

INVESTIGATING THE ADMINISTRATION AND EFFECTIVE IMPLEMENTATION OF THE NATIONAL HERITAGE RESOURCES ACT 25 OF 1999

prepared for

Department of Economic Development and Tourism in the Western Cape (DEDAT)
and Heritage Western Cape (HWC)

Final report 31 March 2021

Prepared by:

vidamemoria heritage consultants

3rd Floor · Guarantee House · 37 Burg Street · Greenmarket Square P O Box 50605 Waterfront · 8002 · Cape Town

tel: 076 840 9556 / 082 330 4066 · quahnita@vidamemoria.co.za · CK 2006/049087/23



TABLE OF CONTENTS

1.	INTRODUCTION	
1.1	Introduction	2
1.2	Scope	3
1.3	Structure of report	3
1.4	Method	3
1.5	Statement of independence	4
1.6	Problem identification	4
2.	LEGAL REVIEW	8
3.	LEGAL REVIEW SYNTHESIS	14
4.	ENGAGEMENT	
4.1	Engagement with interest groups	17
4.2	Survey: conservation bodies	23
4.3	Survey: Western Cape Property Developers Forum	26
5.	SOLUTIONS	29

Annexure A: Legal review

Annexure B: Comment received from the City of Cape Town

Annexure C: Responses conservation bodies survey

Annexure D: Responses WCPDF survey

1. INTRODUCTION

1.1 Introduction

Vidamemoria Heritage Consultants were appointed by *Department of Economic Development and Tourism in the Western Cape (DEDAT)* and *Heritage Western Cape (HWC)* to identify the challenges in effectively implementing and administering the National Heritage Resources Act 25 of 1999 (NHRA) in order to seek a balance between the conservation of heritage resources and the sensitive development thereof. Advocate Peter Kantor has compiled the legal review that forms part of this report.

The heritage application process is a key element in the development pipeline for fixed capital formation within the Western Cape Province. Constrained permit approval process has become a bottleneck slowing the progress of development and the flow of capital into property and fixed infrastructure (both for the private and the public sector). HWC has encountered challenges when applying the NHRA in certain instances, which has led to perceptions that the Act itself is anti-development in terms of the heritage environment. Definitions used in the NHRA, as well as certain sections of the NHRA have left to uncertainty often leading to varying interpretations. Issues raised relate inter alia to systemic, resource and process.

The broad objective of the report will be to enable HWC better to fulfill its statutory mandate in terms of the NHRA. Amongst others, the principle of sustainable development is applicable, as developed by the Constitutional Court, which balances social, economic and environmental interests. Fulfilling this mandate requires an approach firmly founded on a sound legal interpretation of the NHRA and understanding of the nature and scope of HWC's powers and duties, in the light of the constitutional competencies in Schedules 4 and 5 of the Constitution. HWC's approach needs to make full use of the mechanisms available to it to manage the conflicts that necessarily arise in the fulfillment of its mandate. This involves clarity and consistency of approach, policy certainty, as well as the agility to adapt to changes in the law that arises through court decisions and legislative amendments.

Background to the establishment of Heritage Western Cape as a provincial heritage resources authority has been drawn from the previous Report in Preparation of a Regulatory Impact Assessment dated 8 December 2017. The system of administration envisaged within the NHRA is far-reaching and comprehensive, including the identification of the national estate, articulation of significance and ensuring that administration of protections and controls are effective, efficient, lawful, reasonable and fair. Lawful, reasonable and fair are the markers of the Constitutional right to just administrative action. However, the intentions of the NHRA have not been realised, Townsend (2018: 189 – 190), states that the failure to establish a system with adequately capacitated authorities, the incompleteness of identification and grading process and the sheer volume of applications made under general protections all conspire to make heritage management in South Africa inefficient and in large part, ineffective.

The principles of the NHRA enable a cogent and comprehensive system, and should the system be implemented as envisaged, heritage resources management could develop in an appropriately balanced manner integrated into the planning system - protecting heritage and enabling development. In the context of heritage resource management in Africa, the current regulatory achievements (although much criticised) could be lauded as important early steps in the establishing of a rational and effective heritage resource management system (Townsend 2018: 190 - 191).

1.2 Scope

The scope of this report entailed:

- Identification of potentially challenging definitions and sections within the NHRA as they constitute overregulation or red tape
- Assess which sections of the NHRA may be in conflict with any other legislation as well as the Constitution
- Evaluate the socio-economic impact of such definitions and sections
- Make recommendations on how best to proceed in terms of addressing such definitions and sections of the NHRA to be best applied, implemented and administered which could include alternatives for effective implementation of the NHRA in its current form; and recommendations on the most suitable legislative interventions which would present a balance between the interests of heritage conservation and development.

The legal review considered options to reduce red tape focusing on legal definitions and conflicting legislation in trying to streamline application processes around general protections.

Practitioners engaged in heritage process – town planners, environmental consultants and heritage practitioners – as well as officials at the South African Heritage Resources Agency (SAHRA), City of Cape Town (planning and heritage), Heritage Western Cape and Department Environmental Affairs and Development Planning (DEADP) were engaged to consult on issues identified and possible solutions. In addition, two questionnaires were drafted and distributed. The first to all conservation bodies registered with Heritage Western Cape and the second to members of the Western Cape Property Developers Forum. The questionnaires considered aspects of legal definitions and sections of the NHRAct as well as issues experienced in terms of heritage process.

1.3 Structure of report

Section 1 introduces the project and considers method and problem identification

Section 2 comprises overview of the legal review

Section 3 provides a synthesis of the legal review

Section 4 outlines engagement undertaken and highlights survey responses

Section 5 provides possible solutions

1.4 Method

Brief has been completed across three key stages, namely:

- 1 Identification of potentially challenging definitions and sections within the NHRA
- 2 Engagement with key groupings, research and consideration of other legislation
- 3 Presentation of legal review and key solutions

The brief focused on legal definitions and conflicting legislation in an attempt to streamline application processes around general protections. The legal review considered ways to cut red tape in a permit application system seen as anti-development. Peter Kantor conducted legal research and assisted in formulating of key solutions identified.

1.5 Statement of independence

Peter Kantor is an advocate of the High Court of South Africa who specializes in environmental, labour and constitutional law. His environmental law practice includes heritage law and implementation of the NHRA. He did an LLM course in environmental law at UCT in 1995 and his practice included heritage work before the NHRA of 1997 and NEMA of 1998. He has implemented those Acts since their promulgation and has a comprehensive working knowledge of their principles and practical application. Adv Kantor has extensive experience in applying the NHRA, has been on the executive committee of the Cape Town Heritage Trust since 2003, has worked on many heritage matters, been involved in many applications at HWC, and has chaired the Minister's appeal tribunal.

Quahnita Samie is a registered town planner specialising in heritage resource management. She was previously employed at the South African Heritage Resources Agency (SAHRA) when the NHRA was first implemented and has sound knowledge of implementation of the NHRA. Quahnita has served on HWC Council, IACOM, IGIC and Appeals and has extensive experience in heritage resource management and assessment of significance and grading of heritage resources. Having undertaken numerous heritage impact assessments since 2006, she currently focuses on nomination and declaration of national and provincial heritage sites.

The heritage team are independent and have no vested or financial interest in undertaking this study.

1.6 Problem identification

Problem identification highlights issues causing uncertainty in the implementation and administration of the National Heritage Resources Act. These relate to definitions in the NHRA that lead to uncertainty in administration, implications for administration, extent of heritage resource and/or areas considered possessing cultural value, general protections, triggers listed in Section 38 of the NHRA and issues requiring further exploration.

Definitions in the NHRA that lead to uncertainty in administration

- definition of 'heritage resource'
- definition of 'cultural significance'
- definition of 'alter'
- definition of 'interested party'

Implications for administration

- thresholds for identification of heritage resources
- cumbersome application processes for minor works to structures older than 60 years
- delays experienced in applications given broad definition of interested parties and lack of clear consultation guidelines
- volume of applications received

Extent of heritage resource and/or areas considered possessing cultural value where conditions can be imposed on ordinary surrounds considered to possess significance

General Protections generating high volumes of applications, yet not adequately screening applications that do not require detailed heritage input.

Triggers listed in Section 38 of the NHRA do not relate to heritage resources, resulting in cumbersome applications where the heritage process becomes a channel where objectors rely on problematic and vague definitions relating to what constitutes a heritage resource

Issues identified within the legal framework:

- **An unwieldy system:** The Act in its current form creates uncertainty that discourages investment. It envisions a comprehensive system of national and provincial HRAs and assigns the responsibilities for the least significant but most numerous heritage resources to the local planning authorities. However, the Act has been and continues to be unevenly administered. There has been a failure to establish a system with adequately capacitated and resourced authorities. The incompleteness of the identification and grading process to date, and the sheer volume of the applications made under the general protections of the Act will continue to make heritage management inefficient, and to a large degree, ineffective. The general protections outlined in the Act are far reaching and generate a very large number of applications to the provincial heritage resource authorities.
- **Interpretation:** Many value judgements need to be made in determining heritage and this makes the process lengthy leading to inherent inefficiency. Unclear definitions and interpretations of words, such as 'alter', and a lack of guidance on matters such as determining 'significance'. Any upgrades such as the repainting/re-plastering of a 60-year-old building requires a permit to section 34, providing for little flexibility and which can lead to disrespect of the law (intentionally or unintentionally). The failure in administration (under Sections 30 and 31) results in Heritage Western Cape having to manage all work to all buildings that are older than 60 years.
- **Subjectivity:** The triggers are not heritage-related and this requires the exercise of administrative discretion in identifying heritage resources. This contributes to the system being seen as uncertain and arbitrary in its applicability and in its administration. Conditions that can now be imposed are extremely wide including very ordinary surrounds (claimed by any person to be someone's heritage) of very ordinary structures (even when accepted not to be of any significance to anyone).
- **Poor allocation of resources:** The Act has the effect that the most effort and skill and knowledge and time and money is spent on issues that are recognised by very small groups of people and real heritage resources are neglected and given little or no attention.

- **Not user friendly:** There are provisions in the Act that allow for exemptions or expansions but it is necessary to deal with the specificities to minimise unintended consequences, including potential conflicts with the current (national) system.
- **Procedural issues:** The current Act does not comply with the provisions of the Promotion of Administrative Justice Act (PAJA). The lack of integration with other Acts such as NEMA and environmental land-use management is also problematic. The definition relating to an interested or potentially interested party is extremely broad. Key to gaining the commitment and active participation therein by the affected communities, as well as having an approach that includes various stakeholders outside of government, is to provide an enabling environment that demonstrates the economic potential of heritage resources for communities and potential partners that can work with government to unlock this potential.
- **Overlapping competencies:** The relative responsibilities of provincial heritage resource authorities and local planning authorities are inadequately defined. Some local authorities have fulfilled the requirement within the Act of having to draw up inventories and identify conservation areas through their town planning processes. This will eventually lead to the formal listing of grade III buildings and sites on the provincial register.

Further issues identified:

- indecision, delays and unpredictability in outcome within heritage processes undertaken
- unpredictability in dealing with matters relating to intangible significance
- perception regarding permit application system seen as anti-development
- composition of HWC committees
- emphasis on preservation and conservation despite requirement to consider sustainable social and economic benefits to be derived from proposed development
- capacitating of the sector and accreditation of heritage practitioners
- transformation of the sector
- representation within the sector, particularly with regard to intangible heritage
- lack of guidelines regarding consultation processes often resulting in process delays, linked to problematic definition regarding interested parties
- uncertainty caused by general protections, where such does not adequately screen applications made to the authorities
- consideration of the spirit and intent of the NHRA
- defining responsibilities of provincial heritage resource authorities and local planning authorities

Further to discussion with Dr Steve Townsend, two reports dated 2006 and 2007, concerning the state of provincial heritage resources authority of the Western Cape, Heritage Western Cape and its administrative agency, were considered. Findings of the exit report dated 2007 are included here in the context of identification of issues identified:

- Heritage Western Cape must engage in an outreach exercise to inform and persuade local authorities of their responsibilities. This outreach is of paramount importance and heritage resource protection and management will

not become efficient or efficacious until the local authorities embrace the responsibilities and opportunities provided by the Act.

- Heritage management will not improve in efficiency or efficacy until the local authorities have compiled inventories and identified conservation areas and the provincial heritage authorities have established the Heritage Register.
- Local community based heritage-related projects will remain a wish rather than a reality until HWC can generate sufficient capacity to enable real outreach to local communities.
- Registered conservation bodies should be encouraged, in particular, to assist with the identification processes and to assist and pressure the local authorities in this regard.
- HWC has barely begun (in 2007) to foster inter-governmental co-operation with its sister agencies in heritage or environmental management, most importantly SAHRA and DEA&DP. This is of paramount importance; and heritage resource protection and management will not become efficient or efficacious until the appropriate protocols and a *modus operandi* in respect of shared or overlapping responsibilities is established with these agencies.
- A strategic plan must be developed that is realistic in terms of its responsibilities and its capabilities.

In the 2007 Dr Townsend addresses the 'functionality' of Heritage Western Cape as a whole frequently alluded to inadequacies in the decision-making committees and in the capacities of the staff; but, while I have some criticisms of the decision-making committees and I believe that numerous improvements could be introduced. He notes that that the heritage component was severely under-capacitated, both in terms of numbers and in terms of their training and experience, and by the very newness and incompleteness of the agency, Heritage Western Cape itself.

It is important to note that as a consequence of difficulties experienced, staff are often attacked and even denigrated both by applicants and their representatives and, on occasion, even by members of the decision-making committees. Salary scales are low and little attention has been given to their job satisfaction, their career-paths or their personal and professional development. As far back as 2007 staff have been over-worked, under-appreciated, under-paid and not given the appropriate attention to improve their functioning or to ensure their retention. The Department of Cultural Affairs and Sport should adopt appropriate measures to ensure accelerated personal and professional development or accept that the staff complement will turn over rapidly and that the heritage resource management services will not develop the necessary experience to be capable, self-confident and proud.

Further issues identified within engagement have been highlighted within this report.

2. LEGAL REVIEW

The legal review by Advocate Peter Kantor focuses on certain sections of the NHRA to try to streamline application processes around general protections, in particular section 34 permit applications to alter or demolish structures older than 60 years. The background motivation includes finding ways to increase efficiency and effectiveness in the management of heritage resources in the Western Cape Province (the Province) in regard to a permit application system seen as cumbersome and ultimately a hindrance to capital investment. The main conclusions of the review have been briefly summarized here.

This is by no means a comprehensive review of the implementation of the Act, although many aspects of the Act are touched on. An attempt has been made to keep the legal discourse that inevitably accompanies research to a minimum, and rather to link the legal views with practical solutions. The consultation process followed by Vidamemoria as part of this process around perceived issues and views related to the implementation of the Act and management of heritage resources in the Province are dealt with in the report and are not repeated here. However, they have informed this review and are at times referred to. The Province is aware that it could pass provincial legislation implementing its own heritage management system in relation to provincial heritage matters, which would prevail over the Act in the event of a conflict in relation to matters in the Province's exclusive area of legislative competence. However, the scope of this review is limited to working within the Act in its current form.

Part III of the legal review: The overall scheme of the Act

The overall scheme of the Act includes the assignment of the management of Grade III heritage resources to local authorities. Finding solutions to the issues identified requires an understanding of the constitutional legislative competences of the three spheres of government.

Part IV of the legal review: Functional areas of legislative competence

The legal review consider the relevant parts of Schedules 4 and 5 of the Constitution, overlapping legislative competences for municipal planning and cultural matters, the heritage and environmental components of municipal planning and the relevance of statutes such as NEMA.

While 'cultural matters' are a functional area of concurrent national and provincial legislative competence in Part A of Schedule 4 to the Constitution, and 'provincial cultural matters' are a functional area of exclusive provincial competence in Part A of Schedule 5, there is no reference to local or municipal cultural matters in the Parts B to Schedules 4 and 5 of the Constitution, which set out the powers of municipalities.

Municipalities do, however, have executive authority in respect of, and the right to administer, 'municipal planning' matters in terms of Part B of Schedule 4. On an analysis of the relevant case law and interpretation of the Act in the light of NEMA, the following conclusions are reached:

- the three spheres of government may have overlapping legislative competence in regard to matters in Schedules 4 and 5;
- local authorities have original legislative competence in respect of all the components of municipal planning and this power may not be usurped by provinces;
- provincial and national legislation can provide executive oversight and norms and guidelines for local authorities in respect of the competencies of local authorities;
- for a conflict to arise, the two pieces of legislation must be mutually exclusive and incapable of operating alongside each other;
- municipal planning includes environmental and heritage considerations insofar as they relate to land use and planning;
- local authorities can therefore include in their planning by-laws provisions regulating heritage matters that are related to municipal planning;
- decision-makers taking decisions that relate to planning and heritage matters need to consider the Bill of Rights as well as the principles in section 2 of NEMA and other relevant legislation; and
- the principle of sustainable development requires the consideration of social, economic and environmental factors, including cultural heritage, in decision-making.

Heritage matters fall within the original town planning legislative competence of local authorities insofar as they relate to municipal planning, and the City of Cape Town's Municipal Planning By-law is constitutionally valid in that respect. The Act should be interpreted and implemented in a way that does not conflict with the by-law and in the spirit of co-operative government. Assignment of functions to municipalities in terms of the Act can be done in a way that best maintains alignment with constitutional competences.

Part V: Implications for the NHRA

The Act assigns certain administrative functions to local authorities subject to their having the capacity to carry them out, and assigns to them the power to make heritage by-laws subject to the agreement of the province and provides for delegation of authority to them by agreement.

One needs to view this in the light of the legal power a local authority has arising from its original legislative and administrative competence in respect of municipal planning, including its heritage and environmental components. Local authorities derive that competence not from the Act but from the Constitution. Local authorities can protect Grade III heritage resources in terms of their own planning by-laws without assignment, delegation or agreement in terms of the Act.

In order to understand the implications of this on the implementation of the Act one first has to understand the provisions of the relevant municipal planning by-law.

Part VI: The City of Cape Town Municipal Planning By-law

The City's MPBL is designed to align itself with the Act and its protection of 'heritage places' and its HPOZ's necessarily overlap with the provisions of the Act. The City has the competence to manage heritage resources and has submitted its inventory to HWC. Its HPOZ's could be declared heritage areas in terms of the Act if the correct procedures are followed. The City's by-law deems heritage places entered into HWC's register or designated a heritage area to have heritage protection overlay zoning.

In considering applications in terms of the MPBL the City needs to take the Act and NEMA and any other relevant laws into consideration, and particularly the identification of heritage resources and their significance and the principles of heritage resources management, relevant national and provincial legislation, as well as sustainable use and the protection of the environment. While the City's by-law manages heritage resources within its jurisdiction, at the moment HWC's powers under the Act represent another layer of heritage resource management. The City's MPBL and the Act can be brought further into alignment if the machinery of the Act is implemented and the duplication of management functions can be significantly reduced.

Part VII: Implementing the machinery of the NHRA

Paragraphs The legal review identifies certain areas where the Act has not been fully implemented and explores implementation of section 30 (heritage register), section 31 (heritage areas).

HWC could take steps to implement the machinery of the Act in order to reduce its burden of heritage resources management in the province. These steps may include, but are not limited to:

- enabling local authorities to fulfil their duties generally under the Act in terms of section 8(6) read with 24(1)(i) – (k);
- Publishing a heritage register in terms of section 30. HWC would, after following due process, need to prescribe the procedure and information required for the nomination of a resource for listing in a heritage register and the compilation of an inventory of heritage resources by a local authority, and, after consultation with SAHRA, gazette its grading sub-categories IIIa, IIIb and IIIc. Local authorities would need to be assessed and approved as having the requisite capacity, and then their inventories could be submitted and approved after consultation and added to the register.
- Designating heritage areas in terms of section 31. This is something that the Act enables local authorities to do, with the assistance of HWC, in the provisions of their town planning scheme or by-law. It requires HWC and the provincial planning authority to approve of the said provisions. If a local authority declines a request to investigate a heritage area or to designate it in the gazette, HWC may do this.
- granting exemptions in terms of sections 34(3), 38(9) and 48(3);
- delegating authority in terms of section 26(1)(g);
- fulfilling duties imposed on HWC in terms of the Act, such as prescribing policy in terms of section 6(2), prescribing heritage assessment criteria in terms of section 7(2), issuing procedural regulations or guidelines that comply with section 10 read with PAJA; maintain databases on heritage resources in terms of section 24(1)(f), and co-operate with private bodies in the management of heritage resources owned by the State in terms of section 25(2)(f).

Part VIII: Exemptions

The legal review explores the option of granting exemptions in terms of sections 34(3), 48(3) and 38(9), the legal requirements and some practical implications. An exemption from having to obtain a permit in terms of section 34(1) to alter or demolish a structure older than 60 years may be granted for a site or area provided the heritage resources have been identified and adequately provided for in Part 1 of Chapter II of the Act – which refers to the formal protections and includes listing in a heritage register (section 30) or being in a heritage area (section 31).

Protections in a local authority's planning scheme or by-laws must be promulgated in terms of the Act. The exemption must be gazetted after following due process, and exemption can be tailored to suit the site or area concerned. For example, to exempt, totally or partially, owners of structures in the City's HPOZ's and/or structures listed in HWC's heritage register from requiring permits to alter or demolish them, or parts of them, would require the HWC and the provincial planning authority to approve the protections in the City's planning by-law and require the City to promulgate the by-law in terms of the Act.

A section 48(3) permit may be granted in respect of any heritage resource protected by it in terms of the provisions of Chapter II (which includes, among others, both formal and general protections) for a specified activity or class of activities by such persons or class of persons in such circumstances as are specified in the notice. The notice must be gazetted after following due process.

This differs from a section 34(3) permit in that a section 48(3) permit applies to an 'heritage resource' as defined, whereas a section 34(3) permit can apply to any structure older than 60 years, whether or not it is a heritage resource.

A section 38(9) exemption may be granted in respect of any 'place' (broadly defined), exempting the owner of the place from compliance with section 38 (which relates to heritage impact assessments and HWC permission for larger scale developments, some of which may require NEMA environmental authorisation, in which case HWC is the commenting authority). HWC must obtain the approval of the MEC and follow due process before gazetting an exemption notice that specifies the place.

There are no preconditions for a section 38(9) exemption, such as the requirement that the place be protected in terms of Chapter II. However, the decision must be rational and serve the objects of the Act, meaning that care must be taken to manage any heritage resources that may occur in that place. Such an exemption can be given on an *ad hoc* basis, or as part of a forward planning exercise.

Part IX: Delegations

The legal review considers the option of delegating authority to external bodies, particularly with regard to issuing section 34(1) permits, section 34(3) exemptions, section 38 decisions and comments, and section 48 exemptions. A delegation to a local authority or registered heritage organisation requires a decision of the Council of HWC and must be in writing and clearly state the period of the delegation and the functions and powers delegated and any conditions, and the

delegate must have the necessary capacity and must agree to the delegation. The delegations may be revoked in writing by HWC after due consultation. A decision by the delegate is subject to appeal in terms of the Act, as is a decision to revoke a delegation (unless the latter is waived in a delegation agreement).

A delegation agreement can regulate all relevant matters including the extent of powers and functions, processes and criteria for considering applications, co-ordination of governance, and consultation processes. A delegation decision by the HWC Council would usually adopt or ratify the delegation agreement, and would be subject to appeal to the MEC. A 'parent' delegation agreement could be put in place for a particular authority, in terms of which specific delegations are given.

Part X: Interpretation

The legal review considers the solution of statutory interpretation, particularly with regard to section 34(1) permits and the definitions of alter, structure, heritage resources, object, place, site, cultural significance, national estate, and also examines decision-making criteria and the phrase 'change the character of a site'. The definitions in section 1 of the Act, such as 'alter' and 'heritage resource', may not be amended by provincial regulation and HWC policy may not conflict with the definitions in the Act. HWC needs to work with the definitions as they are.

Guidelines could be issued on how to interpret the Act. For example, a guideline on section 34 permits could set out and discuss the triggers, the definitions of 'alter', 'structure', 'heritage resource', 'place', 'site', 'cultural significance', and the national estate defined in section 3(3), how to exercise discretion and considerations relating to conditions of approval.

Decision-making criteria and considerations could also be set out in a guideline, with reference to section 5 (General Principles for Heritage Management) and section 6 (Principles for Management of Heritage Resources), grading criteria and what makes something conservation-worthy, the wider considerations such as NEMA, by-laws and relevant policies, and relevant case law relating to conditions of approval. A guideline could also be issued on the interpretation of the phrase 'change the character of a site' in section 38(1).

Part XI: Policy, Regulations and Notices

The legal review considers the options of promulgating regulations, including re grading assessment criteria, capacity assessment, public participation, the nomination of a resource for listing in a heritage register, and the compilation of an inventory of heritage resources by a local authority. It also considers the publication of notices and policy.

The following must be published in the Provincial Gazette: a heritage register, a heritage area, and exemptions, any matter which it considers to be necessary or expedient to prescribe in order to fulfil its functions and implement its powers and duties under the Act. The following may be gazetted or simply published as policy, depending on the purpose: additional grading criteria, principles for heritage resource management, the manner in which to make permit applications, and other policies and procedures as part of its administrative practices.

Part XII: Fair public participation procedures and compliance with PAJA

The legal review considers the legal requirements concerning public participation. The provisions of PAJA apply to HWC's decision-making procedures, and regulations should be made so that applicants avoid risks associated with unlawful processes. The existing guidelines should be brought into line with the requirements of the PAJA regulations and duly promulgated. If HWC elects to adhere to its guidelines, leaving it to applicants to ensure legal compliance, it should at least ensure that its guidelines are in line with the requirements of the PAJA regulations.

Refer Annexure A for legal review. The legal review considers:

- III The overall scheme of the Act
- IV Functional areas of legislative competence
- Overlap of legislative competences
- Planning, environmental and heritage competences, NEMA
- V Implications for the NHRA
- 'competent', 'capacity' and 'deem'
- VI The City of Cape Town Municipal Planning By-law
- VII Implementing the machinery of the Act
- A record of the national estate
- Publishing a Heritage Register in terms of section 30
- Designation of heritage areas in terms of section 31
- VIII Exemptions
- Section 34(3) exemptions
- Section 48(3) exemptions
- Section 38(9) exemptions
- IX Delegations
- X Interpretation
- Section 34 permits, 'alter' and 'heritage resource'
- Step 1 – _check for section 34 triggers
- Step 2 - heritage resource and significance
- Decision-making considerations and criteria
- 'change the character of a site'
- XI Policy, Regulations and Notices
- XII Fair public participation procedures and compliance with PAJA
- XIV Synthesis and conclusion
- Option 1: exemptions
- Option 2: delegations
- Option 3: a combination of exemptions and delegations
- Option 4: public participation process

3. LEGAL REVIEW SYNTHESIS

The legal review considers the options available to HWC, which should enable the Province to consider the efficiency of a possible composite solution. HWC has options open to it to reduce its workload, and they mostly involve letting local authorities such as the City of Cape Town manage some or all grade III heritage resources. This depends on the local authority having the capacity, which the City of Cape Town appears to have. It fits within the schemes of both the Constitution and the Act, and it requires HWC to let local authorities manage grade III heritage resources under the broad mandate of sustainable development.

Granting exemptions in terms of sections 34(3), 38(9) and 48(3) for structures in HPOZ's so that the City can manage them in terms of its by-laws is an option. Other exemptions can be investigated, for example for designated development areas. This presupposes that a heritage register and heritage areas are gazetted. Delegating powers to local authorities to issue section 34(1) permits in terms of section 48(2), take decisions in terms of section 38(5), make comments in terms of section 38(8), and to grant exemptions in terms of sections 34(4), 38(9) and 48(3), in respect of grade III heritage resources or structures which are not conservation-worthy, are further options. Alternatively, HWC may select a combination of the above options.

HWC should consolidate its policy guidelines on public participation so as to comply with the PAJA regulations, and consider publishing the required procedures in the Provincial Gazette. Options depend upon HWC implementing the machinery of the Act more fully. The systematic identification and protection of heritage resources is a key element to distribution of functions between the three spheres of government. Given the problems facing HWC, this would appear to be a worthwhile allocation of resources.

Extract of legal review: synthesis and exploration of options

A province is required by section 156(4) of the Constitution to assign a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, to local authorities where that matter would most effectively be administered locally, and the municipality has the capacity to administer it. This would include Grade III heritage resources, in respect of which local authorities in any event have original legislative competence insofar as they relate to municipal planning, in terms of the Constitution. The options open to HWC mentioned depend on its willingness to devote the necessary resources to implementing the machinery of the Act more fully. The systematic identification and protection of heritage resources is a key element to distribution of functions between the three spheres of government. Given the problems facing HWC, this would appear to be a worthwhile allocation of resources.

Option 1 - exemptions

The City already has the MPBL in place with its HPOZs and, when deciding development applications for development on property covered by an HPOZ, is already considering the impact on heritage resources and imposing conditions on any development that is approved. Additional decisions in terms of the Act (sections 34(1) and 38(4)) represent an extra layer of approval and red tape for developers.

HWC could in terms of section 38(9) exempt property owners from needing to comply with section 38 for properties in the City's HPOZ's in respect of any development requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act. This refers to larger scale developments that trigger section 38. All that would be required in the MEC's approval and for the exemption to the gazette. The City would be responsible for the identification, assessment and protection of grade III heritage resources affected by the development.

HWC could in terms of section 34(3) exempt property owners from needing to obtain permits in terms of section 34(1) to alter, demolish etc any structure older than 60 years in the City's HPOZ's in respect of any development requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act.

This would first require HWC to publish a heritage register in terms of section 30, which would require HWC to:

- prescribe in terms of section 30(4) the procedure and information required for—
 - (a) the nomination of a resource for listing in a heritage register; and
 - (b) the compilation of an inventory of heritage resources by a local authority.
- confirm the assessments by local authorities, including the City, of heritage resources on inventories they have submitted to HWC;
- include all grade II and grade III heritage resources in the province
- follow a public participation process including consultation with the owner.¹⁵⁹

HWC could in terms of section 48(3) exempt property owners from needing to obtain special consent of the City in terms of section 31(7)(a) in respect of any alteration or development in an HPOZ requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act.

This would first require the City upon request to gazette its HPOZs as heritage areas in terms of section 31(5). If such consent is not obtained, HWC may gazette the HPOZs as heritage areas in terms of section 31(4) after first proposing this to the City in terms of section 30(2).

The City could survey and demarcate any other geographic area, and grant the aforementioned exemptions in respect of such area, with any exceptions as may be necessary.

Option 2 - delegations

HWC could in terms of section 26 delegate to the City the power to take decisions in terms of section 38(4), and/or to comment in terms of section 38(8), on development applications in respect of properties in the City's HPOZ's requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act. This would first require the City's agreement and the delegation would need to be gazette after submitting it for public comment.

HWC could in terms of section 26 delegate to the City the power in terms of section 48(2) to issue permits in terms of Section 34(1) to alter, demolish etc any structure older than 60 years in the City's HPOZ's in respect of any development requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act. This would first require the gazetting of a heritage register as described above, and require the City's agreement, and the delegation would need to be gazetted after submitting it for public comment.

HWC and the MEC could in terms of section 26 delegate to the City the power to exempt property owners in terms of section 38(9) from needing to comply with Section 38 for properties in the City's HPOZs in respect of any development requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act. This would require the City's agreement and the delegation would need to be gazetted after submitting it for public comment.

HWC could in terms of section 26 delegate to the City the power to grant exemptions in terms of sections 34(4), 38(9) and 48(3) from permit requirements or from needing to obtain special consent of the City in terms of section 31(7)(a) in respect of any alteration or development in an HPOZ requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act. This would first require the HPOZ to be gazette as a heritage area as described above. This would require the City's agreement and the delegation would need to be gazetted after submitting it for public comment.

The City could survey and demarcate any other geographic area, and delegate to the City the aforementioned powers in respect of such area, with any exceptions as may be necessary.

Option 3: a combination of exemptions and delegations

HWC could discuss with the City a suitable combination of the aforementioned exemptions and delegations, possibly relating to different areas and categories of heritage resources, and possibly starting off in a limited fashion.

Option 4: Public participation procedures

In order to create more certainty and confidence in its processes, HWC could consolidate its policy guideline on public participation and its draft regulations on public consultation by, among other things, including the following requirements contained in the PAJA regulations: 201.1 if the decision potentially affects persons throughout the province, and not just in a local area, then the notice must also appear in the Provincial Gazette. The notice must be in at least two official languages, taking account of the language preferences in the area concerned; provision must be made for special needs of members of specific communities who may be affected; the notice must contain sufficient information to enable people to submit meaningful comments, provided that a newspaper notice may contain only a concise statement of the proposed administrative action together with details of where further information can be obtained; the notice must caution that comments received after the closing date may be disregarded.

4. ENGAGEMENT

In preparation to undertake the required brief and formulate preliminary set of issues, the following engagement occurred:

- Inception meeting held with representatives of DEAT and HWC on 30 November 2020
- Discussions held with Peter Kantor over the period 27 November – 15 December 2020
- Discussion held with 2 heritage practitioners involved in committees at HWC
- Discussion held with 1 heritage practitioner serving on HWC Council
- Discussion held with 1 heritage practitioner who previously served on HWC Council
- Discussion held with 1 developer / applicant with HWC
- Discussion held with 1 lawyer operating within the built environment
- Discussion with 1 conservation body representative

4.1 Engagement with interest groups

The following engagements took place:

- South African Heritage Resources Agency: Ben Mwasinga Head Built Environment Unit, Mr Simphiwe Mome Legal and Company Secretary
- City of Cape Town: Lance Boyd and written input from David Hart a Heritage Resource Management
- Heritage Western Cape: Acting CEO Collette Scheermeyer, Waseefa Dhansay, Legal advisor Penelope Meyer, Jonathan Windvogel
- Western Cape Property Developers Forum: Chairperson Deon van Zyl and the WCPDF Environmental and Heritage Committee
- Department of Environmental Affairs and Development Planning (DEA&DP): Directorate Development Facilitation (DDF): Gerhard Gerber (Chief Director: Development Planning)
- Town Planners: Tommy Brummer and Paul Olden
- Environmental consultants: Doug Jeffries, Jeremy Rose and Marielle Penwarden
- Heritage practitioners: Stephen Townsend, Nicolas Baumann, Mike Scuur, Bridget o Donoghue and Kathy Dumbrell
- Registered conservation bodies (survey conducted)

Zoom sessions were arranged to consult on problem identification and possible solutions. Methodology entailed problem identification session; research and formulating proposed possible solutions to consult about, planning approach in consultations and zoom calls and identifying parties and inviting to consult. Telephonic discussions were held with each participant ahead of zoom calls. Participants approached are actively involved in heritage processes.

Leading questions discussed within zoom sessions

1. Does the current system of applications to Heritage Western Cape (HWC) create uncertainty? If so, in what ways?
2. Can you suggest any improvements?

3. Are there any definitions in the National Heritage Resources Act (the Act) that are unclear or difficult to work with? If so, please explain.
4. Do you feel that the current system adequately protects heritage resources?
5. Are conditions of approval that may be imposed reasonable?
6. Do you follow HWC's guidelines on public participation?
7. Should HWC issue further guidelines? If so, on what?
8. Should HWC grant exemptions from any permit requirements? Please elaborate.
9. The Act envisages local authorities being in charge of grade III heritage resources if they have the capacity. Do you support this?
 - 9.1 What would be the possible advantages and disadvantages?
 - 9.2 Can you think of any solutions to possible disadvantages?
 - 9.3 What criteria should be used to evaluate the capacity of a local authority to manage heritage resources?
 - 9.4 Should there be appeals to HWC and the MEC from a local authority's decision?
10. Do you think HWC would be more efficient and effective if it had a smaller workload?

Issues raised:

- Lack of accountability and uninformed as to reality of implications
- Lack of mechanisms to deal with conduct (staff, conservation bodies, committees, council) and a reporting mechanism needs to be in place where complaints can be escalated
- reputation management by practitioners as well as additional administrative costs to practitioners
- Institutional culture perpetuated in creation of an environment where officials can deflect and blame the system
- Transparency – are issues being fed through / reported on to HWC Council
- Perception of the heritage authority
- Lack of understanding and method of engagement flagged as a risk
- Not attracting staff due to salary cap as well as turnover of staff
- Working from home resulting in productivity issues and impact on operations
- Committees biased towards IAPs
- What recourse exists in terms of delays caused by HWC due to administrative issues
- Committee composition
- Committee representation in terms of growing community based organisation network
- Unclear as to what heritage issues are and claims to intangible heritage (NIMBY arguments)
- Inconsistencies in engagement - different applicants receiving different levels of service from HWC. Various levels of experiences of interactions noted across the board eg appellants, practitioners, conservation bodies
- Lack of (clear) legal advice
- Transformation within the sector
- Capacity vs implementation issues

City of Cape Town response to request for engagement:

The City Heritage Resource Management Branch was approached to discuss issues and challenges. A response in writing was received (see Annexure B). The following issues outline some of the challenges and opportunities identified by the City regarding the administration of the NHRA at provincial level. These issues obviously have direct impact on the City. Whilst HWC is clearly hampered by spending its resources dealing with applications management under s34(1) of the National Heritage Resources Act, it is felt that this can be significantly relieved through the following general actions:

- Putting in place the required regulations to allow the tools provided in the Act to work. These include but are not limited to regulations for the Heritage Register and for Heritage Areas.
- Exempting the need for s34(1) and s38 applications for alterations in areas of little or no significance through s34(3) and s38(9).
- Delegating the management of Grade III heritage resources and non-conservation-worthy structures over 60 years old to the local authority through s26.

Given the City processes and sends comments to HWC on all s34(1) applications in the metro, there is a clear unnecessary dual process taking place which would largely be avoided should s34(1) in so far as it applies to Grade III heritage resources and 60 years old structures that are not conservation-worthy.

Additional suggestions as listed within correspondence received are listed here:

A. Staffing and Budget

1. There is a significant need for full time additional experienced and qualified professional staff to carry out the Provincial functions mandated by the NHRA.
2. These qualified and experienced senior staff need appropriate delegated authority to act on behalf of HWC as a body, rather than all issues being referred to Council and its Committees.
3. There is a high staff turnover due to poor re-numeration and work stress, and as such it is difficult to attract and retain experienced qualified staff.
4. HWC would benefit hugely from having its own dedicated CEO rather than sharing the position with geographical names and museums. It is a post that carries significant responsibility and a massive work load.
5. Additional budget would enable HWC to get support from the private sector in the establishment of Policy, Guidelines, Regulations which are currently lacking.

B. The Council and Decision-making (Non application related)

6. All authority finally lies with the Council which meets only four times a year which means decisions have a long turnaround time and matters often cannot be dealt with quickly and efficiently. Agendas for Council are sometimes too full for all items to be dealt with.
7. Greater delegation of power from Council to senior staff to allow them to act on behalf of HWC as a body might help efficiency.
8. The three-year term for Council and Committee members gives rise to a lack of institutional knowledge regarding the heritage management system and the roles of institutions involved.

9. Possibly the NHRA could be amended to provide for longer terms for Council members; or the new council members be appointed not all at once, but overlap.
10. There are fewer and fewer experienced heritage candidates in the pool available for appointment to Council as members are limited to two terms. This will threaten the effectiveness of the Council down the line.

C. Data and Records Management

11. A good geo-database of heritage resources with a management component might assist HWC significantly in managing its heritage resources. Possible fuller integration with SAHRIS would help if province cannot afford its own system.
12. A good electronic records and application management system could significantly help HWC with institutional memory and management. It would also assist in reviewing statistics regarding applications and decisions and provide for better management of the provincial estate.

D. Permitting

13. HWC manages permitting and applications well given its overall staffing and capacity.
14. This would however be helped if there were a proper integrated electronic applications management system, such as SAP which is used in the City.
15. Applications take up most of HWC's capacity and HWC has not been able to make inroads into using and developing the heritage management tools and systems provided by the NHRA to make management more efficient. These include inter alia s34 Exemptions, the Heritage Register, Heritage Areas, Delegations to Local Authorities etc.

E. Exemptions for s34(1) and s38 where there are no Heritage Resources

16. The NHRA under s34(3) and s38(9) provides for the exemption of the requirement for HWC permits or authorisation for identified areas of no heritage significance.
17. It is critical that these exemptions are put in place given the number of non-conservation-worthy buildings turning 60 years old which will result in huge amounts of unnecessary red tape and work.
18. For these exemptions to be most effective, the Heritage Register needs to be up and running and in place, as do Heritage Areas. These require regulations to be promulgated.

F. Empowering Local Authorities to carry out Heritage Management through the Heritage Register and Heritage Areas.

19. Local authorities are responsible under the NHRA for the management of Grade III heritage resources. HWC is however managing Grade III heritage resources on behalf of local authorities which adds an exceptional amount of work to HWC and its Committees.
20. S34(1) applications relating to Grade III heritage resources (and non-conservation-worthy 60 year old structures) should be moved to competent local authorities as required under the NHRA. The mechanism provided by the NHRA for local authorities to manage Grade III heritage resources are the Heritage Register and Heritage Areas.

21. Neither the Heritage Area nor the Register regulations and process are in place. It is critical for HWC to get these up and running through the publications of regulations.

G. Delegation of Heritage Management Functions (s34(1) and s38) to local authorities

22. Section 26 provides for the delegation of certain functions to competent local authorities which would significantly lighten the load of HWC. It is understood that almost half the applications made to HWC relate to the City area. Delegations that must be considered would include inter alia the management of:

- a. Section 34(1) (60 years' clause)
- b. Section 38 (Impact Assessment)
- c. Section 34(3) (Putting in place exemptions for s34(1) applications)
- d. Section 30 (Placing sites on the Heritage Register)

23. S48 also provides for certain exemptions which could lighten HWC's load if they were implemented.

H. Assessing Competence of Local Authorities

24. A significant issue when considering Local Authorities taking up their roles as prescribed in the NHRA is that the Local Authority has to be assessed as competent every 2 years. (s8(6))

25. The requirements for local authority competence change every time the City submits its competency assessment requests to the provincial heritage council, and as such there is a no confidence within the City that it will be found competent.

26. The heritage system cannot work if the local authority is assessed without properly regulated requirements. The entire Heritage Register system, Heritage Areas and delegations will fail if HWC were not to find the local authority competent timeously. There would be no authority legally empowered to deal with applications in terms of the Register or Heritage Areas if the local authority' competence "lapsed" or is withheld.

27. As such it is critical that should HWC move Grade III applications management (through which ever tool) to local authorities, there must be a solid framework of competency requirements put in place by HWC through regulations.

28. If the local authority complies with the requirements of the framework, then it needs to be 'guaranteed' that it will be found competent.

4.2 Survey: conservation bodies

A survey was circulated to all registered conservation bodies and 26 responses were received. At the time of circulating the survey there were 72 registered conservation bodies on HWC website. Survey questions considered aspects of both the legal definitions and sections of the NHRA as well as issues experienced in terms of heritage process. The survey was circulated on 25 February 2021 and responses were requested by 12 March 2021. A reminder was sent on 8 March 2021. Conservation bodies were informed that responses will remain confidential and should organisation wish to engage further to the questionnaire could do so via email and / or request zoom interaction. All responses and summary of findings per question are attached as Annexure C.

Survey questions

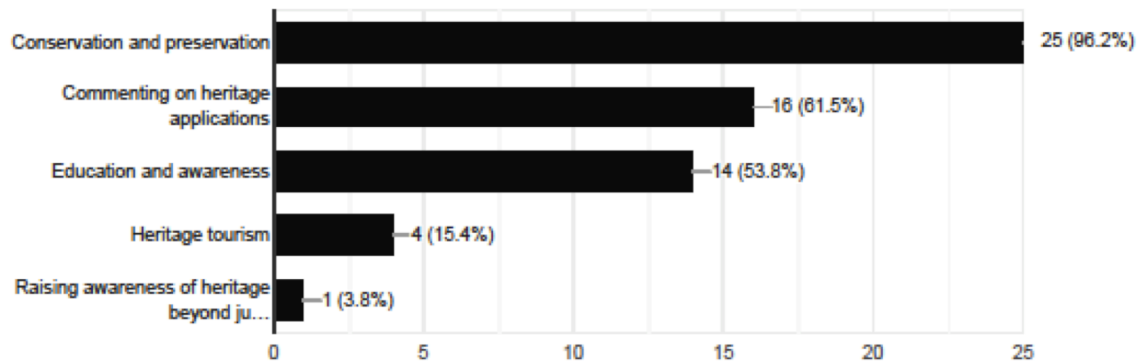
1. *Request for contact details*
2. What are the main heritage aims of your organisation? Options: conservation... commenting on development applications.. education and promotion other
3. What are the main heritage activities of your organisation?
4. How active is your organisation ie commenting regularly on applications as made to the heritage authorities)?
5. Do you feel that the current system and associated processes adequately protects heritage resources?
6. What is your perception of heritage processes? (fair).. Do you feel that heritage application processes are procedurally fair?
7. Do you feel that heritage guidelines for public participation are .. fair ... unfair... no comment
8. Are there any specific sections of the Act that are unclear or difficult to work with? Please elaborate.
9. What challenges has your organisation experienced with regard to heritage process(es)?
10. Do you feel that your organisation is supported by the heritage authorities?
11. What support would benefit your organisation in terms of heritage process
12. Has your organisation been involved in any contentious cases you would like to mention. Please elaborate on steps taken and outcomes
13. What improvements would you like to see within the heritage process
14. Should the heritage authorities issue further guidelines? If so, on what?

Extract of survey key findings

While 96% of respondents highlighted conservation and preservation as the key aims of their organisations, 80% of their activities focused on commenting on heritage applications.

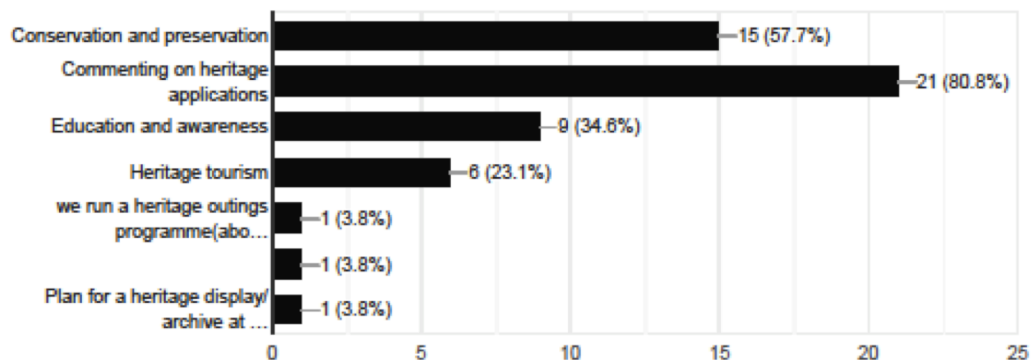
What are the main heritage aims of your organisation?

26 responses



What are the main heritage activities of your organisation?

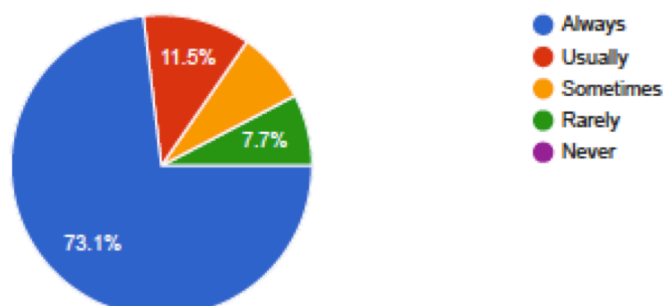
26 responses



Most respondents indicated that they almost always respond to request for comment made to their organizations. It should be noted that of the 72 registered conservation bodies, only 26 responded and it is thus unknown how active the other conservation bodies in fact are.

How active is your organisation as a conservation body i.e. commenting regularly on applications as made to the heritage authorities?

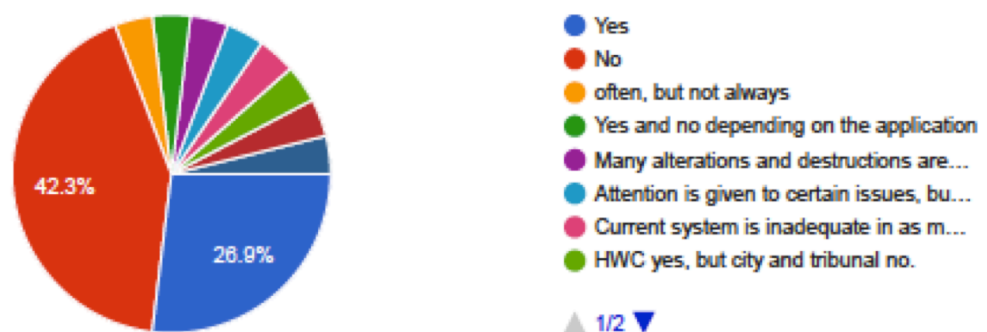
26 responses



The majority of respondents felt that the current system does not adequately protect heritage resources. It was indicated that certain issues are overlooked, with specific reference made to heritage resources within so-called coloured and African communities, and the lack of shared and common understanding of the value of heritage amongst the various Heritage agencies and amongst the different municipal departments (plans examiners, building inspectors etc). Another respondent noted that the system almost looks exclusively at ‘bricks and mortar’ arguments, with living heritage considerations like cultural significance, social fabric, traditions, customs, and memories not at all or not succinctly being taken into account. An example was provided where (HWC) fails a community like Woodstock if an Art Moderne building is preserved from the outside, but apartments and retails spaces in that building are unaffordable to people in the area.

Do you feel that the current system and associated processes adequately protects heritage resources?

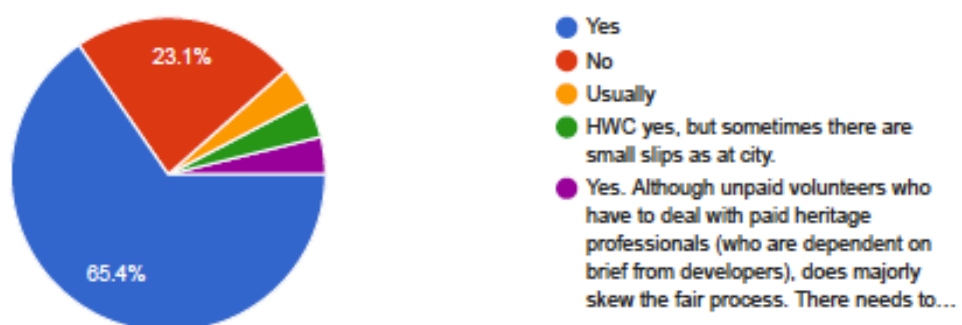
26 responses



The majority of respondents felt that heritage processes are procedurally fair. One respondent noted that unpaid volunteers who have to deal with paid heritage professionals (who are dependent on brief from developers), does majorly skew the fair process. There needs to be some way that public heritage input is supported by publically funded institutions such as HWC and the City – in the same way that someone who can’t afford a lawyer has access to legal aid. This raises issues regarding misconception of the role of the independent heritage practitioner and the perception of the role of the heritage authority.

Do you feel that heritage application processes are procedurally fair?

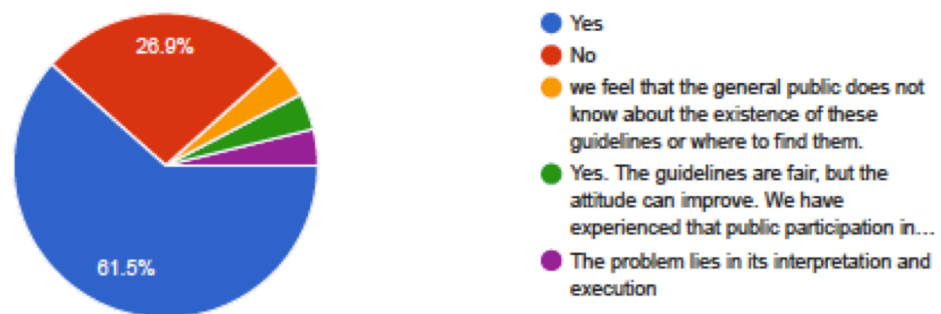
26 responses



The majority of respondents felt that guidelines for public participation are fair. It was noted that guidelines are not readily available and that there are issues in terms of interpretation and execution. One respondent noted their experience that participation input is not necessarily welcome but often seen as distracting, obstructive, delaying or not expert enough. The system sets up public participation in opposition to development proposals, which makes it difficult (and rare) for developers to creatively engage with the public to find good solutions that work financially while being mindful of the value held within the local community.

Do you feel that heritage guidelines for public participation are fair?

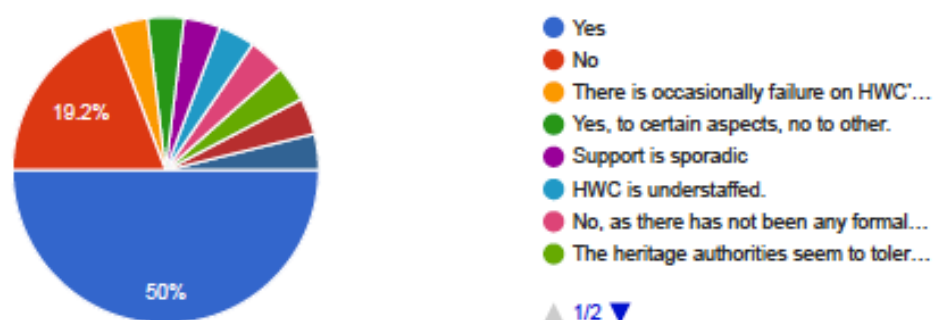
26 responses



50% respondents felt that their organisation was supported by the heritage authority.

Do you feel that your organisation is supported by the heritage authorities?

26 responses



4.3 Survey: Western Cape Property Developers Forum (WCPDF)

Discussions held with the Western Cape Property Developers Forum centred on issues experienced within heritage process and setting out of a questionnaire focusing on heritage process, concerns raised and economic impact. Draft questions presented by Adv Kantor and Ms Samie were included in the survey. The survey method was considered to as to establish a body of evidence in dealing with findings. The forum was particularly interested in the economic impacts of heritage process in considering how much development is being affected and / or cancelled in the Western Cape and implications in terms of investment and job losses. The survey ran from Monday 22 February 2021 - 5 March 2021 and was distributed to all members of the WCPDF as well as advertised. Survey findings are being used for both purposes of this report and by the WCPDF who may consider further investigation and engagement with the relevant authorities.

Key issues highlighted during initial discussions included:

- where heritage processes are linked to environmental processes, such processes work well when DEA&DP is the decision maker and the appeal process is not housed at the heritage authorities. Ie when HWC is a commenting authority.
- Abuse of the heritage process and the appeals process
- Lack of clarity and consistency of approach and processes
- Emotive narrative(s)
- Lack of professionalization
- Lack of overall vision
- Lack of fairness

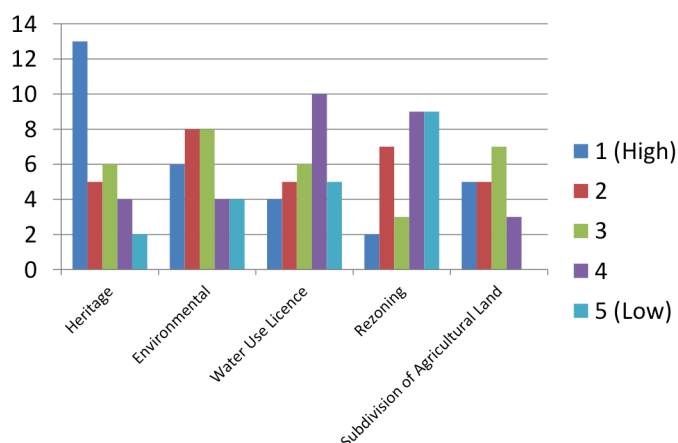
The survey call, the Western Cape State of Heritage Assessments, noted its purpose to tackle the complex issues around the submission of applications to heritage authorities. 30 responses were received, with respondents answering complex survey questions in substantial detail, giving significant insight into the depth of problems being experienced. One of the surprises coming out of the survey was the diversity of respondents themselves: while developers came forward, they made up only 23% of participants. Architects accounted for 17%, town planners 13% and quantity surveyors 8%. A number of heritage practitioners in private practice (7%) participated, members of heritage trusts (3%) and government officials (13%).

The highlights of the survey results as contained in the WCPDF press release reflected three crucial points. Firstly, it confirmed that there are very real problems – and not just hearsay – around the assessment of heritage applications; secondly these problems are stymying and frustrating built-environment professionals across the table and in both the private and public sector; and thirdly there are billions of rands in critical investment being lost in the Western Cape, not to mention thousands of construction jobs, as projects get cancelled or as developers simply walk away from the cost of trying to obtain any outcome at all, let alone a logical one.

The full findings and highlights of the survey results are attached as Annexure D. Note, the first page is a guide in terms of knowing 'who' is saying 'what'. Throughout the document, developers appear in yellow, consultants in white, and 'other' (including government officials) appears in blue.

Extract of survey findings

- When asked whether applications brought before Heritage Western Cape were thought to be procedurally fair, 43% responded in the negative while 37% felt applications would only receive fair processing in some cases. Only 10% believed applications received a fair procedural process.
- Concerns were expressed that members of various heritage committees had a strong theoretical bias but very little practical industry experience.
- In contrast to Heritage Western Cape's management of applications, the City of Cape Town scored a substantially higher confidence score with 70% believing on the whole that the City would manage a heritage application in a more fair and transparent manner.
- Concern was expressed on the weighting given to the opinions of rate payers associations which often contradicted the City of Cape Town's own planning policies, reflecting the pressure exerted from the 'not in my backyard' lobbyists.
- Asked whether the need for a heritage application process would discourage a potential investor entirely from a project, a shocking 73% of respondents said 'yes'.
- While few respondents gave detailed accounts of the nature of investment that had been lost to date to stymied heritage application processes, the seven respondents who provided information recorded a total of more than 36 projects just among themselves (35 in the City of Cape Town municipality and one in Drakenstein). These amounted to a loss of investment conservatively amounting to over R4.486 billion.
- In addition, over R71 million had been lost just in administrative preparation of applications and resubmissions, accounting in some cases for up to five years of consultants' time wasted and the ultimate loss of thousands of construction site jobs that never materialised.
- Most of the respondents shared frustration around the time-consuming way in which heritage applications were being processed and what appeared to be a high level of subjectivity.
- While most of the respondents wanted to treat heritage as an asset, the reality was that due to ill-defined goals by heritage authorities, more than 70% of respondents found heritage resources to be a liability to investors.
- Of all the statutory application procedures that could be triggered by a proposed development (i.e., Heritage, Environmental, Water Use Licences, Rezoning and the Subdivision of Agricultural Land Act), heritage scored as the highest risk among 43% of respondents. The 43% who voted 'heritage' as the highest risk was made up as follows private sector developers (23%), private consultants to the industry eg architects(23%), quantity surveyors (8%), heritage consultants (8%), town planners (15%), other ie University Facilities Management (8%) and government officials (15%).



Elaborating on the survey, the Chairperson of the WCPDF Deon van Zyl noted *'As the WCPDF, we initiated the survey to assess whether anecdotal complaints in particular about Heritage Western Cape a provincial government entity and a statutory body in terms of the National Heritage Resources Act were impacting on investment in the Western Cape. Sadly, the findings confirm the perception.'* The status of heritage management in the Western Cape was also concerning *'In 2019, the WCPDF was asked to address the then newly-formed Heritage Western Cape Council, with the Council even going so far as to acknowledge it had very little knowledge of the private sector and fixed capital investment sectors. As a result, the Council had requested the WCPDF to nominate potential committee members for its various working structures, where a number of industry volunteers came forward. Not a single development industry representative was invited for an interview, let alone appointed to a committee.'*

Concern was raised that the very principle of heritage was being undermined by the statutory body that should be working towards maximising the value of heritage assets. Using the survey results as a basis, Van Zyl concluded: *'On behalf of our industry, the WCPDF now calls on the Western Cape Premier Alan Winde and MEC for Cultural Affairs and Sport, Anroux Marais, to investigate the state of Heritage Western Cape and to ensure that the department be adequately and correctly resourced to undertake the forward planning required to proactively identify conservation-worthy assets. Above all else, the MEC needs to ensure the streamlining of policies in order to bring about an end to the reactive assessment methodology currently being employed whenever an application is received.'* Investors and built environment professionals in the private and public sectors are extremely frustrated by the drawn-out and increasingly vague processes being encountered with heritage applications.

5. SOLUTIONS

The legal review considers the options available to HWC, which should enable the Province to consider the efficiency of a possible composite solution. As highlighted within the legal review synthesis this could include exemptions and / or delegations or a combination of both. HWC should consolidate its policy guidelines on public participation so as to comply with PAJA regulations, and consider publishing the required procedures in the Provincial Gazette

The following are among the solutions that were suggested during the public participation exercise.

- Implementation of the machinery of the Act could significantly diminish the current workload of HWC and free up some of its time and resources to focus more on the pro-active management of provincial heritage resources and maintaining the heritage register.
- A revised allocation of resources could lead to the employment of sufficient staff at competitive remuneration scales with the multi-disciplinary expertise required for sustainable heritage resource management. This could be preceded with an assessment of the optimal skill set and staffing needs.
- The acquisition of appropriate information and data processing skills and technology should be considered in order to make information accessible and to make heritage resources management more transparent. The use of SAHRIS, SAHRA's online system, is available to provincial heritage resources authorities and could be used.
- Making use of existing records of decisions and existing and past institutional knowledge in order to develop policy and guidelines would offer more certainty to applicants. Consideration could be given to sponsoring research into categorising, capturing and making available to the public key elements of past decisions that HWC wishes to refer to in order to give policy direction for the future.
- Much work is yet to be done to identify heritage resources significant to previously disempowered groups and to broaden the public that has an interest in heritage
- Suggestions made by the City of Cape Town: HRS related to staffing and budget, Council and decision-making, data and records management, permitting, exemptions for s34(1) and s38 where there are no heritage resources, empowering local authorities to carry out heritage management through the heritage register and heritage areas, delegation of heritage management functions (s34(1) and s38) to local authorities and assessing competence of local authorities must be considered in detail and responded to accordingly
- Further and broader discussions can be undertaken, however, similar themes may emerge

Previous recommendations in exit report dated 2007 that should be considered:

- HWC should engage in a vigorous outreach exercise to inform and persuade local authorities of their responsibilities and the consequent benefits and opportunities for the local authorities
- identification and assessment of heritage resources in the province to be recognized as HWC's primary focus including establishing the Heritage Register
- identification process to include the identification and engendering of related community-based heritage projects
- engage in vigorous interaction with other state agencies, SAHRA and DEADP in particular, in order to establish the necessary protocols to ensure that services are delivered timeously and efficiently
- staff complement be increased to the levels required to carry out statutory responsibilities of the provincial authority

Economic, social and environmental impacts of solutions

Further implementation of the machinery of the Act along the lines suggested above would be justified if it were to result in the better and more sustainable management of heritage resources in the Province. It would need to further the objects of the Act, read with the Constitution, NEMA and all relevant legislation. Whether the proposed solutions would produce this result or not requires an analysis of the current state of affairs, whether the solutions could be implemented, and whether they would significantly improve the current state of affairs.

The survey of issues mentioned above is not presented as a scientific survey but as an indicator provided by certain key stakeholders. The issues highlighted tend to suggest that heritage resources management is less than optimal and will deteriorate continuously as structures age, unless more resources are unlocked to manage them. The resources are available in the form of local government heritage resources management as part of their town planning processes.

This would require the allocation of resources by HWC in the short term in order to implement the Act further. It is beyond the scope of this study to quantify these allocations or the broader costs and benefits, but an outline of the types of costs and benefits is provided.

The social benefits of improving the management of heritage resources in the Province would be significant and long term (inter-generational). Conservation-worthy heritage resources would be conserved in a sustainable manner. Conversely, the social costs of not doing so could also be significant; conservation-worthy heritage resources would be lost, or non-conservation-worthy resources would be protected, with associated opportunity costs.

The economic benefits arise from adopting the principles of sustainable development: that is, socially, economically and environmentally sustainable. The integration of the management of Grade III heritage resources with multi-disciplinary planning decisions will promote development at the local level while sustainably conserving heritage resources.

Heritage is an important part of the environment, with a particular inter-generational quality. Government planning has to include this aspect in its integrated development planning. The economic and social benefits of heritage management (such as heritage tourism) should be included in long-term spatial planning, as well as a conceptualisation of the future value of antiquities. The ability to conduct planning in accordance with this paradigm is part of the capacity of local government to manage heritage resources.

Capacity assessment also includes whether any particular local authority has the sufficient number of skilled and experienced staff and the administrative support to process the number of applications that will come their way. This is a matter to be discussed with the local authority based on the number of applications received by HWC over time emanating from that local authority's area. It might be necessary to phase in heritage resource management as local authorities increase their capacity, via limited exemptions and/or delegations, possibly starting with structures of lesser significance.

References

National Heritage Resources Act, Act 25 of 1999

Red Tape Reduction Unit (October 2020) *Heritage Western Cape: Parow Precinct Exemption Area Case Study*

SBP Business Environment Specialists (December 2017) *Heritage protection for the Western Cape: Report in Preparation of a Regulatory Impact Assessment*

SBP Business Environment Specialists (undated) *Comments on the report Heritage protection for the Western Cape: Report in Preparation of a Regulatory Impact Assessment*

Townsend S (2018): *Managing the built environment and the urban landscape in South Africa* in *Managing Heritage in Africa Who cares?* Ed Webber Ndoro, Shadreck Chirikure and Janetee Deaceon, Routledge

Townsend S (14 August 2007) *A report on the provincial heritage resources authority of the Western Cape, Heritage Western Cape and its administrative agency, the heritage resources management services of the Provincial Government Western Cape*

Townsend S (15 August 2006) *A report on the current state of the provincial heritage resources authority of the Western Cape, Heritage Western Cape and its administrative agency, the heritage resources management services of the Provincial Government Western Cape*