

**APPROVED MINUTE FOR THE MEETING OF HERITAGE
WESTERN CAPE, APPEALS COMMITTEE
HELD ON THURSDAY, 13TH JUNE 2024, MICROSOFT TEAMS, SCHEDULED
FOR 08:30**

1. Opening and Welcome

The Chairperson, Mr Gregory Ontong, officially opened the meeting at 08:30 and welcomed everyone present.

2. Attendance

Committee Members:

Mr Gregory Ontong (GO)
Ms Corlie Smart (CS)
Dr. Andre van Graan (AvG)
Dr Nicolas Baumann (NB)
Dr Antonia Malan (AM)

Members of Staff:

Ms Nosiphiwo Tafeni (NT)
Ms Penelope Meyer (PM)
Ms Emily-Jane Vowels (EJV)
Ms Waseefa Dhansay (WD)
Ms Sneha Jhupsee (SJ)
Ms Stephanie Barnardt (SB)
Ms Aneeqah Brown (AB)
Ms Chane Herman (CH)
Ms Corne Nortje (CN)
Ms Chiara Singh (CSI)

Visitors:

Item 9.10

Mr Nick Smith
Mr Bongani Sithole
Mr David Hart
Mr Byron Nicholas

Mr Edwin Ngobeni
Ms Sandra van der Merwe
Ms Angela O Connor Smith
Mr Omar Boltman

Item 10.1

Mr John Gribble
Mr Riad Fataar
Mr Faizal Sayed

Mr Jason Freel
Ms Susan Brice

Item 11.1

None

Item 11.2

Mr Ashley Lillie
Ms Elbe Cooper

Ms Belinda McFadzean

3. Apologies

Mr Stuart Hermansen (SH) (on extended leave for 4 meetings)

4. Acceptance of the Code of Conduct

Members re-affirmed their commitment to the Code of Conduct

5. Approval of Agenda

5.1 Dated 13th June 2024.

The Agenda dated 13th June 2024 was approved. The Committee unanimously resolved to adopt the Agenda.

6. Approval of Minutes from previous meeting

6.1 Appeals Minutes dated 15th May 2024

The Committee resolved to approve the Minutes dated 15th May 2024.

7. Disclosure and Conflicts of Interest

None.

7.1 Recusals- General

None.

8 Confidential Matters

None.

9. Administrative Matters

9.1 Appointments

None.

9.2 Outcome of the Tribunal Committees and Recent Court Decisions

PM updated the Committee on recent Tribunal Rulings.

9.3 Report back from HWC Council

None.

9.4 Site Visits undertaken

Albion Road Rondebosch Monday 3 June 2024 AVG, NB & GO

9.5 Potential Site Visits

Item

9.6 Discussion of attendance at any upcoming Tribunal meetings

9.7 Discussion of the Agenda

9.8 Report back from BELCom

9.9 Guidelines

9.10 Consideration of jurisdiction to hear "Appeal" against publication of notice to provisionally protect Erf 32564 RE Cape Town

The representative of the City of Cape Town, Mr Nic Smith, argued that the Appeals committee should hear the appeal for the following reasons:

- The discussion is about whether the committee has jurisdiction, not the merits of the appeal.

- Issue is taken with the committee's legal advisor, PM, who believes the decision to provisionally protect, under section 29 of the NHRA, was made by the Minister's Independent Appeal Tribunal, not Heritage Western Cape (HWC), and thus HWC has no jurisdiction.
- It is countered that the appeal committee does have jurisdiction to consider the appeal.
- The appeal tribunal's ruling on March 25, 2024, and the provisions under Regulation 12, which allow HWC to appoint an appeal committee are noted.
- The city's appeal was submitted on June 4, and it is suggested it should be heard in mid-July.
- The appeal is properly before the committee, which has the jurisdiction to hear it on its merits.
- The decision-making process under section 29 was initiated by HWC's CEO and completed by HWC, thus validating the appeal's legitimacy.
- Reiterates that the appeal is an internal remedy required by the Promotion of Administrative Justice Act.
- Briefly touches on the merits, asserting they are good, but emphasizes they are not relevant to the jurisdictional question at hand.
- In conclusion, the legal advisor's claim that the tribunal's decision precludes HWC's jurisdiction is refuted, as it is asserted that the tribunal was not competent to make the decision in question.
- The appeal concerns the conduct of HWC's CEO in the decision-making process under section 29.

The floor was opened for questions from the Committee to Mr. Smith.

The Committee then went *in camera* to discuss the matter.

Discussion

- The provisional protection of the entire site appeared to be the major concern of the owner, the City of Cape Town.
- Clarification was sought on whether the cadastral boundaries were fixed or still under discussion.
- The tribunal decided on provisional protection, and boundaries must be set within six months in conjunction with the city's heritage section, not the electricity department.
- The Tribunal used the word "shall" in its decision, and the committee agreed that this word is peremptory and does not infer "should" as argued by Mr Smith.
- The issuing of the letter and notice in compliance with the provisions of section 29(4) of the NHRA by the CEO of HWC was merely a procedural step to give effect to the decision taken by the Tribunal and did not amount to an administrative action. This means that the action of the CEO cannot be appealed to HWC Appeals committee.
- The current issue is whether the committee has the legal right to make the requested decision.
- The opinion was that the committee does not have jurisdiction; any other decision would be invalid.
- If there are disputes with the tribunal's decision, they must be resolved in court.

DECISION

The Appeals Committee does not have jurisdiction to hear the matter and any decision taken by this Committee would be *ultra vires*.

10 Matters Arising

10.1 Erf 55585, 26 Draper Street, Claremont

HM/CAPE TOWN METROPOLITAN/ CLAREMONT/ ERF 55585
Case No: HWC23101716SB1017

Appeal against HOMs's decision. Case officer Stephanie-Ann Barnardt (SB), introduced the item.

For the first appellants (Muslim Judicial Council) Mr Riad Fataar

- It is not a new matter, there is a history which goes back to 2013.
- City of Cape Town has done their own research, and this was shown that the land was a cemetery that was used by the Muslim community.
- The cemetery could not be used during the apartheid area as a Muslim cemetery.
- In order to protect burials sites, the Muslim community used to register the property in an Imam or other respected member of the community's name in order to protect the property.
- Descendants have sold the land.

For the second appellants Ms Brice (City of Cape Town)

- Ms Brice advised that her authority to represent the City of Cape Town was still being considered by the legal department of the City.
- She nevertheless wanted to personally oppose the development of the site as there was a need for cemetery space in the City.

For the respondent Mr Jason Freel

- There is no dispute that access to certain properties have been denied to communities in the past and this is regrettable.
- The controversy has been going for some time. No positive action has been taken by either the MJC or the City of Cape Town since 2013.
- No pro-active measures have been taken to protect the site.
- This space has not been used as a burials site since 1994.
- There have been no individuals who have visited the site in this time.
- Regarding the alleged procedural irregularities, the HWC delegations are clear that the Heritage Officer's meeting had authority to take the decision.
- All parties had the same notifications and access to the meetings.

DISCUSSION

Amongst other things, the following was discussed by the Committee:

- The problems posed by these sites in general is acknowledged.
- There are many layered complexities in the present site, and the fact that it is in private ownership further complicates the issue.
- There needs to be some kind of policy or system to deal with these Muslim sacred sites within the City of Cape Town.
- However, what is before the committee is the archaeological report, and there is consensus that the report is compliant.
- The committee is constrained to only exercise its jurisdiction in terms S35 of the NHRA. The only issue which triggered the NHRA was the need for a permit in terms of S35 and a subsequent report which would clarify whether the cease-works order may be lifted.
- HWC has no jurisdiction under the NHRA to insist on the site being used as a burial ground.

DECISION

The appeal is dismissed.

The Report on Archaeological Excavations (TerraMare Archaeology 29 January 2024) complies with the relevant provisions of the NHRA. It is recommended that the City of Cape Town

investigate the provisional protection of the site.

SB

11. New Matters

11.1 Erf 357, 6B Devonport Road / 8 Signal View Close, Tamboerskloof HM / CAPE TOWN METROPOLITAN / TAMBOERSKLOOF / ERF 357 Case No: HWC24020103KB0201

HELD OVER

The matter will be held over to the next meeting to allow the Committee to conduct a site inspection on 8 July 2024 at 10 am.

KB/SJ

11.2 Erf 46748, 67 Albion Road, Rondebosch HM/CAPE TOWN METROPOLITAN/ RONDEBOSCH/ ERF 46784 Case No: HWC23121303CH0223

Appeal against BELCom's decision. case officer Chane Herman (CH), introduced the item.

Dr A van Graan read the site inspection report into the record.

Ms Belinda McFadzean for the appellant:

- The main concerns are detailed in a submitted document.
- No opposition to the demolition itself, acknowledging the property may lack necessary heritage value.
- Concern over unconditional approval of the demolition.
- The area has a character that should be protected.
- The decision overlooks the city's assessment of the area's heritage value.
- Surrounding buildings are graded and have conservation worthiness.
- The building may not be conservation-worthy, but the surrounding area has heritage quality.
- Other buildings in the area are worth conserving.
- The general arrangement and scale of buildings contribute to the heritage resource.

Mr Ashley Lillie:

- Basis of appeal that there is an overall heritage character of the neighbourhood.
- BELCom explored it at length
- The context of this building is a very mixed character.
- Could not possibly be considered a heritage area.
- Area does not warrant protection and conditions would be inappropriate.

DISCUSSION

Amongst other things, the following was discussed by the Committee:

- The building has been substantially changed. The IIIB grading suggested by the City of Cape Town official is not agreed with.
- The context is eroded, very mixed with a lot of large buildings. There is no cohesive heritage character.
- There needs to be a distinction drawn between planning and heritage parameters.
- The context does not provide sufficient heritage significance to warrant the requirement that HWC approve the replacement structure.

DECISION

The appeal is dismissed.

CH

12. Other Matters which were noted only

12.1 None

13. Proposed next date of the meeting to be held online: 17th July 2024

14. Adoption of decisions and resolutions

The Committee resolved to adopt the decisions and resolutions dated 13th June 2024 AvG moved to adopt and NB seconded.

Closure: The meeting was adjourned at 12:20

MINUTES APPROVED AND SIGNED BY:

CHAIRPERSON  DATE 14 August 2024

SECRETARY _____ DATE _____ 2024