly protecting the character of the area. The photograph presented with the application is misleading as the photograph is taken much higher than the roof of the building.

(d) (Paragraph 69 to 74 of the objection letter) Departure Application

It is clear that should the removal application be refused, that the departure application will not even be considered. The objector states that the applicant did not motivate why a departure should be granted in terms of Section 36 of LUPO.

The applicant was afforded the opportunity to respond to the objector's statements and can be summarised as follow;

- (a) (Paragraph 8 to 13 of the applicant's response) The objector is entirely incorrect in stating that Removal of Restrictions Act 84 of 1967 has been repealed. A circular from DEA&DP dated 9 July 2015 set out the procedures regarding the processing of applications in the applicable legislation pre- and post 1 July 2015. As such all applications in terms of the Removal of Restrictions Act 84 of 1967 which were submitted before the implementation of LUPA (Land Use Planning Act) must be processed, advertised, assessed and decided upon in terms of the Removal of Restrictions Act 84 of 1967.
- (b) (Paragraph 15 to 25 of the applicant's response) Considering the aforementioned statement; the applicant is of the opinion that the objector is not correct in stating that the application was submitted in terms of the wrong legislation. Therefore the considerations in terms of SPLUMA and LUPA are not relevant to this application. The applicant does state that the motivation of the application to remove the restrictive conditions was done in terms of Section 2.(1)(a)(aa) of the Removal of Restrictions Act.

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Regarding Section 25 of the Constitution and Compensation the applicant states that Section 25(1) is relevant to the deprivation of property as oppose to Section 25(2) which deals with the expropriation of land. Section 25(1) requires that the two conditions be met namely –

- that the deprivation occurs in terms of a law of general application; and
- that the law of general application does not permit arbitrary deprivation of property.

The Removal of Restrictions Act is a law of general application, as it applies to each and every application and meets the first condition as mentioned above. Furthermore, the Removal of Restrictions Act does not allow for arbitrary deprivation of property. Therefore the Minister and the delegated authority must assess if the conditions of Section 2 of the Removal of Restrictions Act have been met.

The applicant states that the Removal of Restrictions Act is the enabling legislation to deal with alteration, suspension or removal of restrictive conditions of title and servitude, the reference made to Section 25 of the Constitution is misguided and irrelevant in the given context.

- (c) (Paragraph 37 to 65 of the applicant's response) Regarding the agreement between the two parties; the applicant states that an agreement was concluded in 2002 between the two owners relating to the development of Erf 2228 in a manner which would have offended against the provisions of the servitude registered over the property.

However, it is also stated that the contract has lapsed as it was never acted upon in time. The applicant does state that in accordance with the Removal of Restrictions Act, Section 2.(1)(a)(aa):

“the Administrator may, subject to the provisions of this Act, of his own accord or an application of any person in terms of Section 3, by notice in the Provincial Gazette of the province, alter, suspend or remove, either permanently or for a period specified in such notice and either unconditionally or subject to any condition so specified, any restriction or obligation which is binding on the owner of the land by virtue of-

(aa) a restrictive condition or servitude registered against the Title Deed of the land”

And that therefore there is nothing untoward on the part of the applicant to apply to the Provincial Government to have the servitudes altered.

Regarding the Provincial Spatial Development Framework (PSDF, 2009) and Overstrand Municipal Spatial Development Framework (2010), the applicant motivates that densification is encourage in terms of the PSDF as

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it furthers effective usage of existing services and land usage which is in the best interest of the public. The applicant also states that densification in terms of the PSDF includes development tools such as subdivisions, second dwellings and sectional titles. The Overstrand Municipal Spatial Development Framework (2009) (SDF) read with the Overstrand Municipal Growth Management Strategy (2010) only refers to subdivision as a densification tool as the Overstrand Scheme Regulations allows for a second dwelling as a primary right. Furthermore, more densification is permitted in the existing residential fabric as indicated in the strategic documents

Regarding the impact of alteration of servitude the applicant states that the objector failed to demonstrate how the proposed second dwelling, that is limited to 6,4m, will have an adverse impact on the rights enjoyed by his client (Erf 2226). The second dwelling is not in line of sight of the ocean. The line of sight is over the existing dwelling house, which view will continue to be protected by the condition in the Title Deed that restricts the existing (and proposed) dwelling unit to a height of no more than 6.4m above base level.

- (d) (Paragraph 45 to 46 of the applicant's response) Departure Application :
The objector has failed to demonstrate why the two minor extensions will have a negative impact on the owner of Erf 2226.

Town Planner's Response:

- (a) The Removal of Restrictions Act 84 of 1967 will only be repealed when LUPA and the Municipal By-Law is implemented at each Municipality.
- (b) Considering the aforementioned statement, the application was submitted in terms of the correct legislation. The Removal of Restrictions Act 84 of 1967 allows for the removal and amendment of a restrictive condition or servitude registered against the Title Deed of the land. However, consideration must first be made in order to establish whether the removal or amendment of Title Deed conditions will be desirable for the interest of the establishment or development of any township or in the interest of any area of public interest, as will be discussed in the Evaluation.
- (c) Referring to the motivation for the removal and amendment of the Restrictive;
- It should be noted that the applicant submitted a contract which dates back to 2002 where the two parties agreed to the erection of a certain building. It does not state the size of the building or the use of the building, nor to which building plan it refers to. The correspondence letters (dated 2000 to 2004) which was submitted as part of the objection, states that the owner of Erf 2226 is willing to agree to a

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relaxation or removal of the servitude in order to accommodate a building which may not be used for accommodation purposes. No further proof is given in an effort to show that the two parties are in agreement.

Furthermore, the servitude registered against Erf 2228 (the servient tenant) is in favour of Erf 2226 (the dominant tenant). Therefore the servitude is considered a personal restrictive condition, as the servitude is only for the benefit of the dominant tenant.

It should be noted that all single residential erven in the area has a primary right for a second dwelling. Therefore all erven will have the same characteristics furthermore land value tends to increase as soon as a person has the property owner can utilise more of the property. Currently the property is very limited due to the extensive servitude. Even so the property owner of Erf 2228 bought the property knowing that the clause is inserted into the Title Deed.

Considering the aforementioned, the removal and amendment of the servitude will not affect necessarily on the character of the area, but will have an adverse effect on the dominant tenant as stated in the objection.

- (d) It should be noted that the proposed extension of the main dwelling will encroach upon the 100ft servitude, as shown on the plans which was submitted with the departure application. Therefore if the removal of the Title Deed restriction is refused then the proposed departure cannot be considered.

Evaluation

In an effort to evaluate the proposed application one must consider the nature of the restrictive condition. As stated in the discussion, the restrictive condition is a servitude registered against Erf 2228 (the servient tenant) is in favour of Erf 2226 (the dominant tenant). Therefore the servitude is considered a personal restrictive condition as the servitude is only for the benefit of the dominant tenant, as further confirmed in the comment received from the Overstrand Municipality's legal department.

As stated in the discussion the Town Planning Scheme allows for all single residential erven to be developed with a second dwelling, therefore removing the servitude will not have a negative effect on the character of the area nor for the public interest. The reason for the servitude is rather to ensure that the views and privacy of Erf 2226 is protected and also the property value. Knowing full-well of the aforementioned the owner of Erf 2228 purchased the property. Therefore the objection made by the owner of Erf 2226 has relevance. The opinion is held that an agreement between the property owners

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of Erven 2226 and 2228 must first be reached before the removal and amendments of the restrictive conditions can be considered.

As further confirmed in the comment received from the Overstrand Municipality's legal department, the Municipality is the deciding authority for the proposed departure application, however case law dictates that the Municipality cannot approve an application which is in conflict with a restrictive condition. Thus the proposed departure application cannot be considered due to the proposed extension of the main dwelling which will encroach upon the servitude as stated in the Title Deed.

Conclusion

The application for the removal/amendment of Title Deed restrictions is not recommended for approval, and the departure application is also not supported

7. Financial Implications

None

8. Staff Implications

None

9. Comments from other Departments, Divisions and Administrations

Engineering Department

See Annexure D.

Building Department

No objection for second dwelling. Do not support 6 parking areas direct from Tenth Street.

Fire Department

Total size of openings on 1m building line may not exceed 5m² – SANS 10400T : 2011 Table 2. May provide a boundary wall – 60 min fire resistance at 2.1m high as alternative

Legal Department

Herewith the comments from legal services in respect of the removal of a restrictive title condition applicable on Erf 2228.

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It is duly noted from the background discussion that a servitude is registered against Erf 2228 in favour of Erf 2226 under Title Deed Number T10151/2000, which refers to the Deed of Servitude. The Deed of Servitude brings forth the agreement that Erf 2228 shall not be built upon, but shall remain vacant and kept clear of any obstruction save for natural growth.

Due regard is given to the objection received on behalf of the owner on Erf 2226, which is based on the premise that Section 59 of the Spatial Planning and Land Use Management Act 16 of 2013 commenced on 1 July 2015, and in accordance with Schedule 3 of the Act determines that the Restrictions Act was repealed. As mentioned by the applicant, a circular from the Provincial Government dated 9 July 2015, stipulate the procedures regarding the processing of applications, with specific regard to applications submitted before the implementation of the Land Use Planning Act within our jurisdiction. Accordingly due regard must still be given to the Removal of Restrictions Act in the processing, advertisement and assessment of removal of restrictive conditions. I therefore agree with Town Planning contention that the Removal of Restrictions Act 84 of 1967 will only be repealed once LUPA and the Municipalities By - Law is enforceable within our jurisdiction. The application was accordingly submitted in terms of the correct legislation.

Consideration must be given whether the removal of the restrictive condition is in the interest of the development of the township or the public. From my assessment it is clear that the limited real right in favour of the objector was contractually agreed with the applicant, and then registered against the title deed. It is accordingly clear that legal consequences flowed from both the contract and registration, which not only bind the contracting parties, but also their successors in title. On this basis the applicant must adhere to the registered servitude, which is a real property right in terms of Section 25 of the Constitution. I agree that the restrictive condition fall within the parameters of a personal servitude. This is specifically based on the fact that the restrictive condition flows from an agreement between the applicant and the objector. The benefit of the limited real right is accordingly bestowed to the objector through an agreement, which was subsequently registered as a condition in the title deed.

In conclusion the fact of the matter is that a clear link exists between the servitude agreement and the restrictive condition. The Municipality cannot consider any removal or alteration of the personal servitude, unless specifically agreed upon by both the beneficiary of the limited real right and the applicant. In addition as case law dictate the Municipality cannot approve an application which is in conflict with the restrictive condition, even if it is line with the scheme regulations.

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10. Annexures

- Annexure A: Locality Plan
- Annexure B: Proposed Site Development Plan
- Annexure C: Motivation Report
- Annexure D: Services Report
- Annexure E: Objection received from the owner on Erf 2226
- Annexure F: Applicant's response to the objection received

RECOMMENDATION:

1. that it be recommended that the removal/amendment of restrictive title condition Title Deed No. T10151/2000, which refers to Deed of Servitude No. 3/1949 in terms of the Removal of Restrictions Act, 1967 (Act 84 of 1967) applicable to Erf 2228, Hermanus, **be refused** by Western Cape Government: Environmental Affairs and Development Planning;
2. that the departure from the relevant Scheme Regulations on Erf 2228, Hermanus, in terms of Section 15 of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985), in order to relax the lateral building lines from 2m to 1m respectively to accommodate additions, **not be approved**;
3. that the refusals in paragraphs 1 and 2 are based on the following reasons;
 - (a) the Title Deed is encumbered by a servitude, which is in favour of the property owner of Erf 2226 who has not given consent to the proposed removal/amendment; and
 - (b) in accordance to the Planning Law the Municipality cannot approve an application which is in conflict with the Title Deed restrictions;

RESPONSIBLE OFFICIAL :	P ROUX
TARGET DATE FOR IMPLEMENTATION :	13 APRIL 2016
TARGET DATE TO INFORM APPLICANT :	13 APRIL 2016
TARGET DATE TO INFORM OBJECTOR :	13 APRIL 2016

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11.

**ERF 2228, 71 TENTH STREET, VOËLKLIP, HERMANUS, OVERSTRAND
MUNICIPAL AREA : REMOVAL OF RESTRICTIONS ACT, 1967 (ACT 84 OF 1967)
AND DEPARTURE : MESSRS TOMMY BRUMMER TOWN PLANNERS ON BEHALF
OF ONSHELF PROPERTY EIGHTY SEVEN (PTY) LTD**

2228 HVK (2962)

P Roux

28 January 2016

(028) 313 8900

Hermanus Administration

**THIS MATTER SERVED BEFORE THE JOINT PORTFOLIO COMMITTEE ON
22 MARCH 2016, WHICH COMMITTEE SUPPORTED THE RECOMMENDATION**

RESPONSIBLE OFFICIAL :

P ROUX

TARGET DATE FOR IMPLEMENTATION :

13 APRIL 2016

TARGET DATE TO INFORM APPLICANT :

13 APRIL 2016

TARGET DATE TO INFORM OBJECTOR :

13 APRIL 2016

3 THE PROPERTY

3.1 Contextual Description

As indicated on the Locality Plan in **Figure 1**, attached, Erf 2228 Hermanus ('the property') is situated in Hermanus East; more specifically, in the area known as Voelklip. With reference to the Aerial Photograph in **Figure 2**, attached, it can be seen that the property is located on 10th Street, north of the coastal edge. The Noting Sheet, that has also been obtained from the office of the Surveyor General, is contained in **Figure 3**, attached, and shows the location of the subject property in relation to the street network and extent of surrounding erven.

3.2 Deed of Transfer (Title Deed)

Erf 10114 Cape Town is described in Deed of Transfer T10151/2000 as follows:

"Erf 2228 Hermanus in die gebied van die groter Hermanus plaaslike oorgangsraad, afdeling Caledon, Provinsie Wes-kaap."

The Deed of Transfer (Title Deed) referred to above is attached hereto as **Annexure C**.

3.3 Surveyor General's Diagram

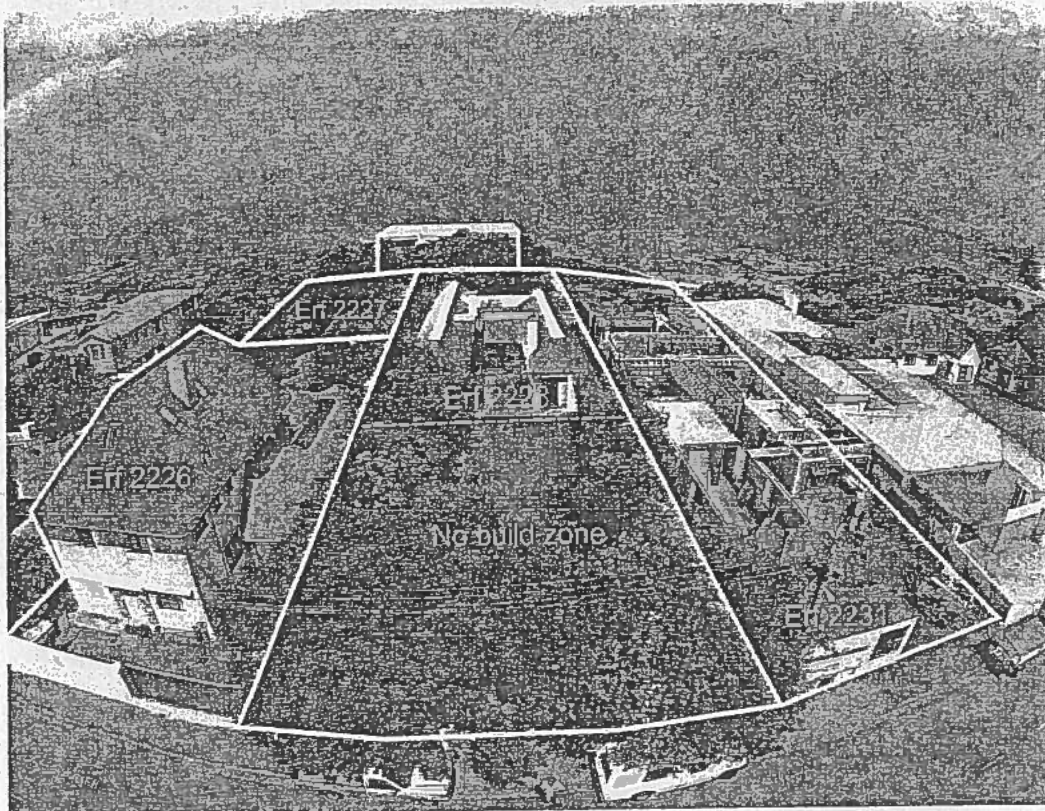
The SG Diagram (SG 3349/1933) has been obtained from the Office of the Surveyor General and is attached hereto as **Annexure D**.

3.4 Zoning

The zoning of properties in Hermanus is controlled by the provisions of the Overstrand Zoning Scheme Regulations. According to the Zoning Map in **Figure 4**, attached, the property is zoned Single Residential SR1.

4 DEEDS OF SERVITUDE

The following photograph illustrates the location and relationship between Erven 2226, 2228 & 2231 Hermanus:



4.1 Deed of Servitude 3/1949

Page 5 and 6 of Deed of Transfer 10151/2000 refer to Deed of Servitude 3/1949 which is registered against Erf 2228 Hermanus. A copy of both the Title Deed as well as the Deed of Servitude are attached as Annexure C.

The Deed of Servitude 3/1949 sets out the parameters of the servitude and its conditions that were registered over Erf 2228 Hermanus in favour of abutting Erf 2226. The conditions of the servitude are as follows:

"3. MARGARET'S TRUST (PROPRIETARY) LIMITED does hereby agree that Erf No. 2228 Hermanus to a depth of One Hundred (100) Feet, from its boundary on Tenth Street, shall not be built upon but shall be and remain vacant and shall be kept clear of any obstruction thereon save for natural growth."

"4. MARGARET'S TRUST (PROPRIETARY) LIMITED does hereby agree that no building or other structure whatsoever shall be erected or placed on the remainder of Erf No. 2228 other than a dwelling house and its customary appurtenances."

"5. The dwelling house and appurtenances permitted under Clause 4 hereof shall:-

- (a) Have a thatch roof.
- (b) Be single-storeyed.
- (c) Not exceed Twenty-One (21) Feet in height from the ground.
- (d) Have outside walls of face brick or of local stone or of plastered brick or of plastered concrete or of any one or more of these."

"6. Nothing in these presents shall preclude the erection of a boundary wall or fence on Erf No. 2228 Hermanus provided that such wall or fence shall not exceed a height of Three (3) Feet from the ground and shall be constructed of wire and/or the material specified in Clause 5(d) hereof."

There is a small existing structure on Erf 2228, which is obscured in the above photograph by the existing vegetation. An attempt was made in 2003 to regularise this structure as well as to erect a small building by way of registering a further servitude 49m² in extent over Erf 2228 (i.e. to permit the structure & building in the 'no-build zone'; however this servitude was never registered – as can be seen from SG Diagram 2823/2003, attached hereto in **Annexure D.**)

4.2 Deed of Servitude 2/1964

With reference to page 4 of Deed of Transfer 18856/86, it can be seen that a Notarial Deed of Servitude was also registered over Erf 2231 in favour of Erf 2226. A copy of both these Title Deeds as well as the servitude documents are attached hereto as **Annexure C**. The conditions of this servitude are slightly different to those in Servitude 3/1949 referred to in paragraph 4.1, above. These conditions require consent from the owner of Erf 2226 insofar as any proposed building is concerned, save for a single dwelling. The

conditions also prohibit the hanging up of unsightly washing and require the owner of Erf 2231 to remove any tree, at its own expense, should such tree interfere with the view enjoyed by the occupiers of Erf 2226.

The owner of Erf 2226 subsequently purchased Erf 2231 and this servitude (2/1964) was accordingly cancelled in 2014.

5 REMOVAL OF RESTRICTIONS ACT NO. 84 OF 1967

Section 2.(1)(a)(aa) of the Removal of Restrictions Act No. 84 of 1967 provides as follows:

"Whenever the Administrator of a province in which the land in question is situate, 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; he may, subject to the provisions of this act, of his own accord or on application of any person in terms of section 3, by notice in the Provincial Gazette of the province alter, suspend or remove, either permanently or for a period specified in such notice and either unconditionally or subject to any condition so specified, any restriction or obligation which is binding on the owner of the land by virtue of a restrictive condition or servitude registered against the title deed of the land;"

Annexure A, attached, lists the conditions of Servitude 3/1949 that are to be deleted and altered. It is recommended that Clause 3 be deleted and that Clauses 4 & 5 be altered and replaced with a new condition. Annexure A reads as follows:

Condition to be Deleted:

3. MARGARET'S TRUST (PROPRIETARY) LIMITED does hereby agree that Erf No. 2228 Hermanus to a depth of One Hundred (100) Feet, from its boundary on Tenth Street, shall not be built upon but shall be and remain vacant and shall be kept clear of any obstruction thereon save for natural growth.

Conditions to be Altered:

4. MARGARET'S TRUST (PROPRIETARY) LIMITED does hereby agree that no building or other structure whatsoever shall be erected or placed on the remainder of Erf No. 2228 other than a dwelling house and its customary appurtenances.

and

5. The dwelling house and appurtenances permitted under Clause 4 hereof shall:

(a) Have a thatch roof.

(b) Be single-storeyed.

(c) Not exceed Twenty-One (21) Feet in height from the ground

(d) Have outside walls of face brick or of local stone or of plastered brick or of plastered concrete or of any one or more of these.

To Be Combined to Read as Follows:

MARGARET'S TRUST (PROPRIETY) LIMITED does hereby agree that the buildings erected on Erf 2228 shall be limited to a dwelling house and a second dwelling unit, and their appurtenances, only. These buildings shall have a thatch roof, be single-storeyed and shall not exceed 6.4m in height, measured above mean sea level. Further, Erf 2228 shall not be subdivided without the written consent of the owner of Erf 2226 Hermanus.

6 SITE DEVELOPMENT PLANS AND ZONING SCHEME REGULATIONS

6.1 Site Development Plans

Site Development Plans have been prepared by *Newman Architecture and Design* and can be summarised as follows:

- The tv room and bedroom of the existing dwelling house will be extended in a northerly direction by 2m.
- The new second dwelling unit will measure 114m² in extent and will comprise two bedrooms, a living room and kitchen.

- There is space for 5 on-site parking bays to serve the existing and proposed dwelling units.

6.2 Zoning Scheme Regulations

As mentioned in paragraph 3.4 above, Erf 2228 is zoned SR1 in terms of the Overstrand Zoning Scheme Regulations.

Section 6.1.1 of the Scheme Regulations lists the uses permitted on the property.

Primary uses are: day care centre, dwelling house, guest rooms, home occupation, second dwelling unit;

Consent uses are: creche, green house, guest house, house shop, institution, place of instruction, place of worship, residential building, tourist accommodation.

Section 6.1.2 of the Scheme Regulations lists the Development Rules applicable to the property; these are summarised in the table below:

Coverage	50%
Street building line	4,0m
Side and rear building line	2,0m
Height: base level to top of roof	8m
Parking	Dwelling house: 2 bays Second dwelling: 1 bay

7 MOTIVATION

7.1 Provincial Spatial Development Framework

- The Provincial Spatial Development Framework ('PSDF') was approved in 2009 as a Section 4(6) Structure Plan in terms of the Land Use Planning Ordinance 15 of

1985, which Framework provides to guide municipal Integrated Development Plans and Spatial Development Frameworks.

- Densification is listed as one of the objectives in the PSDF (Policy UR2) which recommends for the average gross residential density in urban settlements to be increased to 25 dwelling units per hectare (du/ha). Further, it is also recommended in Policy UR3 that the density target should be achieved using a range of urban development tools such as subdivisions, second dwellings and sectional title developments.
- Insofar as Policies UR2 and UR3 are concerned, the following conditions / controls are recommended in the PSDF: *"Framework plans for the main settlements in local municipalities should indicate the most appropriate locations for the application of the different urban development tools."* In this regard, reference will be made to the Overstrand Municipal Growth Management Strategy (2010) in Paragraph 7.3, below.

7.2 Opinion of the Head: Department of Environmental Affairs & Development Planning

- In support of the above (goal of densification in the Province), reference is made to an answering affidavit, dated April 2012, from the Head: Department of Environmental Affairs and Development Planning ('the Department') with respect to an application for the amendment of restrictive title conditions, and specifically in relation to the question of the public interest of such an application. The Department notes that the densification strategies identified in the PSDF, which *"in essence encourages urban development to reach an average residential density of 25 units per hectare, in order to encourage the most cost-effective use of existing services and urban land, and to increase the accessibility of urban opportunities to a greater number of people ... The Department considers this strategy, and the policy underlying it, to be in the interest of the public."* The Department goes on to argue as follows: *"The larger vision is to reach sustainability. But this strategy very specifically points out that densification should be applied in a sensible matter."*

- It is clear from the above that the official response from the Department, who will also evaluate and make a recommendation to the Minister on the subject proposal, considers the principle of densification to be in the public interest and in the interest of the township and the area, but that such densification is to be achieved in a 'sensible manner'.

7.3 Overstrand Municipal Growth Management Strategy (2010)

- As recommended in the PSDF, local Municipalities are to indicate appropriate locations in which to implement tools that can achieve the goal of densification; in this regard, attention is drawn to The Overstrand Municipal Growth Management Strategy (2010) which advocates follows: *"the potential of using densification as an integral part of a growth management strategy to positively redress and counteract the effects of urban sprawl is now recognised by the Overstrand Municipal Council, as a necessary and positive step to promote the longer term sustainability of the Overstrand Municipality and its sub-regions' environmental quality."*
- The Growth Management Strategy defines densification as follows: *"Densification is the process whereby residential densities (the number of dwellings per hectare) are increased, in a planned and meaningful way, within the existing boundaries of a specific area. That is, the increased use of space to provide more residential dwelling units, both horizontally and vertically, within existing urban area, within existing properties and in new development."*
- As purported in the Growth Management Strategy, an increase in residential densities hold a number of advantages for urban places in the Overstrand area; these advantages, which are in the interest of the development of the area are noted to be, among others, as follows: densification is a means of improving the efficiency and sustainability of public infrastructure and thereby improving the social and economic vitality of urban precincts, low density is expensive and inefficient, increased density facilitates variety in housing form, higher densities can reduce public costs, increased density conserves land and densification supports efficient service provision.

- The subject property falls into the Hermanus East area which area predominantly consists of the higher income residential suburbs of Voelklip, Fernkloof, Kwaiwater and Hermanus Heights. One of the general densification strategy principles for this area is *"to increase thresholds for a greater range and choice and variety of urban opportunities."*
- The Hermanus East area is further divided into 6 Planning Unit areas; the subject property falls into Planning Unit 6 which is identified as the *"existing pristine high income, low density southern section of the Vloeklip residential area"*. According to the Growth Management Strategy, the following densification strategy is recorded for this Planning Unit: *"Incremental development through subdivision to allow a second and third dwelling units respectively ... this proposal can potentially contribute more than 200 additional dwelling units, increasing the current gross density from 8.7 to 11.3 du/ha."*
- The Growth Management Strategy identifies a number of strategies through which densification can be achieved, including the permission to erect second dwellings on erven as of right.

7.4 Zoning Scheme Regulations

- With reference to Paragraph 3.4, above, the property is zoned Single Dwelling SR1 in terms of the Overstrand Zoning Scheme Regulations. The primary uses permitted in this zone are: day care centres, dwelling house, guest rooms, home occupation & second dwelling unit, subject to the applicable development rules for this zone.
- The following definitions are relevant to note in the context of the above:

"dwelling house" means a self-contained inter-leading group of rooms, used for the accommodation and housing of one family, together with adequate sanitary facilities and kitchen, and such outbuildings as are ordinarily used therewith, provided further that a dwelling house may not have more than two kitchens;"

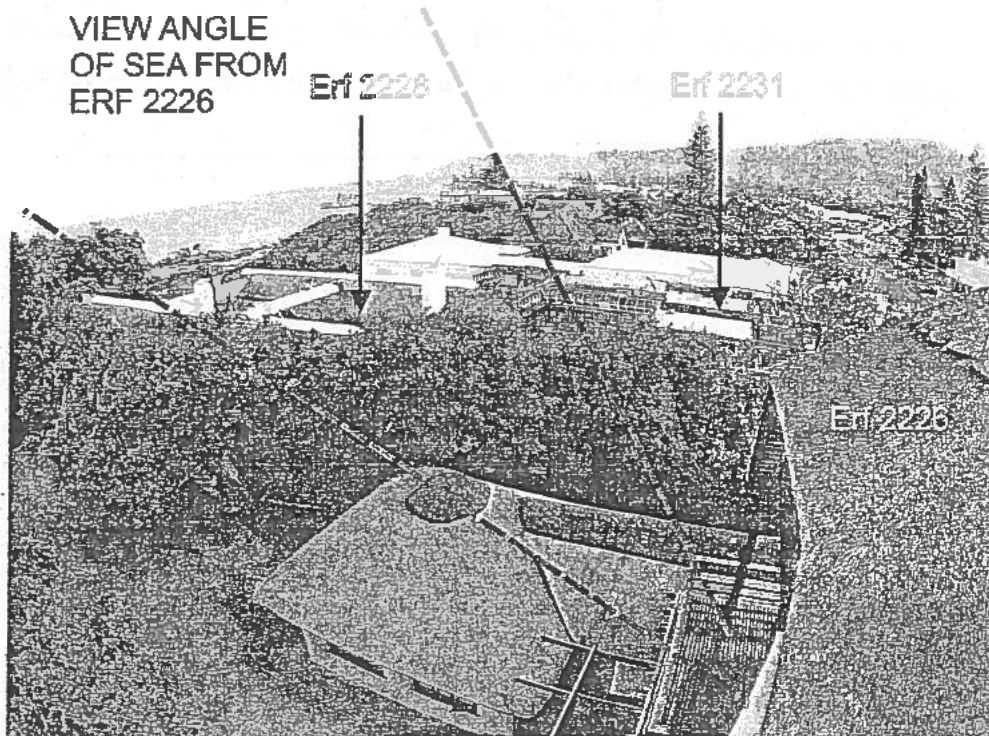
“second dwelling unit” means an additional dwelling unit which may, in terms of this zoning scheme, be erected on a land unit where a dwelling house is also permitted, and such second dwelling unit may be a separate structure or may be contained in the same structure as the dwelling house; provided that ... “

7.5 Planning Discussion

- Paragraphs 7.1 to 7.3 above have comprehensively demonstrated that residential densification is in the interest of the area and the public. This is a goal purported in the Provincial Spatial Development Framework at a macro level as well as at a micro level for the Voelklip area as identified in the Overstrand Municipal Growth Management Strategy. Among others, residential densification improves efficiency and sustainability of public infrastructure, conserves land, supports efficient service provision and facilitates a variety in housing forms.
- It has also been recorded that the Head: Environmental Affairs & Development Planning, who will make a recommendation to the Minister on the subject application, is of the opinion that densification is in the interest of the public.
- Whilst these planning documents advocate an average residential density of 25 du/ha, and whilst no one solution fits all, we would like to point out that the current density on the property is that of 10 du/ha; permitting a second dwelling on the property would increase this density to 20 du/ha, which is more in keeping with the goals advocated in Provincial and Local planning strategies. (These are nett figures as no roads and open spaces have been included; the gross density figure would be much lower.)
- With reference to Paragraph 7.4 above, it is noted that the erection of a second dwelling unit is permitted as of right in the Overstrand Zoning Scheme Regulations. Not only does the servitude registered against Erf 2228 prevent the further development of the township, which is in the public interest, but it hinders the owner of Erf 2228 from exercising its real zoning right, as provided for in the Scheme Regulations. It can thus be stated that the status of the servitude has in effect taken away a real property right to erect a second dwelling, which is provided to the owner

by way of the provisions of the current SR1 use zone. Not being able to exercise this right has in turn affected the development of the township which, as has been demonstrated, is in the interest of the public.

- Whilst desirability is not a matter of consideration insofar as Removal of Restrictions Applications are concerned, given the nature of this servitude, registered over one property in favour of another, it is appropriate to mention that the deletion and alteration of conditions thereof will not have a negative impact on the owner of Erf 2226. It can be assumed that this servitude was registered to protect, among other things, the views enjoyed from Erf 2226. The photograph, below, which was taken from just above the southern balcony on Erf 2226, clearly illustrates that a second dwelling erected on Erf 2228 (in the location illustrated in the attached Site Development Plan) will have no negative impact on views enjoyed from Erf 2226. The second dwelling will be erected towards the street end of Erf 2228 which will further ensure that the seaward views of Erf 2226 will be preserved, accordingly. The height of the second dwelling is proposed to be the same height as the existing main dwelling house on Erf 2228.



- In terms of the Overstrand Zoning Scheme Regulations, a second dwelling unit may not exceed 120m² in extent; this too will ensure that the second dwelling is of moderate extent. The proposed second dwelling measures 114m² in extent.
- With reference to **Annexure A**, attached, it is recommended that the new condition also limit the subdivision of Erf 2228. This will provide further protection for abutting Erf 2226 insofar as the extent of development on Erf 2228 is concerned.
- With reference to **Annexure A**, attached, it has been recommended that a height limit of 6.4m above mean sea level be imposed for all buildings on Erf 2228 which will effectively limit all dwellings to a single storey only. This will ensure that the view enjoyed from Erf 2226 will be preserved, accordingly.
- As was mentioned in Paragraph 4.2 above, the servitude registered over Erf 2231 in favour of Erf 2226 has already been cancelled. Our proposal is however not to cancel the existing servitude, but to delete / alter conditions of the servitude to allow the owner of Erf 2228 to exercise its development rights, which have been demonstrated to be in the interest of the public and the area, but which remain to protect the rights of the owner of Erf 2226 as originally envisaged by the servitude.

TOMMY BRÜMMER TOWN PLANNERS

June 2015

**COMMENTS FROM THE ENGINEERING SERVICES DEPARTMENT FOR:
APPLICATION FOR REMOVAL OF RESTRICTION & DEPARTURE: ERF
2228, VOELKLIP (2962)**

Electricity : In order
Water : In order
Sewer : In order
Stormwater : In order
Roads and traffic : In order

Conditions:

1. that only the existing water and sewerage connections will be available to the development, should larger capacity in any of these services be required, the upgrading will be at the owner's cost;
2. that only the existing electricity connection will be available for the development therefore the capacity must be divided between the two buildings;
3. that stormwater be allowed to discharge through Erf 2228, Voelklip, unobstructed;
4. that no on-street parking be allowed.



**DENNIS HENDRIKS
SENIOR MANAGER:
ENGINEERING SERVICES**

18/12/2015
DATE