

Stephen S Townsend

B Arch, Cape Town; Diploma in the Study and Restoration of Monuments, Rome; Ph D, Cape Town

Architect, Statutory Planner, Conservationist

10 Faure Street
Gardens
Cape Town 8001
Cellphone: 072 9271300
ssquared@worldonline.co.za

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MEC for Cultural Affairs and Sport
Western Cape Government

Attention: Advocate Michael Petersen, Tribunal Secretary

Dear Sir,

**Development Proposed at Oude Molen, RE Erf 26439, Alexander Road,
Pinelands:
Application Submitted to s.38, National Heritage Resources Act, to the
Provincial Heritage Resources Authority, Heritage Western Cape:
APPEAL *contra* a Decision by Heritage Western Cape, now addressed to the
Tribunal of the MEC for Cultural Affairs and Sport:**

A CRITIQUE OF THE ADMINISTRATION AND DECISION-MAKING PROCESSES

I have been asked by the owner of the land in this matter to analyse and critique HWC's administrative and decision-making process and, ultimately, the decision itself in support of an appeal to the Tribunal of the MEC for Cultural Affairs and Sport. Given that the decision in question turns on the rationality (or otherwise) of contentions in respect of living heritage, the critique focuses on this question and, in effect, bypasses other questions raised in the process.

The property owner and Applicant/Appellant in this matter is the Western Cape Government's Department of Infrastructure. The site is a large portion of Remainder Erf 26439, a little more than 13 hectares, located between the Black River flood plain and Alexander Road and opposite the Pinelands railway station with Maitland Garden Village to its immediate north and the Vincent Pallotti hospital to its south. This land, occupied by a mill (perhaps two) in the eighteenth and early nineteenth centuries and then by the Valkenberg Hospital until 1997, has long been known as Oude Molen. It is now occupied by a number of disparate uses of recent origin (all

post 1995). This history of use and of ownership has, despite its strategic location, meant that its use and development has been uncertain. However the owner, the Provincial Government, is now committed to its rational redevelopment; and the most recent iteration of the proposed development includes (roughly) 1360 dwelling units (including affordable units) and 22 300sqm of retail and office space. The process of applying for approval to the NHRA commenced in the first half of 2021 when a Notification of Intent to Develop was submitted to Heritage Western Cape. This was followed by iterative periods for comment and interactions with HWC. HWC has now, through its Impact Assessment Committee and then its Appeals Committee, recently refused the application (at a meeting of the Appeals Committee on 10 June; its written Decision and its separate Reasons are both dated 26 June 2026).

1 The Development Proposal:

Given that this current administrative process is one triggered by a development proposal, we must start with a description of the development proposal:

The mixed-use development proposed is, after amendments made and described and analysed in the *Final HIA* and the subject of the HWC decision in question here, includes of the following components within a framework:

- approximately 460 inclusionary housing dwelling units (in four-storey walkups);
- approximately 900 open market dwelling units (some inserted into the ex-Valkenberg wards built in the 1920s, some in four- and five-storey apartments, some in two-storey terraces);
- potentially, a school (using one of the ex-Valkenberg wards built in the 1920s);
- 19 000sqm office space (in six- and seven-storey blocks);
- 3 400sqm retail space (below the open-market apartments and the offices);
- 800sqm cultural/public facility accommodated in the historic Oude Molen Homestead complex and ex-dining hall complex and including a superintendant's dwelling overseeing the floodplain of the Black River riverine corridor lining the western edge of the site; and
- a communal garden space, an events amphitheatre, swimming pool, and various open spaces.

The shape, form and design of the development proposed is, however, described in the *Final HIA* as a “development framework”. This framework (version 4C) has been described in considerable detail, first, in the 165-page *Development Proposal Package* of November 2015 by Nigel Burls & Associates and, second, summarized, although still in great detail, in the *Final HIA* of February 2026 (see pp106-149); and it includes discussion of the design informants (including those derived from the consultation processes) and the development of the design via several alternatives (the final Preferred Alternative on p122). This ‘framework’ then analysed by testing it against a number of indicators derived both from heritage-related information and from other assessments like, for example, the Landscape Assessment and the Archaeology and the Visual Impact Assessments (see pp150-175).

The development proposed is, therefore, a ‘high-level’ proposal containing proposed building-envelopes but with well- and comprehensively described design-guidelines to regulate the more detailed design stages to follow, for example, in the rezoning process, and the precinct- and site development design steps before, ultimately, the building plan approval stage.

The Heritage Western Cape decision-making committees have not considered the shape, form or impacts of the proposal at all, saying that this could not be done, given that, for example, this contention of the Appeals Committee: “The deficiencies [of the *Final HIA*] are material and relate primarily to the identification and assessment of heritage resources, particularly living and intangible heritage. As a result, subsequent components of the assessment, including impact analysis, consideration of alternatives, and proposed mitigation, are incomplete and cannot be properly evaluated”.¹

This is the nub of the question that I must examine: does this decision take all of the necessary factors into account and is this rational?

2 Heritage Western Cape’s Two Decisions:

Decisions in respect of the development application in question have been made,

¹ HWC Appeals Committee, undated (rec. 26/6/2026), *Reasons for Decision*, p2.

first, by HWC's Impact Assessment Committee (which, in this instance, included members from other committees) and, second, by its Appeals Committee.

2.1 The IA Comm Decision:

At the IA Comm meeting of 18 March 2026, the committee considered the revised *Final HIA*, itself already much added to in response to its earlier "Further Requirements", and it decided that "The development as proposed cannot be considered as the Heritage Impact Assessment does not meet the requirements of Section 38(3) of the NHRA" and that "The application is not approved". The written decision is dated 8 April 2026.

2.2 The Appeals Committee Decision:

At the Appeals Committee meeting of 10 June, the committee dismissed the appeal made by the attorney, Richard Summers, on behalf of the owner, the Provincial Government. This written decision is dated 26 June 2026 as are the written *Reasons for Decision* emailed to the attorneys on the same day. These *Reasons* referred to the IA Comm decision and, as a consequence, I must describe and analyse both the IA Comm decision and the Appeals Committee decision.

3 Defining Living and/or Intangible Heritage:

Given that certain of the contentions and arguments of both IAPs and of HWC's committees have, if belatedly, made much of what has been referred to as either, or both, living heritage and intangible heritage, it is necessary to articulate, as best and as clearly (and briefly) as I can, what these terms mean (or should mean) in the context of decision-making *in this instance*.

First, the committee members and the committees of HWC seem to have used the two terms together or separately as though they were the same thing. Certainly I have not seen any suggestion separating or identifying different meanings in this instance. And, as a consequence, given that our law refers to 'living heritage' only, I will prefer that term unless required by the context to refer to 'intangible heritage' or, as done by HWC, I shall use both terms together.

Second, the term 'intangible heritage' has assumed a wider use internationally and,

given South Africa's relatively recent adoption as of April 2025 of the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*, we can reasonably argue that the definition in the Convention is a fair place to start when arguing about what we mean (or should mean) when we discuss living/intangible heritage:

"Intangible Cultural Heritage means the practices, representations, expressions, knowledge, and skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity."²

In other words (adapting this definition for circumstances like the one in question), intangible and/or living heritage are (i) the patterns of behaviour or rituals practiced or performed (ii) in some cases in particular places (iii) by groups who recognise/claim those practices as aspects of their cultural identity (iv) which have been passed on from previous generations.

Still referring to living/intangible heritage generally, a number of questions inevitably arise when discussing living/intangible heritage and, in particular, its protection and/or management and/or the cost of protection/management. These include:

- whether the ***behaviour/ritual*** in question is recognisable as ***cultural*** in origin (practiced/shared by a group);
- whether the claim *vis a vis* the behaviours/rituals in question is bound to a ***place***, space or building, or whether it could be practised elsewhere or even anywhere without loss in meaning or significance to the group;
- whether the claimants in question can be identified as a ***group*** or community of a ***shared culture***;
- whether the group or community in question is a ***small or large*** one;
- whether the practice/ritual has been passed on from ***generation to***

² UNESCO, 2003, *Convention for the Safeguarding of the Intangible Cultural Heritage*, Article 2, Definitions. #1.

generation or not and for **how long**; and

- whether the practices/behaviours in question are and can be persuasively articulated as living/intangible heritage and significant enough to warrant their preference over other social goods.

With these difficulties in mind, we turn now to living heritage in South Africa.

4 The National Heritage Resources Act and Living Heritage:

The NHRA refers to 'living heritage' just three times, once in s.2 Definitions and twice in s.3 National Estate in the same subsection which lists tangible things which may be included:

- s.2(xxi) says that "'living heritage' means the intangible aspects of inherited culture, and may include- (a) cultural tradition; (b) oral history; (c) performance; (d) ritual; (e) popular memory; (f) skills and techniques; (g) indigenous knowledge systems; and (h) the holistic approach to nature, society and social relationships";
- s.3(2)(b) says that "places to which oral traditions are attached or which are associated with living heritage" may be included in the national estate; and
- s.3(2)(i)(ii) says that "objects to which oral traditions are attached or which are associated with living heritage" may be included in the national estate.

I note also that 'heritage resource' is defined in s.2 Definitions as:

- s.2(xvi) says that "'heritage resource' means any place or object of cultural significance".

There is no other reference in the NHRA to 'living heritage'. And so living heritage is, therefore, not protected or managed via the NHRA; and nor can living heritage be a 'heritage resource'. However, in cases in which a place which is **associated** with living heritage, presuming that the significance of that living heritage is great enough, is claimed by a recognisable and large enough culturally specific group or community, and is tied to the place in question, that place could well be deemed to be a part of the national estate and it could well be deemed to be worthy of protection from development impacts that would otherwise damage the living heritage associated with the place in question.

However, in all decisions imposing protections of the sort implied here, the benefits of the protection must be weighed (as required by both s.38(3)(d) of the NHRA and by s.36 of the Constitution) against the impacts of the protection (or refusal, as in this case) on the costs or disbenefits to otherwise realisable social or economic goods (like social housing or the transformation of the apartheid city). This weighing of relative benefits and disbenefits has been brought into sharper focus by the recent Constitutional Court decision in respect of the Tafelberg School site in Sea Point.

I will return to the question of weighing benefits and disbenefits later.

5 Current uses and planning of the site since 1997:

As I have said earlier (if very briefly), most of the site was occupied by the so-called non-white section of Valkenberg which was reduced in size in several steps as those patients were integrated into other psychiatric hospitals (including at Valkenberg itself) from the 1990s as apartheid was dismantled.

The property owner, the Provincial Government, after accommodating the Robin Trust, a non-profit organization which provides health care through the training of nurses and care workers, the provision of after-hospital care, a frail care facility, individualized home-care services and training of individuals in home-based care services, initially explored low-key uses occupying existing buildings with a number of tenants. This was largely in order to manage the site more effectively following its illegal occupation and the associated damage to and destruction of a number of the buildings on the property. These new uses included, from about 2003, a range of uses eventually coalesced under the banner of an ‘eco-village’ and, over time, two kindergarten-primary schools. The balance of the tenants comprise a mix of commercial office and business uses, a number of budget holiday accommodation facilities, various social facilities and uses, some residential accommodation, the offices of the tenant’s association, various urban-gardening components and an equestrian use. A small number of the built structures on site are not currently tenanted and some vacant land is neither tenanted nor effectively used and remains in a state of semi-derelict “private” open space.³

³ This description of the current uses relies on Nigel Burls & Associates’ *Development Proposal for Heritage Assessment* report dated November 2025, p25.

This site, now referred to as the Oude Molen Precinct, is a small part of a much larger area, then known as the Two Rivers Urban Park (TRUP) and now simply as the Two Rivers Area, that was the subject, from as early as 2002, of numerous land-use planning and heritage studies initiated by both the Provincial Government and City Council. These studies include:

- 2002 *Two Rivers Urban Park: Baseline Heritage Study*, Aikman and Winter for City of Cape Town;
- 2003 *Two Rivers Urban Park Contextual Framework and Phase 1 Environmental Management Plan*, CoCT Environmental Management Branch;
- 2007 *Towards a Strategic Development Approach for Oude Molen*, Swilling for Western Cape Provincial Government
- 2013 *Valkenberg Hospital Phase I HIA*, Baumann, Winter, Attwell and Abrahamse, for DTPW
- 2015 *Transit-Oriented Development Strategic Framework*;
- 2015 *The First Frontier: An Assessment of the Pre-Colonial and Proto-Historical Significance of the Two Rivers Urban Park Site*. ACO Associates (Hart and Schiettecatte) for Attwell (for Western Cape Provincial Government);
- 2016 *Study Two Rivers Urban Park: Baseline Heritage*, Attwell and Jacobs for Western Cape Provincial Government;
- 2019 *Two Rivers Urban Park: First Nations Report*, Arendse of AFMAS Solutions for Western Cape Provincial Government;
- 2020 *Phase 1 Heritage Impact Assessment for the Site 'Two Rivers'*, Postlethwayt for Western Cape Provincial Government;
- 2020 Historical Background of Oude Molen, 'Valkenburg East', Erf 26439/RE, Hislop
- 2023 Municipal Spatial Development Framework;
- 2023 Table Bay District Plan;
- 2023 Two Rivers LSDF; and
- 2025 CoCT Non-Motorised Transport Policy and Strategy.

The most recent (and with the most direct influence on the planning of the Oude Molen Precinct) of these land-use planning policies is the approved 2023 *Two Rivers Local Spatial Development Framework*. The effect of this policy on the Oude Molen Precinct is described by Nigel Burls & Associates as follows:

“The OMP lies within the Two Rivers local area, which has been the subject of an extensive visioning and planning exercise which has culminated in the formulation and subsequent approval of the Two Rivers LSDF (2023). This document provides detailed guidance as to the future spatial development of the OMP. The Two Rivers study area represents a significant area of underutilised, state owned and private land, strategically placed within the Urban Inner Core of the City. The proximity to Public Transport and the opportunities offered to promote integration require that state finances are utilised to unlock the development potential of the study area. At the same time, the ecological role of the river corridors, the importance as a regional amenity and the significance placed on the layers of cultural and built heritage must be enhanced. The site currently has a dual character where it has both potent negative and positive effects on the surrounding urban landscape. It is simultaneously an “urban green lung” but also “urban divider”. The site is a strategic site in the city with the potential to create new jobs and housing opportunities, while simultaneously improving the natural environment and enhancing the diverse cultural and built heritage.

“With regards to the OMP site in particular, the Two Rivers LSDF provides the following principles / goals:

- ☐ Mixed use residential led development along eco principles.
- ☐ Increase density towards Alexandra Road.
- ☐ Decrease density towards the river.
- ☐ Acknowledge heritage structures.
- ☐ Improve interface with Maitland Garden Village and river.
- ☐ Acknowledge the cultural rights of First Nations and integrate heritage and culture into public place design.
- ☐ Promote TOD through intensification of residential and commercial use around station.
- ☐ Promote spatial integration through social housing.
- ☐ Open space between mixed use and river could include picnics/horse riding etc (park).

“Once again, the proposal is entirely consistent with the development principles outlined in the TRUP LSDF. The proposal is for a mixed use residentially led development which does not preclude eco principles to be implemented in future detailed design. Density and massing decreases in an east-west direction, being highest along Alexandra Road and stepping down significantly towards the Black River corridor. Buildings and elements that have been identified by the heritage consultant and impact assessment specialists as conservation worthy have been incorporated into and are integral to the structure of the proposed redevelopment, including the retention of trees of heritage and cultural significance. Ample opportunities exist to connect the site into the Tussen Die Riviere Resistance and Liberation Heritage Route in memorialisation of the First Nations cultural heritage, and for further memorialisation to take place in the public spaces within the OMP and on the adjacent open space between the site and the Black River.

“The redevelopment of the site allows for a significant improvement to the interface with Maitland Garden Village to the north and the Black River Corridor to the west, creating a positive interface and greater permeability to facilitate better integration through and around the OMP. The proposed redevelopment contributes positively to the objective of promoting social justice through the provision of a significant quantum of affordable housing in an exceptionally well-located precinct and is in

support of TOD principles, having a direct relationship with the Pinelands station on its doorstep.

“The proposed development does not preclude the adjoining City owned open space along the Black River to be used for picnics, horse riding, etc.”⁴

These studies and local area spatial development plans have all emphasized the central location of this site, it being a large piece of land relatively close to the city centre, to the residential inner-city suburbs of Salt River, Observatory, Maitland, and to the employment opportunities of the city-frame of the harbor and railways yards, Salt River, Woodstock, Ndabeni, and Paarden Eiland. These planning studies and spatial development frameworks have, as a central pillar of their intentions, the transformation of the apartheid city by including, perhaps especially, the provision of social housing in or near to the central city. Indeed, this objective has recently, as the consequence of a Constitutional Court judgment, received dramatic pressure and reinforcement. Many of the studies listed were designed very specifically to research the historical and heritage-related significances of the Two Rivers area and of Valkenberg: none of them implied even an inkling of living heritage associated with the Oude Molen Precinct of any party other than that of First Nations groups.

There are three conclusions to draw from these twenty-odd years of planning, heritage-related research and identification, and the associated public consultation processes:

- the Oude Molen precinct is a valuable and currently low-intensity-use pocket of land in a central location;
- the history- and heritage-related interests are those of the First Nations groupings and of the Zulu nation only;
- the interests of the tenant community have not at any time included a clearly articulated *bona fide* living heritage-related interest.

I will return to this later and, given the context of this development application made in terms of the NHRA, in particular to the details of the claims and arguments made by IAPs regarding the histories and significances of the parts of the site claimed to be one or more heritage resources.

⁴ Ibid. pp32-33. Given its importance in this discussion (and for the convenience of the reader), the entire section on the Two Rivers LSDF is copied.

6 The History of this NHRA application process:

Given this history of planning and heritage studies dealing with the wider Two Rivers district, we turn now to the current application process under s.38 of the NHRA:

6.1 The NID and HWC's Response:

A NID was submitted by the heritage practitioner, Bridget O'Donoghue, to HWC in March or April 2021. HWC's Response dated 4 May 2021 confirmed that an HIA was required and repeated the requirements of s.38(3), adding that the HIA should also "have specific reference to the following":

- an archaeological impact assessment;
- a visual impact assessment;
- a social impact assessment;
- a cultural landscape study; and
- a built environment study.

There was no explicit or implied reference in this *Response* to living or intangible heritage as a relevant consideration.

6.2 The Baseline HIA:

Given the response of HWC, the property owner, the Provincial Government, commissioned a number of 'baseline' studies which were carried out during the next year:

- *Trees and Shrubs Quality Survey*, Nov 2020, Planning Partners
- *Archaeological Specialist Study (Scoping)*, 12 August 2022, Dr Jason Orton
- *Visual Impact Assessment Baseline Report*, 7-9-2022, David Gibbs
- *Social and Socio-Economic Baseline Report*, September 2022, Barbour and van der Merwe
- *Built Environment Baseline Study (Updated)*, October 2022, Baumann Winter Wilson
- *Socio-Economic Impact Report*, September 2022, Urban-Econ Development Economists Pty Ltd.

Although not listed here, the 'baseline' studies included a series of six 'workshops' (some in-person and some on-line, all minuted) held by a specialist consultant with

groups of people with different interests in May 2021. I note also that the Barbour/van der Merwe study included interviews during July 2022 with nineteen tenants and tenant representatives. Living heritage was not mentioned by any of the tenant representatives during these interviews or workshops.

O'Donoghue then compiled a *Heritage Impact Assessment Baseline Study*, dated 26 October 2022, incorporating the inputs from these studies (and including inputs from the preliminary phase of public interaction). This 'Baseline' HIA, dated 26 October 2022, was submitted to HWC and considered by the IA Comm on 16 November 2022 at a 'confidential meeting'.⁵ HWC's Approved Confidential Minutes of 16 November 2022 confirms that the committee "endorsed the approach, framework and content undertaken thus far".

I note that there is no implied or explicit reference in any of these studies or in the *Baseline HIA* to tenants (who have occupied limited parts of the site for limited periods, none more than twenty-eight or twenty-nine years) having thoughts of having developed living heritage practices that are tied to this place.

6.3 *The HIA-Proper and the IA Comm Demand of Further Requirements:*

Given this, O'Donoghue proceeded with the HIA-proper. But, during 2023, she then, by mutual agreement, withdrew from the project; and Cindy Postlethwayt was commissioned in October 2023 to proceed with the HIA relying on the studies carried out to date.

Accordingly, Postlethwayt then proceeded with a *Draft HIA for Public Comment*, now including additional and revised studies and the assessment of a new iteration of the development proposal. This *Draft HIA* circulated for comment included the substantive contributions of *inter alia* the following studies which were also attached as Annexures:

- *Archaeological Impact Assessment*, September 2024, Katie Smuts of RSA Architects and Heritage Practitioners;

⁵ We presume that this meeting was "confidential" in that there had not yet been any public consultation. But we also insist that this meeting cannot be kept 'secret' and its conclusions suppressed.

- a 25-page *Historical Background of Oude Molen, 'Valkenberg East'*, undated, Hislop;
- *Visual Impact and Cultural Landscape Study*, September 2024, David Gibbs;
- *Socio-Historical Study including First Nations Input*, August 2024, Ron Martin;
- *Landscape Framework Plan and Design Guidelines*, July 2024, Planning Partners;
- *Development Proposal Package for Heritage Assessment*, July 2024, Nigel Burls & Associates and SVA International;
- *Socio-Economic Impact Report*, September 2022, Urban-Econ Development Economists Pty Ltd.

This *Draft HIA* was then circulated (to an IAP-list of nearly 300 parties) inviting comment in September-October 2024 and advising of access to all of the documentation on a dedicated project webpage, and an 'open house' meeting was held on 18 September 2024. This process led to 48 comments being received ("almost all wishing to retain the status quo")⁶ and reported on.

Following the circulation of the *Draft HIA* and amendments being made both to the proposal and to the HIA, it (now dated March 2025) was submitted to HWC in March 2025. This first full version of the HIA (the first HIA-proper) included all of the studies listed above (several of them having been revised/supplemented in the light of commentary received), a revised development proposal, and a separate *Comments and Responses Report* dated March 2025 (including both the IAP-comments received and a tabulated discussion of them) as annexures.

The IA Comm then visited the site 25 April 2025; and on 14 May 2025, after hearing oral representations from IAPs, considered the HIA and its attached studies and concluded that further studies and additional information were required. The *Further Requirements Response* was dated 3 June 2025 and described the committee's views as follows:

- "The Committee is of the opinion the HIA does not meet the requirements of S.38(3) of the NHRA for the following reasons:
1. The intangible heritage/living heritage has not been sufficiently investigated including how that significance translates tangibly, with reference to S.3.3 of the NHRA.

⁶ Postlethwayt, March 2025, Comments and Responses Report, para.7, p7.

2. There is insufficient information regarding the significance of the site in relation to the broader TRUP heritage area (macroscale). Further work is required concerning spatial integration with TRUP land.
3. There is insufficient information regarding the interrelated significances of various character areas within the site itself and therefore insufficient information to inform precinct specific heritage indicators.
4. More detailed information is required pertaining to the massing of proposed buildings in order to make an accurate assessment of the impact on heritage resources.
5. Additional alternatives are required regarding the nature of interfaces (internal between old and new fabric and external particularly related to TRUP land and Maitland Garden Village) and the underlying rationales supporting those alternatives.

The revised HIA is to be advertised to all Interested and Affected Parties including All First Nation Groups identified in River Club HIA process.”

It should be apparent from this *Further Requirements Response* that the committee’s requirements were not particularly onerous (or did not seem so even though ‘living heritage’ had been mentioned in the meeting by one of the IA Comm members). I say ‘not particularly onerous’ even though, given what had been included in the documentation before the IA Comm, it appeared that the members had not looked at the documentation or recognised the level of detail appropriate for the development framework proposed. There was certainly neither explicit or implied reference to tenants who have occupied isolated parts of the site for thirty years or less having developed living heritage that is tied to this place.⁷

Given this, the specialist consultants set about adding to their studies in order to satisfy these ‘further requirements’ and additional studies were commissioned now including the following:

- a 199-page *Urban Design Report: Preferred Alternative 2025 Rev.5*, October 2025, SVA International;
- a 165-page *Development Proposal Package for Heritage Assessment* report (including comprehensive urban design analysis), dated 4 November 2025, Nigel Burls & Associates;
- a 53-page now extended *Socio-Historical Impact Assessment*, February 2025, Ron Martin;
- a 18-page detailed stand-alone overview of the current land-uses and activities report, *Contemporary Oude Molen*, undated, Postlethwayt and

⁷ I note that this vagueness and range of opinion in the IA Comm membership is reflected in the utterances of the IA Comm members during this meeting on 14 May 2025 and reported verbatim in the later *Response to HWC Further Requirements* of February 2026.

Martin;

- a 37-page stand-alone overview of the site history, *Historical Background*, an extract from the 2022 O'Donoghue *Baseline HIA*;
- a detailed stand-alone analysis of the built form, an extract from the 2022 O'Donoghue *Baseline HIA*;
- a 63-page detailed separate *Response to HWC Further Requirements*, February 2026, Postlethwayt with additional input from Ron Martin, David Gibbs and the project planning and design team; and each of the five points raised in the *Further Requirements Response* were discussed and the satisfaction of those points explained.

The contents of all of these studies and the outcomes of the additional consultation process were included in the *Final Heritage Impact Assessment* dated February 2026 (now 208 pages) and submitted to HWC (with all of the amplified contributing studies and additional round of public consultation as required by the IA Comm attached).

I note that despite the vagueness and inconsistency in the views voiced by the IA Comm members and in the written *Further Requirements* letter of 3 June 2026, the question of living heritage was discussed in the *Final HIA* documentation at considerable length. Given that neither the IA Comm members nor, later, the Appeals Committee members appear to have read the documentation before them, I list the some of the sections/pages dealing with living/intangible heritage in the *Final HIA* and its accompanying studies/documentation here (for the convenience of the Tribunal members):

- *Response to HWC Further Requirements*, Intangible/Living Heritage, pp 3-10;
- *Response to HWC Further Requirements*, Objections, pp 51-57 and 59-60;
- *Final HIA*, Heritage Resources and Significance, pp 92-95;
- *Final HIA*, Heritage Indicators, pp 80-91;
- *Final HIA*, Public Participation, pp 185-188 and 201-204;
- *Final HIA*, Appendix J, Comments and Responses Report, p25-32;

Regarding the history of the current users and tenants and their activities, see:

- *Final HIA*, Historical background, Oude Molen Village (1997-present), pp 30-

31 and 45-49;

- *Socio-Historical Impact Assessment*, Contemporary Oude Molen, pp 25-44.

All of this was submitted to HWC in March 2026.

6.4 *The IA Comm Decision:*

The matter was then considered anew at a ‘special’ on-line meeting of the IA Comm on 18 March 2026 with the committee asserting (verbally and in writing via screen-sharing) that the HIA still did not satisfy the requirements of s.38(s) of the NHRA and it introduced a new requirement saying that a “living heritage assessment” was required that focussed “specifically on the practices, skills and community relationships that may constitute living heritage on the site”. This, it seems, is the first clear suggestion that tenants who have occupied parts of the site for thirty years or, in most cases for considerably fewer, may have developed living heritage practices that are tied to this place. The Applicant’s representatives contradicted this view immediately, arguing that an assessment of the tenants as living heritage had been undertaken and refuted. As a consequence, the IA Comm solved to refuse the application and the written decision dated 8 April 2026 says simply that the “development as proposed cannot be considered as the Heritage Impact Assessment does not meet the requirements of Section 38(3) of the NHRA”.

It bears noting that despite all of the evidence contained in the Final HIA and all of the detailed studies before them, the IA Comm could not/did not describe, name or suggest any living heritage behaviours or practices or any members of any cultural group of practitioners of living heritage that might warrant the belated demand being made other than the generalised demand that “the practices, skills and community relationships that may constitute living heritage on the site” had to be investigated, and that such living heritage could only be identified via a separate “Living Heritage Assessment”. Given the contents of the *Final HIA* which dealt at length with heritage and living/intangible heritage and the criteria by which such claims should be assessed (pages 80-91), and the disagreement with the Applicant and its expert representatives (some of whom have even chaired HWC committees), it was incumbent on HWC to guide or even direct the Applicant to the specifics of its

concerns and spell out its requirements.⁸ This is necessary, especially in the cases like this one, where the decision-makers discuss and explore matters at length *in camera*, effectively in secret. Indeed, we note, if in passing, that this (routine) practice is contrary to the requirements of s.10(2) of the NHRA.

6.5 *The Appeal contra the HWC IA Comm's Decision:*

Following this, the attorneys, Richard Summers Inc, submitted a 29-page appeal *contra* the IA Comm decision on 28 April 2026 which, necessarily, included twenty-two annexures, these being a major (though not complete) part of the record but including the revised *Final HIA* (which now included the additional work carried out to satisfy the IA Comm's further requirements of 8 April 2025), a separate report listing and explaining those additions, and the additional studies.

I hesitate to repeat too much of the appeal but I must list the grounds and outline brief summaries of them:

- First ground: Compliance with s.38(3) of the NHRA:
The appeal includes a reminder of the process to date, its iterations, the responses to HWC's requests for information, and the comprehensive documentation submitted.

- Second ground: The failure to properly examine the assessment of living/intangible heritage and its association with the site and its heritage resources in the HIA and accompanying studies:
Given that the IA Comm's decision turned on this question, the second ground is argued most comprehensively in the appeal. In this second ground of appeal, namely, that the IA Comm did not interrogate contentions (including their own) of intangible/living heritage and how such contentions, if rational and sustainable, did or could "translate tangibly" to the site in question, the appeal lists the studies submitted to the IA Comm and argues that "based on the extensive assessment undertaken to-date, the existing tenants and their businesses and activities do not and cannot fulfil the international, national

⁸ See the NHRA, s.5(3).

and local criteria for the definition of intangible/living heritage”;⁹ and it points out that:

Barbour & van der Merwe undertook a baseline study of existing information, including leases, a report prepared by Professor Mark Swilling in 2020, and interviews with tenants (“Baseline Study”). A lease audit conducted in 2020 indicated that, at the time, there were approximately 40 separate tenants with leases on the site, with a number of lessees having leases to multiple units and some even multiple premises. These include the Robin Trust, River Lodge, the Waldorf school, Pinelands Montessori as well as Oude Molen Stables. Approximately 39% of the total building lease area was vacant, with informal leases on undeveloped land yet to be verified. There was no reference at this stage to the tenant’s views of themselves as intangible / living heritage during this process. The Baseline Study notes that “*Despite the diversity, core tenants generally share the same broad ethos of environmental sustainability, heritage conservation, public accessibility of the site, socio-economic inclusivity, custodianship, and creative land uses.*”¹⁰ (underlining added here for emphasis)

I should emphasise here that the Applicant does not resist all claims of living heritage in this instance, just those made by or on behalf of some tenants and users of the site. Indeed, there is no question in respect of claims of living heritage made by the First Nations groups or by the Zulu nation (although the interests of the Zulu nation are not in respect of living heritage but are associations with an historical event, the holding of the deposed King Cetshwayo for three years here from 1879 to 1882). Indeed, the HIA and the appeal both conclude recommending conditions that will ensure the continued heritage-related monitoring (by HWC and/or SAHRA) into the future as later steps (which includes further consultation steps in respect of heritage-related uses) in the approval and implementation sequences are completed.

- Third ground: That, contrary to the IA Comm’s assertions, the *Final HIA* clearly demonstrates that it has considered the full scope of “heritage resources” as defined in section 3 [of the NHRA]”:

This ground, which in a sense encompasses the second, was necessary to argue because of the structure of the IA Comm’s contentions and it too was argued comprehensively in Summers’ appeal referring to the very numerous parts of the *Final HIA* and the accompanying documentation deal with heritage and heritage resources.

⁹ Summers, para.20, p7/29.
¹⁰ Ibid. para.25, p8/29.

- Fourth ground: That the *Final HIA*'s assessment is consistent with SAHRA's guidance and other international, national and local policy and, in this regard, the appeal points out that:

"SAHRA's comment on the Application dated 28 January 2026 is telling in terms of their attitude towards the Heritage Impact Assessment dated February 2026: Following SAHRA's comment of 30 October 2024, the revised Heritage Impact Assessment presents a more balanced and inclusive proposal, with reduced massing, improved recognition of primary heritage resources and their surroundings, preserved visual connections, softened edges and a measure to retain living heritage and cultural practices. SAHRA further recommends the development of appropriate conservation and disaster risk planning documentation, together with interpretation signage to communicate the site's significance and strengthen linkages to the wider context, ensuring the safeguarding and meaningful appreciation of the identified resources."¹¹

Notwithstanding the comprehensive summary of the *Final HIA* and its contents, its assessments, its findings, its recommendations, and its demonstration that the Final HIA and its accompanying studies contained in Summers' appeal, the Appeals Committee dismissed the appeal after discussing the matter at length *in camera*, effectively in secret, which is contrary to the requirements of s.10(2) of the NHRA and, in the case of complicated and controversial subjects (as in this case), contrary to good administrative practice.

6.6 *Analysis of the HWC Appeals Committee's Decision:*

In due course, the written *Decision* of 26 June 2026 and separate undated *Reasons for Decision* were emailed to the attorneys on the same day. The *Decision* says simply that "The Appeal is dismissed and the decision of IACom upheld". The *Reasons for Decision* is brief (barely 800 words on three pages) but require some analysis:

The *Reasons* contend that there were five "central issues" "for determination" and then purports to deal with them. These "issues" (discussed here in the order argued in the *Reasons*) are each discussed very briefly and are, in the form given, determinations reliant on assertions rather than an account of reasons. Be that as it may, the Appeals Committee's "determinations of the central issues" are as follows:

- *Whether the HIA meets the requirements of section 38(3):*

¹¹ Ibid. para.56, p21/29.

“The Committee finds that the HIA does not comply with section 38(3) of the NHRA.

“The deficiencies are material and relate primarily to the identification and assessment of heritage resources, particularly living and intangible heritage. As a result, subsequent components of the assessment, including impact analysis, consideration of alternatives, and proposed mitigation, are incomplete and cannot be properly evaluated.”

It appears from this that the HIA is deemed inadequate because it does not identify and assess heritage resources which are or may be heritage resources because of their associations with “living and intangible heritage”. What these heritage resources are or may be, what the living heritage practices are or may be, or what the necessary associations of the practices with the heritage resources are or could be is not alluded to here. And, as a reason, this is, at best, so inadequate as to be meaningless. It is a conclusion or assertion, not a reason.

- *Whether living heritage and intangible heritage have been adequately identified and assessed:*

“The Committee finds that the investigation and assessment of living heritage on the site are inadequate.

“Evidence before the Committee indicates that the site accommodates longstanding and interrelated communities of practice, including activities associated with education, small-scale agriculture, craft production, ecological practices and social programmes. These activities demonstrate elements of continuity, place-based association, and community recognition.

“The conclusion in the HIA that living heritage is limited or absent is not supported by the available information and reflects an insufficient methodological approach. The Committee further notes that a dedicated Living Heritage Assessment was expressly required but was not undertaken.”

It is clear from this that HWC is concerned with the assessment of living heritage only and that the committee is of the opinion that there are “longstanding and interrelated communities of practice, including activities associated with education, small-scale agriculture, craft production, ecological practices and social programmes”. Given that the activities referred to here are those of the recent tenants of the precinct, none of which have occupied the site for as long as thirty years, the effective assertion is that these activities comprise the living heritage previously implied by HWC. However, notwithstanding the description and analysis of these activities in the *Final HIA* and its accompanying studies (for example the several kinds of social

impact assessments) and notwithstanding the definition of living heritage in the NHRA, the Appeals Committee's conclusion here is that these activities are so important that they should be studied in a separate stand-alone "Living Heritage Assessment". In other words, this putative living heritage is not yet obvious to HWC and requires time and money to study and assess but it is obvious enough to them to disagree with a raft of experts and to refuse to even examine a development proposal that satisfies singularly important national socio-economic objectives. This must come as a shock to any sensible observer of the socio-political climate in this country.

"The Committee attaches significant weight to the fact that the applicant was previously directed to undertake further investigation into living heritage and did not comply with these requirements.

"Instead, the applicant elected to proceed to decision.

"The Committee finds that the absence of the required specialist assessment cannot be cured at appeal stage and that the failure to comply with prior lawful directives renders the HIA incomplete."

Here the Reasons include an additional argument: which seems to be that because the Applicant contested the contentions of the IA Comm after having attempted to satisfy the "further requirements" in the *Final HIA* and its accompanying studies rather than 'obeying' an unreasonable demand, the Appeals Committee takes a punitive view.

- *Whether the site has been appropriately assessed as a cultural landscape:*

"The Committee finds that the site constitutes a cohesive, complex and layered cultural landscape in which built, natural and social components are interdependent.

"The HIA does not adequately assess this cultural landscape or the relationships between its constituent elements. The analysis is fragmented and does not sufficiently address the spatial, ecological and social characteristics that contribute to the site's heritage significance and sense of place."

Here the Appeals Committee is clear: it thinks that this environment, given the detailed knowledge of the place provided by the Final HIA and the numerous accompanying studies, is a significant heritage resource with "spatial, ecological and social characteristics" **and** or **because** it is associated with significant living heritage comprising "education, small-scale agriculture, craft production, ecological practices and social programmes".

In other words, the Appeals Committee regards the Oude Molen Precinct to be a significant heritage resource and significant enough to be protected as an invaluable component of the National Estate on the grounds that, they contend, there are living heritage practices associated with and tied to this place.

- *Whether the assessment of impacts, alternatives and mitigation is adequate:*

“Given the deficiencies in identifying and assessing heritage resources, the Committee finds that:

- The assessment of impacts is incomplete;*
- The consideration of alternatives is not adequately informed; and*
- Mitigation measures cannot be properly evaluated.*

“Accordingly, the Committee is not in a position to weigh heritage impacts against the potential benefits of the proposed development.”

Here the committee contends, despite its own conclusions about the significance of living heritage and the consequential significance of the place, that it is unable to make its own assessments of the development proposal and any impacts, alternatives and mitigations. Given the volume of material available, this is an unusually supine position to adopt or it is a cynically devised ploy.

- *Whether the IACom decision was reasonable and justified:*

“The Committee acknowledges that the proposed development may yield socio-economic benefits, including the provision of affordable housing. The relative scale of proposed affordable housing warrants concern.

“However, section 38(3) requires that such benefits be assessed in the context of a complete understanding of heritage significance and impacts. In the absence of a compliant HIA, this balancing exercise cannot be undertaken.”

Here the committee goes through the motions of acknowledging the socio-economic benefits of the proposed development without a proper weighting or weighing of benefits and disbenefits. Indeed, given the committee’s refusal to properly articulate its conclusions or even name the living heritage practices or articulate their relative significances or say how these practices are tied to this place making it a significant heritage resource warranting protection, this appears cynical rather than rational or reasonable.

Given this analysis of the Appeals Committee *Reasons for Decision*, it is clear that,

rather than provide its own independent analysis of the Applicant's *Final HIA* and accompanying studies and the attorney's appeal and of the IA Comm's decision, the Appeals Committee has chosen to avoid its responsibilities and has simply reiterated the vague and unsustainable contentions of the IA Comm. Central to this matter is the failure of both IA Comm. and Appeals Committee to describe or name the living heritage behaviours/practices of any cultural group of practitioners of such purported living heritage.

7 Account of IAP's claims in respect of living heritage:

Given that the Appeals Committee's *Reasons for Decision* includes the contention that "extensive submissions were made highlighting the presence of living heritage and the social, cultural and spatial significance of the site" and that "(t)hese submissions reinforce the need for a comprehensive and methodologically sound assessment of living heritage and cultural landscape values within the immediate and larger TRUP context", it is necessary to discuss the submissions made by the IAPs in a little more detail.

I note, first, that there have been eight periods or opportunities in which the interested parties did or could have voiced or articulated their claims in respect of living heritage:

- any time during the exploration of opinions and possible alternatives for the development of the precinct before 2021 when the current application process under the NHRA commenced;
- in May 2021 when five separate workshops were held with parties recognised to have an interest in the site as heritage;
- in July 2022 when the socio-economic study was carried out by Barbour/van der Merwe and nineteen tenants were interviewed;
- in September-October 2024 when the *Draft HIA for Public Comment* was circulated to nearly 300 parties;
- in May 2025 when the HIA was circulated to all parties and parties made submissions to the IA Comm at its meeting on 14 May 2025;
- in November-December 2025 when the amended (for the 'further requirements') was circulated to all parties;

- in March 2026 when the now Final HIA was circulated to all parties and parties made submissions to the IA Comm at its meeting on 18 March 2026; and
- in June 2026 when the Attorney's Appeal was circulated to all parties and parties made submissions to the Appeals Committee at its meeting on 10 June 2026.

I note also that, the First Nations groups and the Zulu nation apart, no party was argued or claimed to be practitioners of living heritage associated with this piece of land until November-December 2025. And then, it was not, as it must, be contended that they are, as a cultural group, practitioners of a living heritage practice.

I must also make clear that this critique, in as much as I refer to a wide range of peoples' claims about the tenancies, about the land-uses, about the character of the precinct and, in effect, about the opinions and, therefore, the values held by these people, I do not denigrate or devalue these people or their views. I may disagree with much of what they argue and/or I may share their views in some matters or aspects of their contentions but, more importantly, I certainly disagree about the place of their contentions in this application process, an application under the National Heritage Resources Act which must be assessed under the criteria of that law. I do also, in contesting views that I may be sympathetic to, take account of the relative socio-political and socio-economic benefits and/or disbenefits for heritage and of the development proposed and how they must be weighed one against another.

7.1 *The Zulu Nation:*

I do not discuss the contentions of the Zulu monarch because those claims are not contested. In this instance, in this particular development application process, the claims are historically based and recognised without question. These claims are described and responded to in the *Final HIA* and are accommodated in the recommendations of the *Final HIA*.

7.2 *First Nations Groups:*

I do not discuss the contentions of the First Nations groups and individuals who have

made claims about the site having associations linked to cultural practices and belief systems simply because those claims are not contested. In this instance, in this particular development application process, they have made clear claims from the outset in the workshops of May 2021, and these claims are described and responded to in the *Final HIA* and are accommodated, in as much as they can be, in the recommendations of the *Final HIA*.

7.3 *Green and Civic Groups:*

The workshops of May 2021 included workshops with both environmental groups and separately with civic associations. In the environmental workshop, as would be expected, concerns about wetlands, floodlines, site boundaries and horses were concerns while in the civic group workshop a much wider range of concerns were raised including tenancies and displacements, approval processes, the density of the development proposed, the income level of the housing, and ideas of co-design. Neither of these groups referred to living heritage at that time.

7.4 *Current occupants/tenants and Other Commentators:*

The workshops of May 2021 included one with the tenants (22 attended) at which First Nations' heritage, buildings with 'heritage value', ownership and custodianship (including contention that the land had been donated for public use), approval processes, density and the built form of the development proposed were discussed. Living heritage was not raised.

Given that many submissions are from people who do not identify their association with the Precinct, it seems best to discuss these comments together and, where possible (and necessary) to identify the speaker's association.

That said, a number of comments submitted in November-December 2025 (88 submissions were received) refer to the tenant land-uses and activities as living or intangible heritage and contending that intangible heritage cannot be "relocated"¹² and that these land-uses satisfy the UNESCO criteria for intangible heritage, that is, they claim, "ongoing practice, intergenerational transmission, community recognition

¹² For example, Zaahira Mahomed, email, 8/12/2025.

and deep connection to place”¹³ which must be “safeguarded without freezing”.¹⁴ Indeed, the OMEVTA submission of 15/12/2025 goes the most distance in attempting to describe the living heritage now claimed:

i. First Nations knowledge-keepers and ceremonial practitioners

Who conduct land- and river-based rituals, teach intergenerational IKS and steward indigenous plant corridors.

ii. Horse trainers, riders and equestrian culture-bearers

Who maintain paddocks, stables, trails and mentorship programmes that transmit horsemanship skills to young people from Maitland Garden Village, Pinelands, Langa, Kensington and beyond.

iii. Eco-therapists and animal-assisted healing practitioners

Whose work integrates land, horses, community, nature and trauma healing in ways recognised in intangible heritage domains involving “knowledge concerning nature and the universe.”

iv. Agro-ecological farmers and seed-keepers

Who cultivate organic crops, maintain soil regeneration systems and teach sustainable farming methods to youth and volunteers.

v. Social development educators, artisans and cultural workers

Who operate within communal and semi-public spaces, offering workshops that pass on knowledge, craft, identity and collective memory.”¹⁵

And their 47-page submission argues for each of these land-uses and their practitioners/ tenants to be regarded as a “community of practice” with a “cultural and social identity”.¹⁶ These contentions (echoed by many of the commentators) are argued at length and in many respects repetitively, but do not describe practices that can rationally be recognised as intangible or living heritage and which satisfy the definitions described in the section on Defining Living and/or Intangible Heritage and, more particularly, the section on The National Heritage Resources Act and Living Heritage on pages 3 – 6 above.

Given this discussion, it seems that much is being ‘invented’ here, ‘invented’ in the sense that Hobsbawm uses the term in his well-known 1983 essay, ‘Inventing Traditions’.¹⁷ Writing in a period when ‘cultural tradition’ or simply ‘tradition’ referred to what we now call living or, since 2003, intangible heritage, Hobsbawm describes tradition as “a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms

¹³ OMEVTA, email, 15/12/2025, p2/47. In addition to the 47-page submission, a second, Part Two submission of annexures (of some 300 pages), was also submitted on 15/12/2026.

¹⁴ Ibid. p8/47 and 11/47.

¹⁵ Ibid. p15/27.

¹⁶ Ibid. p27/47.

¹⁷ Hobsbawm, 1983, ‘Introduction: Inventing Traditions’, pp1-14, in Hobsbawm, Eric and Terence Ranger, Editors, 1983 *The Invention of Tradition*.

of behaviour by repetition, which automatically implies continuity with the past”¹⁸ and which he differentiates from custom (what is established in practice) and convention or routine (which has no ritual or symbolic function but is a social practice established for convenience and efficiency).

These distinctions are well made and should assist in discerning the difference between the practical everyday routines and interactions of the tenants and culturally significant practices with some kind of symbolic meaning to a cultural community, which could more meaningfully be accepted as living heritage.

Given these conclusions, it should be clear that the IA Comm’s and the Appeals Committee’s insistence that a stand-alone Living Heritage Assessment was necessary and should be demanded was irrational.

8 Conclusions

Given this analysis, we conclude that HWC has failed in its responsibilities in numerous respects during its administration of this application and most especially in its decision-making as follows:

First, HWC has been remarkably casual in its specifying of the information to be provided. Indeed, no mention was made of living heritage or the necessity of a stand-alone Living Heritage Assessment during the 2022 NID or 2024 Phase I HIA stages and even after the submission of the 2025 HIA, the demand that more research and assessment be carried out was coy in the articulation of precisely what the IA Comm thought was necessary. Further, it is only in the June 2026 Appeals Committee decision that HWC finally (as an afterthought) says unequivocally that, in HWC’s view, the site is occupied by a group of (unnamed) tenants who, individually or between themselves, establish some (not described and unnamed) living heritage practices which are significant enough to require specialist expert study.

Second, given the very numerous studies provided by experts in their fields, all demonstrating that the claims of the tenant IAPs regarding their tenure are not

¹⁸ Ibid. p1.

claims that can be taken account of in an application made in terms of the NHRA, the (belated) identification (in the most general terms) of living heritage and of culture in this instance by HWC reveals a view of living heritage that is unambiguously perverse. Indeed, this view, which recognises behaviours of considerably less than a single generation of unrelated parties as “inter-generational” living heritage, is, at best, irrational or simply nonsensical.

Third, the failure to recognise the submissions and views of the national heritage resources agency, SAHRA, demonstrates the irrationality of the view of the HWC committees.

Fourth, the pretence of the decision that the Final HIA with its numerous accompanying studies does not comply with s.38(3) of the NHRA is a fig-leaf to cover a failure to make a proper decision under s.38(4) and is an abrogation of mandated legislative responsibility and to cover the failure to (i) weight (a) the putative heritage-related significances of the heritage resources and any feared damage and (b) the socio-economic and socio-political significances of the development proposal and, then, (ii) to weigh benefits and disbenefits to the national estate and to the national projects of transforming our cities and providing social housing.

Fifth, the refusal of the HWC committees to assess the impacts of the development proposal on the significances of the putative living heritage belatedly identified (by them) is an impermissible abrogation of its mandated legislative responsibility. Indeed, there has been no weighing of rights as required by sections 36(1) and 39(2) of the Constitution which, together, require that every decision-maker take account of the limits and cautions listed in section 36 when imposing limitations, for example:

- the nature of competing rights, in this instance the significant rights of equitable access (to housing, to services, to infrastructure, to work opportunity and to strategically located and under-used land) and the Provincial Government’s responsibility in affording such access weighed against the rights of a small unnamed loosely-formed ‘community’ to an as yet undefined living heritage;

- the importance of the limitation, that is, the importance of this refusal of a development framework enabling social housing and of transforming the apartheid structure of the city;
- the nature and extent of the limitation, in this case, a denial of the right to housing for 460 poor families and of the responsibility of the owner, the Provincial Government, to implement its policies aimed at transforming the apartheid structure of the city;
- the relation between the limitation and its purpose, in this case, between the refusal of the project and its purported intention of protecting an undefined heritage resource; and
- whether a less restrictive means could have achieved the purpose intended, in this case, if the cultural significance were assumed to be high (which we deny), whether such protection could have been achieved by, for example, moving the affected cultural community to an appropriate alternate site.¹⁹

Indeed, this is a decision with so many faults that it can fairly be described as arbitrary for lack of reason.

Finally, while I have not dealt with the recommendations made in the *Final HIA* in respect of the development proposal (in effect, a series of steps) as they have not been contradicted in any way by the HWC committees, we trust that the Tribunal will assess the proposal (the development framework) and will approve the process as spelled out in the Recommendations of the *Final HIA*.

Dr Stephen Townsend

¹⁹ This exercise is best understood through reference to the 2002 Con Court judgment, *FNB vs Commissioner for SARS*.

Stephen Stewart Townsend

Abbreviated CV

Stephen Stewart Townsend (1947, Cape Town) is an architect with forty-five years experience as an architect (until recently a corporate member of Cape Institute for Architecture and of the South African Institute of Architects and registered with the South African Council for the Architectural Profession; now retired); prior to graduating as an architect in 1978, he worked for ten years as an engineering and then architectural assistant; he is a statutory planner (an associate member of the South African Planning Institute); he is also a professional heritage practitioner (an accredited member of the Association of Professional Heritage Practitioners); and from 2009 until 2018 he was a part-time Adjunct Associate Professor at the University of Cape Town.

He has a B Arch from the University of Cape Town (1978), a diploma in conservation studies from the University of Rome (1985; equivalent to a Masters degree), and a Ph D from the University of Cape Town (2003; thesis title: *Development Rights and Conservation Constraints*).

His work as an architect in the late-1970s and 80s focused on conservation-oriented work: this included the infill of more than a hundred houses in the Muslim Quarter or Bokaap of Cape Town, the Bokaap community centre, and a range of other conservation and restoration projects.

Later, from 1985 to 2004, he worked for the City of Cape Town managing the built environment, first as head of the Urban Conservation Unit (ten years) during which time he was responsible for the creation of nearly thirty conservation areas; and then as head of land use management (for nine years). During these nineteen years he became experienced in the administration of the law relating to development, in particular, those regarding planning, heritage resources, the environment and building development generally. Also, during the last three years at the City Council he conducted more than thirty forensic investigations prompted by accusations of corruption and/or incompetence.

Between April 2006 and September 2007 he was Chief Executive Officer of Heritage Western Cape, the Western Cape provincial heritage resources authority; and in August 2010 he was appointed to the Heritage Western Cape Council and its Executive Committee for a three-year period ending in September 2013 during which time he chaired two of its permit committees (the Impact Assessment Committee and the Built Environment and Landscape Committee) and served (for six years) on another, the Inventories and Grading Committee. More recently, he has served on the panel of the Tribunal resolving final appeals submitted to the provincial MEC for cultural affairs under the National Heritage Resources Act.

He served on the Cape Institute for Architecture's management committee from 1987 to 2006; during which time, between 1988 and 1998, he chaired its Planning and Environment Committee and then its Heritage Committee; and he chaired its Heritage Committee again from 2004 to 2006; and he continues to serve on its Heritage Committee.

He has also been active in the formation from 2003 of the Association of Professional Heritage Practitioners, an embryonic professional association of heritage practitioners, and has served on its executive committee for two three-year periods, chairing its academic liaison and mentorship committee and serving on its legislation and administration committee and on its professionalization committee.

He was also a founder member and first treasurer of ICOMOS SA, the national branch of the International Council on Monuments and Sites which is an agency under the aegis of UNESCO, of which he remains a member, and in which capacity he has conducted reviews of nominations for listing as World Heritage Sites.

He has presented papers on conservation-oriented management and on land use management and development control at both local and international conferences; and has had books, chapters, papers and articles published in the press and in scholarly and legal journals since 1977.

He established his own architectural, planning and heritage consultancy in 2004 in which capacity he specialises in heritage resource-, land-use planning- and building plan-related advice and applications regarding development and its regulation and administration. This consultancy work includes assisting provincial task teams in drawing up both land-use planning and heritage resource-related provincial laws; and he is frequently consulted as an expert in the courts.

As an adjunct associate professor he taught at the University of Cape Town's School of Architecture, Planning and Geomatics, convening and teaching the Master in Philosophy in Conservation of the Built Environment degree (which he established in 2009) until the end of 2017 and again for a semester in 2023 (this includes supervising approximately thirty-five M Phil dissertations); and, also at the University of Cape Town, he still runs continuing professional development courses in architectural and urban conservation which have trained more than 500 participants in the past fifteen years.

January 2024
SS Townsend