

APPEAL RESPONSE: OUDE MOLEN HERITAGE IMPACT ASSESSMENT

CASE NUMBER: 21022615SB0330E

1. Introduction

This submission is made in response to the appeal against the decision of Heritage Western Cape to refuse the Heritage Impact Assessment (HIA) for the Oude Molen site.

The decision under appeal is narrow: does the HIA comply with section 38(3) of the National Heritage Resources Act (NHRA)?

The Impact Assessment Committee found that it does not, due to the failure to identify and assess living heritage.

That finding discloses no error of law or principle and provides a sufficient basis for refusal.

It is submitted that the appeal should be dismissed.

2. The Legal Framework

Section 38(3) of the NHRA requires that an HIA must:

- identify all relevant heritage resources;
- assess their cultural significance; and
- evaluate the impact of the proposed development on those resources.

Living heritage forms part of the national estate and must therefore be addressed as part of the baseline identification of heritage resources.

The statutory sequence is clear:

identification → assessment of significance → evaluation of impact

If identification is incomplete, the subsequent assessment and impact evaluation is unreliable.

3. The Nature of the Defect

The committee found that living heritage on the site had not been adequately identified and assessed, and that the HIA does not meet the requirements of section 38(3).

This is a finding of non-compliance, not a difference of opinion.

Importantly, the Committee expressed in-principle support for aspects of the development. This demonstrates that the refusal was not based on opposition to development, but on a specific and material deficiency in the assessment.

The applicant was afforded an opportunity to provide further information but elected to proceed to decision. The consequences of that election cannot now be remedied through the appeal process.

4. The Appeal Mischaracterises the Issue

The decision required that living heritage, expressly recognised under the NHRA, be identified and assessed as part of the heritage baseline and evaluated within the statutory framework in section 38.

The appeal asserts that the Committee improperly required a Social Impact Assessment. This is incorrect.

The decision required compliance with section 38(3), including the identification and assessment of living heritage. That is a statutory requirement, not an expansion of scope.

The appeal therefore attacks a mischaracterised standard.

IACom did NOT require an SIA. It required compliance with s38(3), which already includes social value.

In any event, even if the Committee had referred to the need for an SIA, that would not constitute an impermissible expansion of scope.

Section 2(vi) of the NHRA defines “cultural significance” to include, inter alia, aesthetic, social and spiritual value or significance.

Section 38(3)(d) expressly requires an evaluation of heritage impacts relative to the sustainable social and economic benefits of the development, which necessarily entails consideration of social impacts insofar as they bear on heritage significance and impact.

Where existing heritage value is derived, in whole or in part, from ongoing social practices, community use, and place-based relationships, the displacement or disruption of those practices constitutes a direct heritage impact. Such impacts must be identified, assessed, and weighed within the section 38(3) framework.

The HIA did not consider the negative social and economic impacts of displacing the existing heritage and therefore did not comply with section 38(3)(d).

5. Alleged Delays Are Not a Basis to Relax Statutory Compliance

Under the NHRA, the heritage authority is mandated to ensure that heritage resources are adequately identified and assessed before a decision is made.

The adequacy of the assessment is a statutory requirement. It is not contingent on timelines, convenience, or project delivery considerations.

The appeal raises concerns regarding alleged delays in the assessment process. This is not a legally relevant basis on which to challenge the refusal.

The appeal’s reliance on delay improperly seeks to invert the statutory burden, by suggesting that deficiencies in the assessment should be excused or rendered immaterial once a certain amount of time has elapsed. The Act permits no such trade-off. Compliance with section 38(3) is mandatory and cannot be displaced by considerations of expediency.

Any delay arose not from arbitrary conduct by the decision-maker, but from the applicant’s failure to provide a compliant assessment and its subsequent election to proceed to decision despite being afforded the opportunity to remedy identified deficiencies. The consequences of that election cannot be displaced by invoking delay.

Neither a lack of administrative efficiency on the part of the applicant, nor the complexity of the issues requiring assessment, permits the circumvention of section 38(3).

The requirement for further assessment of living heritage is not a duplication of work, but a necessary corrective to an HIA that has failed to properly identify and evaluate a core component of the national estate.

6. Structure Does Not Equal Compliance

The appeal relies on assertions that the HIA:

- follows accepted structure;
- aligns with SAHRA guidance;
- reflects international principles.

Even if accepted, this is insufficient. Compliance with general principles does not demonstrate compliance with statutory requirements in a specific case.

While the HIA adopts the *form* of an assessment, it does not demonstrate the method by which living heritage resources were identified, evaluated, or excluded.

An asserted “holistic” or “integrated” approach is not a substitute for a demonstrable methodology capable of review.

7. The Issue Is Process, Not Outcome

The appeal attempts to frame the issue as a disagreement with the conclusion that only the Goringhaicona kraal constitutes living heritage.

The determinative issue is whether a lawful assessment process occurred. A conclusion that activities do not constitute living heritage, absent a systematic and criteria-based evaluation of their significance, does not satisfy section 38(3).

This is therefore not a dispute about outcome, but a failure to demonstrate that relevant material was assessed at all.

8. Absence of a Demonstrable Methodology

The appeal characterises the HIA as an exercise of professional judgment within an acceptable range of discretion. That proposition is correct in principle but inapplicable on these facts.

Professional judgment is legally effective only where the reasoning process underpinning it is disclosed and capable of scrutiny. The assessment be intelligible and testable: it must be possible to understand how and why conclusions were reached on the evidence.

However, the HIA does not disclose a coherent evaluative framework for identifying or excluding living heritage. It does not set out how evidence was evaluated, the criteria applied, the thresholds of significance, how competing interpretations were resolved, or how evidence of sustained social and cultural use was weighed.

The absence of a prescriptive template does not exempt the applicant from the requirement of rationality. Under Section 38(3), an HIA is a scientific and consultative tool. For a conclusion to be legally 'assessable,' the specialist must disclose their criteria for significance.

Without a clear methodology, it is not possible to distinguish between assessable professional judgment and unsubstantiated assertions.

“Adequacy” under section 38(3) is therefore not satisfied by the production of a professionally authored report or by general statements of principle. It is satisfied only where there is a rational and reviewable chain of reasoning linking evidence to conclusion. That is absent here. The conclusions reached are not capable of review and therefore cannot satisfy section 38(3).

9. Incorrect Tests Applied in the Appeal

The appeal advances arguments that apply incorrect tests and, in doing so, underscore the absence of a defined evaluative framework:

9.1 “Activities could occur elsewhere”

The question is not whether activities could theoretically occur elsewhere, but whether they exist at the site and contribute to its heritage significance.

9.2 “Recent origin”

The NHRA does not limit living heritage to long-established or intergenerational practices. Living heritage is not fixed in the past - it includes evolving cultural expressions.

9.3 Size of the community

The appellant dismisses the Oude Molen community as a “small, niche lifestyle” group. However, section 3(3)(g) of the NHRA does not set a “size” requirement for a community.

9.4 “Entrench sectarian interests”

By labelling the community's social fabric as “sectarian” and “fake”, the appellant seeks to characterise the tenants as “elite” or “privileged” to make their displacement socially acceptable.

However, the Oude Molen tenants provide services to the public - equestrian therapy for disabled children from all backgrounds, transitional housing and life-skills development for young women aging out of the care system, organic food education, children’s education, youth development programmes, elder care, dementia care, step-down care, carer and nursing training, and mental health support.

This is the opposite of “sectarian”, it is public-facing heritage.

9.5 “Random”, “unstructured” evolution

The appellant's argument that the site’s 30 plus year organic development has been “random” and therefore incapable of giving rise to heritage significance reflects a misapplication of the statutory test.

It imports a requirement of deliberate planning or formal structure that is absent from the statutory definition of living heritage. Section 2(xxi) of the NHRA protects “popular memory” and “tradition”, both of which are inherently organic and emergent processes.

9.6 Dismissal of stakeholder input

The characterisation of stakeholder input as “shoehorned” or self-interested does not address whether the information provided required assessment.

The existence of competing interpretations reinforces the need for a transparent evaluative process, not its absence.

9.7 Selective application of the definition of living heritage

The Appellant's attempt to decouple the "ethos" of the tenant community from the statutory definition of living heritage constitutes a material misdirection in law.

By acknowledging First Nation practices but summarily excluding community practices that have spanned three decades, this selective recognition reflects an arbitrary and inconsistent application of Section 2(xxi).

The distinction drawn by the Appellant between "recognised" heritage practices and those associated with the existing community is not grounded in any articulated legal or methodological framework.

Furthermore, the proposal to "memorialise" displaced values in the implementation acknowledges that impacts would be permanent and not reversible, as it replaces active, living culture with static, retrospective monuments.

10. Broad Interpretation of Living Heritage

The definition of living heritage in Section 2(xxi) of the NHRA is intentionally broad and inclusive of lived, evolving cultural expressions.

Similarly, international doctrine (including the Burra Charter and UNESCO frameworks) recognises that cultural significance arises from social value, community associations, and intangible connections to place.

Living heritage arises where cultural practices are materially dependent on place and generate social meaning through sustained use over time.

Evidence before the committee demonstrated:

- sustained community use;
- embedded social relationships;
- practices linked to land, environment, education, and mutual support;
- the accumulation of popular memory and social meaning over nearly three decades.

These fall squarely within the statutory definition of living heritage and required assessment.

The appeal adopts an unduly narrow interpretation of living heritage, inconsistent with both the National Heritage Resources Act and established heritage doctrine.

The appeal's approach reflects a narrow, top-down interpretation, in which heritage is confined to static, institutionally validated expressions, and excludes the living, communal dimensions rather than assessing them.

This submission does not suggest that all activity constitutes living heritage. It submits that where sustained patterns of social practice, land use, and community meaning exist, as contemplated in section 2(xxi), they must be identified and assessed through a defined methodology. The HIA does not demonstrate that this occurred.

This reinforces the Committee's finding that living heritage was not adequately assessed.

11. Evidence of Living Cultural Landscape Was Not Assessed

Multiple submissions placed before the Committee contained substantive and detailed evidence of ongoing cultural, educational, therapeutic, care-based and land-use activities on the site.

These include food growing, horse husbandry, equestrian therapy, mental health support, step-down and elder care, nursing and carer training, child-centred education, environmental education, and community-based support practices.

These are not incidental or interchangeable uses but materially depend on the site's spatial character, environmental qualities, tranquillity, and continuity of land-based use and demonstrate an ongoing relationship between people and land.

They constitute a contemporary evolution of the site's long-standing association with care, healing, and institutional-agricultural functions.

Where sustained practices are embedded in place and generate social meaning through continued use over time, they fall within the statutory conception of living heritage contemplated in section 2(xxi) of the Act. Such practices may together constitute a living cultural landscape rather than discrete or unrelated activities.

Public submissions formed part of the evidentiary record and raised material issues relating to living heritage. However, this evidence was grouped into broad themes, summarised, and effectively dismissed without transparent reasoning.

The obligation on the applicant was not to accept those submissions, but to evaluate them using a defined methodology.

In the absence of a systematic assessment of this evidence, the baseline identification of heritage resources is incomplete. As a result, subsequent findings on heritage significance and impact cannot be relied upon for the purposes of section 38(3).

12. Character, Sense of Place, and Living Heritage

Under both the National Heritage Resources Act and established heritage doctrine (including the Burra Charter), "sense of place" is a recognised indicator of cultural significance.

It refers to the qualities that make a place identifiable, meaningful and socially valued, arising from the relationship between:

- spatial form and land use;
- environmental features;
- patterns of occupation and activity; and
- social and cultural associations.

The Oude Molen site represents a distinctive hybrid landscape. Even the Appellant's own specialists describe it as "bucolic-institutional". That hybrid nature is precisely what makes the resource significant and rare in an urban context.

This heritage value does not depend on the site functioning as a formal or historic "working farm". Rather, its significance lies in its continued existence as a low-intensity, semi-rural remnant within an urban setting, and in the ongoing interaction between people, land and environmental systems that this landscape enables.

The site's character, including its semi-rural sense of place, forms part of its living cultural landscape and is therefore directly relevant to the identification and assessment of living heritage.

Agricultural, cultural, educational and therapeutic activities, together with proximity to the river and open spatial patterns, contribute to a distinct sense of place that is actively experienced and sustained through daily use.

This relationship is constitutive: cultural practices on the site are shaped by, and dependent upon, its spatial and environmental character. In turn, those practices reinforce and sustain that character.

The removal or displacement of these activities would not merely relocate services; it would sever the relationship between community, practice, and place that gives rise to heritage significance.

The appeal disputes the Committee's characterisation of the site as having a semi-rural sense of place and rejects comparisons to other sites. However, where "sense of place" is a recognised indicator of heritage significance, the appeal must identify a lawful basis for dismissing the Committee's findings as "not evidence-based", rather than merely asserting disagreement.

The issue is not whether such place and landscape character can constitute heritage, but whether they were assessed through a defined, reviewable methodology. Section 38 requires, in this context, an evidence-based account of how the site's character contributes to cultural significance, and how that significance may be affected by the proposed development.

The HIA does not demonstrate that such an assessment of character and sense of place was undertaken.

13. Environmental Systems and Living Heritage

Expert input, including the submission by Professor Lynne Shannon, raised issues relating to the environmental functioning of the site.

Where environmental systems underpin land use, livelihoods and cultural practices, they form part of a living cultural landscape.

The failure to engage substantively with this evidence further supports the conclusion that living heritage was not adequately assessed.

14. Cumulative Impact and Loss of Heritage Envelope

The HIA fails to properly engage with the cumulative impact of the proposed high-density, mixed-use development on the heritage resources on site.

Heritage significance does not reside only in isolated structures or formally graded elements. It arises from the relationship between those elements and their surrounding landscape context.

On the Oude Molen site, the identified Grade II and Grade IIIA heritage resources are not experienced in isolation. They exist within a broader spatial, environmental, and cultural setting characterised by:

- open land and low-density spatial patterns;
- visual permeability;
- low-intensity land use;
- ecological systems;
- and the continuity of human activity across the landscape.

This setting functions as the heritage “envelope” within which these resources derive much of their meaning, legibility, and social value.

While the HIA describes aspects of this setting, it does not assess the landscape context itself as a heritage resource, nor does it evaluate its contribution to overall significance through a defined and transparent methodology. It fails to engage with the cumulative and systemic effects of the proposed development on the cultural landscape as a whole

A high-density development would:

- alter scale, massing, and spatial grain;
- fragment open land and visual coherence;
- disrupt established patterns of use;
- and sever the relationship between heritage resources and their landscape setting.

These impacts are not incremental, but transformative and irreversible.

In heritage terms, this would amount to the loss of the cultural landscape as a coherent system, even if certain built elements are retained.

The retention of individual structures does not equate to the protection of heritage significance where that significance is derived from landscape context. The proposed development would remove the spatial and cultural envelope within which these resources are experienced. This constitutes a direct impact on their significance, which has not been assessed.

In the absence of a complete identification and evaluation of the cultural landscape, including its living heritage components, the cumulative impact of the proposed development cannot be reliably understood.

This further supports the Committee’s finding that the HIA is structurally deficient and does not meet the requirements of section 38(3).

Even on the Appellant’s own case, the assessment treats heritage resources as discrete elements, with impacts considered at the level of individual structures and their immediate curtilage. It does not assess the landscape context that gives those resources meaning. The proposed development would fundamentally alter that context.

This impact is irreversible and was not assessed. For that reason alone, the HIA does not meet the requirements of section 38.

15. Development Framework and Timing of Assessment

The proposed development is advanced as a high-level development framework, with key parameters to be determined later.

In this context:

- development rights are broadly defined;

- spatial impacts are not fixed;
- cumulative impacts cannot be assessed at later stages once development rights are granted in principle.

The appeal seeks approval of the framework “on the understanding that refine of areas of heritage concern will be undertaken and resolved appropriately at subsequent design levels”.

An assurance that “details will be dealt with later” is not a lawful substitute for compliance with section 38 and permits the approval of development rights without adequate scrutiny of potentially material and irreversible harm to heritage resources.

Once approval is granted in principle, there is limited opportunity to revisit or refuse elements that may later prove harmful.

Should the development framework be approved, the "heritage indicators" become mere suggestions. A five-storey block cannot later be “refined” into an agricultural precinct. “Refinement” cannot undo the permanent destruction of the site’s tangible heritage landscape.

The time for heritage to inform the design is now, not after the approval.

Approving development parameters in principle predetermines heritage outcomes and renders subsequent assessment meaningless.

Where development is approved in principle, heritage impacts must be sufficiently identified and understood at that stage to inform decision-making. Deferring the assessment of living heritage risks reducing subsequent processes to implementation rather than evaluation.

Cumulative landscape impacts, in particular, cannot be deferred to later stages where development rights have already been established in principle. Once the spatial framework, including density, bulk, and land use intensity, is approved, subsequent processes are constrained to implementation.

At that point, the loss of landscape context is no longer avoidable, only manageable.

Section 38 requires that such impacts be assessed before approval, not after.

16. Procedural Fairness

The proposal evolved from a Precinct Plan to a Development Framework after public participation had closed.

This raises concerns that stakeholders have not had an opportunity to comment on the proposal in its current form.

While not the central issue, this supports a cautious and procedurally sound approach.

17. Spatial Justice and Living Heritage

The appeal advances an implicit argument that the transformation of the site, including the removal of existing uses, is justified in pursuit of spatial justice and broader social benefit.

This position is legally flawed.

Spatial justice and heritage conservation are not mutually exclusive objectives. The NHRA does not permit the destruction or disregard of existing heritage resources, including living heritage, on the basis that alternative social or developmental benefits may arise.

Living heritage, as recognised in section 3 of the Act, includes ongoing cultural practices, community use of land, and social value.

On this site, these include activities that contribute to:

- social cohesion and community support systems;
- food production and food security;
- environmental education and stewardship;
- cultural and spiritual practices tied to place.

These are existing, functioning heritage values that form part of the national estate and must be identified and assessed.

The NHRA requires the protection and evaluation of existing cultural significance. It does not allow for its substitution or sacrifice in exchange for urban development goals or anticipated development benefits.

The balancing exercise contemplated in section 38(3)(d) and (g) can only occur after heritage resources have been properly identified and assessed. It cannot be used to justify the omission of that assessment.

The Appeal's reliance on spatial justice and development benefits is misplaced in law, as it seeks to invoke the balancing stage of the enquiry to excuse a failure at the identification stage.

A legally compliant approach requires that development be shaped in response to identified heritage significance, rather than heritage being disregarded to accommodate predetermined development outcomes.

18. Broader Context and Cumulative Risk

Within the Two Rivers Urban Park context:

- a broader area-wide heritage assessment was not completed;
- heritage considerations were deferred to site-level processes;
- those same processes are now at risk of being curtailed.

This reinforces the importance of ensuring that heritage assessment is properly undertaken at the stage where it is legally required.

19. Consequence: The Impact Assessment Is Unreliable

Because living heritage was not adequately identified and assessed:

- the baseline heritage significance is incomplete;
- the assessment of significance is unreliable;
- the impact evaluation cannot be relied upon.

A structural deficiency in the identification of heritage resources cannot be remedied through conditions, deferred assessment, or subsequent design stages.

Conditions are meant to manage impacts; they do not establish the existence and significance of heritage resources.

20. Inadequacy Cannot Be Remedied Post-Approval

The Appellant's response to Heritage Western Cape's further requirements illustrates the central deficiency in the assessment.

Rather than undertaking a transparent reassessment of living heritage significance, the response primarily advances design refinements, visual mitigation measures, and planning justifications.

This reverses the statutory sequence required by section 38(3). Heritage significance must first be identified and assessed; only thereafter can design responses be meaningfully evaluated.

Design refinement cannot cure an incomplete baseline heritage assessment.

The applicant declined the opportunity to supplement the assessment when requested. Having elected to proceed to decision, the applicant cannot now seek to remedy fundamental deficiencies through the appeal process.

If heritage significance is not established before approval, heritage assessment is reduced to a post hoc exercise, contrary to the purpose of section 38.

21. Conclusion

The deficiency identified by the Committee is not a matter of scope or detail.

It is a failure to:

- adequately identify living heritage as part of the baseline;
- assess its significance;
- incorporate it into a reliable impact evaluation.

In the absence of a demonstrable methodology, the HIA does not meet the requirements of section 38 of the NHRA.

In these circumstances, refusal was the only appropriate decision available to the Committee.

22. Requested Outcome

It is respectfully submitted that the appeal ought to be dismissed and that the decision of Heritage Western Cape be upheld.

The refusal of the Heritage Impact Assessment ("HIA") was based on a fundamental deficiency, namely the failure to identify and assess living heritage as required by section 38(3) of the National Heritage Resources Act. That deficiency goes to the core of the assessment and cannot be remedied through conditions, partial supplementation, or deferral to subsequent stages.

The applicant should be required to

- undertake a comprehensive, methodology-based assessment of living heritage;
- meaningfully engage affected communities; and
- submit a revised HIA that complies with section 38(3) of the National Heritage Resources Act.

Such revised HIA must, at a minimum, demonstrate the following:

- **A clear, transparent, and criteria-based methodology** for the identification and evaluation of living heritage resources, including a structured and reasoned approach to the assessment of all public submissions and expert inputs, with reasons provided for the acceptance or rejection of such material.
- **A systematic and methodologically consistent evaluation of all evidence** relating to living heritage, undertaken in accordance with the stated criteria and capable of independent review.
- **Identification and assessment of the site as a cultural landscape**, rather than as a collection of discrete heritage elements. This must include, inter alia, spatial patterns (including open land and density), land use practices, ecological systems supporting those practices, continuity of use over time, and sense of place as an indicator of heritage significance.
- **A comprehensive assessment of cumulative impacts** on the cultural landscape, including the transformation of spatial character, land use patterns, and experiential qualities.
- **A reasoned demonstration of impact pathways**, showing how the proposed development will affect identified heritage resources, including living heritage and the cultural landscape, and expressly addressing cumulative and irreversible impacts.

In conclusion, the deficiency identified by the decision-maker is foundational. It relates to the identification of heritage resources themselves, and not merely to the refinement of an otherwise adequate assessment. Adequacy requires a rational, reviewable chain of reasoning. A conclusion without disclosed criteria and evaluation is not “adequate” in law.

Accordingly, in the absence of a revised HIA that satisfies the requirements set out above, any approval would be inconsistent with section 38(3) of the National Heritage Resources Act and would be liable to be set aside.

The issue before the Appeals Committee is therefore one of legal compliance: in the absence of a complete and lawful identification and assessment of heritage resources, the HIA cannot be approved.