



RICHARD SUMMERS INC.
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Ministry of Cultural Affairs & Sport
c/o Independent Appeals Tribunal
Attention: Adv. Michael Petersen
8th Floor, Protea Assurance Building
CAPE TOWN

Our ref: CND26-001
HWC CASE: 21022615SB0330E

Email: Michael.Petersen@westerncape.gov.za

27 July 2026

Dear Adv. Petersen

Appellant:

Western Cape Provincial Government:
Department of Infrastructure's
Directorate: Special Programmes

First Respondent:

Heritage Western Cape

APPEAL BY THE WESTERN CAPE PROVINCIAL GOVERNMENT: DEPARTMENT OF INFRASTRUCTURE'S DIRECTORATE: SPECIAL PROGRAMMES AGAINST HERITAGE WESTERN CAPE'S APPEALS COMMITTEE'S DECISION REGARDING AN APPLICATION IN TERMS OF SECTION 38 OF THE NATIONAL HERITAGE RESOURCES ACT 25 OF 1999 FOR THE PROPOSED REDEVELOPMENT ON ERF 26439, ALEXANDRA ROAD, OUDE MOLEN ECO VILLAGE, PINELANDS

HWC CASE NO: 21022615SB0330E

INTRODUCTION

1. This is an appeal by the Western Cape Provincial Government: Department of Infrastructure's Directorate: Special Programmes against the decision by Heritage Western Cape ("HWC") Appeals Committee ("**Appeals Committee**") to uphold the decision of the HWC Impact Assessment Committee ("**IACom**") to refuse the application in terms of section 38(4) of the National Heritage Resources Act 25 of 1999 ("**NHRA**") for the proposed redevelopment of Erf

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Reg No: 2017/536164/21



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26439-RE, Alexandra Road, Pinelands, Cape Town ("**Application**"). The Appeals Committee's decision was communicated by the first respondent to the appellant on 26 June 2026 ("**Appeal Decision**").

2. The appeal is directed to and lodged with the MEC for Cultural Affairs and Sport in terms of section 49 of the NHRA, read together with Regulation 12 of PN 336 in *Provincial Gazette* 5937 dated 25 October 2002.
3. The Application relates to the redevelopment of Erf 26439-RE in Pinelands, Cape Town to enable an integrated development that provides a residentially-led mixed use development with particular emphasis on providing affordable housing on the strategically located site with access to job opportunities, education and heritage resources within the Oude Molen Precinct and surrounds.

FACTUAL BACKGROUND

4. In 2021, the appellant lodged a Notice of Intention to Develop ("**NID**") with HWC in respect of the proposed redevelopment of the Oude Molen Precinct on the subject property.
5. On 4 May 2021, HWC responded to the NID by requiring a heritage impact assessment to be undertaken as HWC had "*reason to believe that the proposed redevelopment on Erf 26439-RE, Oude Molen Village, Cape Town will impact on heritage resources*". In its response to the NID, HWC required that the heritage impact assessment must specifically include an archaeological impact assessment, a visual impact assessment, a social impact assessment, a cultural landscape study and a built environment study only. The response made no express or implied reference to living heritage as being a specific consideration or aspect which is required to be addressed by way of a separate study.
6. On 17 March 2025, a Heritage Impact Assessment Report prepared by Cindy Postlethwayt dated March 2025 ("**2025 HIA**") was submitted to HWC in terms of section 38(4). The following conclusions in the 2025 HIA are apposite:
 - 6.1. The site has layered heritage significance with tangible heritage dating to an early Dutch East India Company (VOC) mill of 1718 and the remnants of the associated early historic werf of the early 18th century, both of which are rare to the racially segregated 20th century institutional history of Valkenberg.
 - 6.2. Living heritage is equally significant, with the major historical themes identified as follows:
 - 6.2.1. First Nations significance;



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- 6.2.2. The incarceration of Zulu King Cetshwayo on the site from early 1881 to 1883 and associated significance to the Zulu Nation; and
- 6.2.3. The segregated Valkenberg psychiatric facilities for people of colour who were treated unequally in the system of mental health provision.
- 6.3. The primary heritage associations with the Oude Molen Precinct are those of dispossession exclusion, imprisonment, marginalisation and loss.
- 6.4. The redevelopment of the Oude Molen Precinct presents a transformative opportunity to unlock the area's economic potential and thereby create substantial socio-economic benefits, while recognising and managing the site's cultural significance.
- 6.5. While the proposed redevelopment will result in an altered sense of place, including the reduction of the bucolic character of the site through increased building density, the loss of buildings of lesser cultural significance, introduction of new services infrastructure and a loss of informality through a more formally ordered urban layout, the overall benefits to on-site and associational heritage and the pressing demands imposed on the Western Cape Provincial Government and the City of Cape Town to provide for housing and socio-economic upliftment justify these changes.
- 6.6. Opportunities for memorialisation and links to the Tussen Die Riviere Resistance and Liberation Heritage Route require the engagement of all interested and affected parties ("I&APs") and should be led by the Western Cape Provincial Department of Arts and Culture in respect of the latter and the Western Cape Government as site custodian in respect of the former.
- 7. The conclusions reached in the 2025 HIA were based on and included the findings of numerous baseline studies, a series of workshops facilitated by the Professional Service Provider, Chand Consultants, with I&APs in May 2021 and interviews with 19 tenants and tenants' representatives. During these interviews and workshops, living heritage was not mentioned as a relevant consideration by any I&APs.
- 8. On 25 April 2025, IACom conducted a site visit. The site inspection report recorded that:
 - 8.1. *"City of Cape Town has graded the precinct 3A, with the historic core graded 2 ... The main structure (Grade 2) is in a severe state of disrepair and requires urgent conservation intervention;*
 - 8.2. *Both the graded and NCW structures within the precinct were viewed;*



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- 8.3. *The site is well-utilised and is an active and living space, pedestrian-friendly and safe ... Public access facilities were noted such as the swimming pool and picnic space;*
- 8.4. *Current site use is dominated by small eco-centric businesses including various trades, stables, horse riding, organic grocer, composting, social facilities including a school, creche and care facility resulting in a diverse range of people from various backgrounds and ages utilising a shared space;*
- 8.5. *Consistency of uses as 'semi-rural' through time create the envelope within which the significant heritage resources are situated ... The existing context within the precinct can be described as 'semi-rural' with various skills and trade activities alongside creative and educational facilities ... Area around the historic core retain a semi-rural character with open space for riding facilities and recreational area leading onto the open space of the river frontage;*
- 8.6. *Built form of low (2 storey), free standing structures with green setbacks from internal roads creating a pedestrian-friendly space – clear distinction between institutional and residential structures;*
- 8.7. *Extensive treed landscape dominated by established plants and trees ... Long, expansive views over the river 'valley' into Devils Peak and Rhodes Memorial precinct;*
- 8.8. *Apron onto the river frontage is dominated by stables and farming activities creating a gradient of less-developed into more-developed space; and*
- 8.9. *Sense of place – well utilised, integrated, community focused, functional and regenerative. Calm oasis within the City".*
9. The Application was tabled at the IACom meeting on 14 May 2025. Following the hearing, IACom issued the appellant with "Further Requirements" dated 3 June 2025, recording that IACom was of the opinion that the 2025 HIA did not meet the requirements of section 38(3) of the NHRA. The following reasons were provided by IACom in support of this conclusion:
 - 9.1. *"The intangible heritage/living heritage has not been sufficiently investigated including how that significance translates tangibly, with reference to section 3(3) of the NHRA;*
 - 9.2. *There is insufficient information regarding the significance of the site in relation to the broader Two Rivers Urban Park ("TRUP") heritage area (macroscale). Further work is required concerning spatial integration with TRUP land;*
 - 9.3. *There is insufficient information regarding the interrelated significances of various character*



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areas within the site itself and therefore insufficient information to inform precinct specific heritage indicators;

- 9.4. *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;*
- 9.5. *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; and*
- 9.6. *The revised HIA is to be advertised to all I&APs including all First Nation Groups identified in the River Club HIA process”.*
10. In satisfaction of IACom’s further requirements, the appellant commissioned seven additional studies which were included in a report entitled “Response to HWC Further Requirements of Heritage Impact Assessment” prepared by Cindy Postlethwayt dated February 2026 (“**Further Requirements Report**”) and the revised Heritage Impact Assessment Report prepared by Cindy Postlethwayt dated February 2026 (“**revised HIA**”). Key sections in the revised HIA dealt in depth with heritage objects and living heritage.¹
11. The 2025 HIA, the revised HIA, the Further Requirements Report and associated specialist assessments are collectively referred to as the “**HIA**”. On 18 March 2026, the appellant’s professional team presented the Further Requirements Report and revised HIA to HWC’s IACom. IACom determined that the HIA tabled could not be considered by HWC as the revised HIA did not, in IACom’s opinion, satisfy the Further Requirements dated 3 June 2025 or the prescribed requirements of section 38(3) of the NHRA. The reason cited by IACom for this refusal to consider the HIA was due to the fact that:
 - 11.1. *“The intangible heritage/living heritage has not been sufficiently investigated including how that significance translates tangibly, with reference to section 3(3) of the NHRA”.*
 - 11.2. *As a result, IACom required the appellant to compile a bespoke Living Heritage Study that complements the existing revised HIA and focuses on “the practices, skill and community relationships that may constitute living heritage on the site. The findings of this study must inform the spatial layout of the proposed development framework and the prescient (sic) plan”.*

¹ Further Requirements Report (pp 3-10, 51-57, 59-60); revised HIA (pp 92-95, 80-91; 185-188, 201-204); Appendix J to the revised HIA (pp 25-32); the Socio-historical Impact Assessment prepared by Ron Martin dated February 2025 (pp 25-44).



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12. The appellant's professional team expressed their disagreement with IACom's position on the basis that the additional information tabled before IACom was comprehensive and expressly addressed the issues raised by IACom during 2025 and that the revised HIA satisfied the assessment requirements of section 38(3) of the NHRA, including with regard to investigation into "intangible heritage/living heritage".
13. On 8 April 2026, IACom refused the Application citing that the "*development as proposed cannot be considered as the HIA does not meet the requirements of section 38(3) of the NHRA*" ("**IACom Decision**").
14. On 28 April 2026, the appellant lodged an appeal against the IACom Decision with the Appeals Committee in terms of section 49 of the NHRA, read together with Regulation 12² and which appeal was tabled at the HWC Appeals Committee meeting held on 10 June 2026.
15. On 26 June 2026, the appellant was notified of the decision by the Appeals Committee to dismiss the appeal and uphold the IACom Decision ("**Appeal Decision**"). The following reasons were cited by the Appeals Committee:
 - 15.1. "*The HIA does not meet the requirements of section 38(3) of the NHRA;*
 - 15.2. *Living heritage has not been adequately identified or assessed;*
 - 15.3. *The cultural landscape has not been properly interrogated;*
 - 15.4. *The impact assessment, alternatives and mitigations are consequently incomplete; and*
 - 15.5. *The IACom decision was reasonable and justified*".
16. Aggrieved by this decision and the manner in which the investigation into living heritage had been ignored by the Appeals Committee, the appellant instructed Richard Summers Inc. to prepare and lodge the present appeal.

GROUPS OF APPEAL

17. The grounds of appeal relied on by the appellant center around the following key submissions:
 - 17.1. The HIA satisfies the substantive requirements for a heritage impact assessment in terms of section 38(3) of the NRHA.

² Provincial Notice 336, published in *Provincial Gazette Extraordinary* 5961 dated 25 October 2002.



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- 17.2. The HIA satisfies relevant policy requirements in relation to the NHRA.
- 17.3. The Appeals Committee's finding that the HIA failed to comply with all impact assessment requirements is based on an error of law and fact.
- 17.4. The HIA expressly considered and assessed the impact of the proposed development on the cultural landscape and the broader area.
- 17.5. An investigation into the historical development and associated values of the identified heritage resources.
- 17.6. An assessment of the social, cultural and community relationships through which the significance of heritage resources has been created, maintained and transmitted.
- 17.7. An assessment of the meaning and value attributed to heritage resources by relevant communities and stakeholders.
- 17.8. The HIA assesses the potential positive and adverse effects of the proposed development on heritage values, associations and relationships.
- 17.9. The HIA identifies appropriate measures to avoid, minimise or mitigate adverse impacts.
- 17.10. An investigation into the results of consultation with communities affected by the proposed development and other I&APs regarding the impact of the development on heritage resources.
- 17.11. The right of affected communities to be consulted and to participate in the management of heritage resources.
- 17.12. The Appeal Decision ignores the manner in which the proposed development promotes spatial justice and integration.
18. This appeal is accompanied by, and must be considered in conjunction with the written submission by Dr. Stephen Townsend, an expert in heritage resources management, attached hereto as "**Annexure A**" and which must be considered in its own right in conjunction with this appeal.
19. The written submission by Dr. Stephen Townsend considers whether the Appeal Decision is rational and whether it took into account all relevant considerations, with particular reference to the conclusion that the revised HIA is materially deficient in its identification and assessment of living heritage, and that these deficiencies render the subsequent components of the revised



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HIA incomplete and incapable of proper evaluation. Dr. Townsend concludes that the Appeal Decision is irrational and failed to take into account all necessary consideration the following reasons:

- 19.1. The expert studies submitted to the Appeals Committee demonstrate that the claims advanced by the tenant I&APs regarding tenure rights fall outside the scope of an application considered under the NHRA, and are therefore not matters capable of determination in these proceedings.
- 19.2. The belated identification of living heritage by HWC reflects an unreasonable and irrational interpretation of living heritage, which fails to properly consider the submissions and expert views of the South African Heritage Resources Agency ("**SAHRA**").
- 19.3. The Appeals Committee failed to apply its mind to the issues before it and, instead, merely repeated the vague and unsustainable conclusion reached by IACom, without undertaking an independent evaluation of the evidence.
- 19.4. Neither the IACom Decision nor the Appeal Decision identifies or describes the specific living heritage practices, traditions or behaviors that are alleged to be affected by the proposed redevelopment, thereby failing to establish the factual basis upon which the identified impacts are said to arise.
- 19.5. In reaching its decision, the Appeals Committee failed properly discharge its obligations under section 38(4) of the NHRA by neglecting to undertake the balancing exercise required by the NHRA. In particular, it failed to weigh:
 - 19.5.1. The alleged significance of the identified heritage resources and any potential adverse impacts against the socio-economic and broader public interest benefits of the proposed development; and
 - 19.5.2. the respective benefits and disbenefits to the national estate, as contemplated in section 3 of the NHRA, including the contribution of the proposed development to provincial objectives aimed at addressing historical spatial inequality in the Western Cape and providing much-needed social housing.
- 19.6. The refusal by both IACom and the Appeals Committee to assess the significance of the identified living heritage and to evaluate the impacts of the proposed development against competing constitutional rights renders their approach constitutionally deficient. In particular, they failed to undertake balancing exercise required by sections 36(1) and 39(2) of the Constitution of the Republic of South Africa, 1996 ("**Constitution**"), including consideration of the section 26 right of access to adequate housing and other relevant



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constitutional imperatives.

Ground of Appeal 1: The HIA satisfies the substantive requirements for a heritage impact assessment in terms of section 38(3) NHRA

20. Section 38(3) of the NHRA prescribes the substantive content of a heritage impact assessment. It requires:
 - 20.1. The identification and assessment of heritage resources;
 - 20.2. An evaluation of their significance;
 - 20.3. An assessment of the impacts of the proposed development;
 - 20.4. Consideration of alternatives;
 - 20.5. Consultation with I&APs; and
 - 20.6. The identification of measures to avoid, minimise or mitigate adverse impacts.
21. Read together with section 38(4), these requirements are intended to provide HWC - as the responsible heritage resources authority - with sufficient information to determine whether a proposed development may proceed and, where appropriate, on what conditions.
22. Properly construed, section 38 is concerned with substance rather than form. The statutory enquiry is whether the heritage assessment provides the information necessary to enable HWC to make the determination contemplated by section 38(4). It does not prescribe a particular methodology, nor does it require that individual aspects of the assessment be contained in separately prepared or titled reports. Accordingly, the absence of a separate living heritage study or document bearing the title "*Living Heritage Study*" cannot render an HIA non-compliant where the substantive investigation and heritage assessment has in fact been undertaken.
23. An objective evaluation of the assessment tabled before HWC demonstrates that the HIA satisfies the statutory requirements of sections 38(3) and 38(4). It identifies, evaluates and assesses the relevant heritage resources and provides HWC with a comprehensive evidential and management framework upon which to make the statutory determination in terms of section 38. This is demonstrated below.



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Identification and mapping of heritage resources³

- 23.1. The HIA identifies and maps the heritage resources within the site and its broader setting.
- 23.2. The HIA assesses not only the physical resources located on the property, but also the wider Two Rivers cultural landscape, including the Black River and Liesbeek River corridors, the riverine and wetland landscape, the historic frontier landscape, the Valkenberg / Observatory ridge line, Maitland Garden Village and the broader historical and spatial context.
- 23.3. The HIA therefore recognises that the significance of the site derives not only from individual heritage resources but also from their relationship with the broader cultural landscape, and the heritage assessment undertaken included the heritage resources on the site and its broader landscape context and setting.

Assessment of heritage significance⁴

- 23.4. The HIA evaluates significance of identified heritage resources on the site and broader context with express reference to the criteria contained in section 3(3) of the NHRA.
- 23.5. The investigation and assessment reported in the HIA extends beyond architectural or physical significance and considers historical, associational, social, cultural and living significance. It identifies, amongst other matters, the history of First Nations dispossession as one of the main groups linked to the site's history, the incarceration of Zulu King Cetshwayo, the significance of the site to the Zulu Nation and the history of segregated psychiatric institutions in South Africa, linking these historical narratives, where possible, to tangible locations on and surrounding the site with a view to ensuring their protection and management in the later articulation of specific development proposals.
- 23.6. This integrated approach undertaken by Cindy Postlethwayt in the HIA accords with the NHRA, which recognises that heritage significance frequently arises from the interaction between tangible and living heritage rather than from physical fabric alone.

Investigation of living heritage⁵

- 23.7. The HIA expressly incorporates a dedicated socio-historical and cultural study entitled "*The*

³ 2025 HIA (pp 12-112); revised HIA (pp 51 -80).

⁴ 2025 HIA (pp 80-112); revised HIA (pp 80-92).

⁵ 2025 HIA (pp 160-161); revised HIA (pp 56 and 57).



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*Socio-historical Impact Assessment*⁶ that specifically investigates the living heritage associated with the site and its surrounds.

- 23.8. Drawing upon the extensive research undertaken during the Two Rivers Local Spatial Development Framework (“**LSDF**”) process and the River Club application, the HIA examines the historical, cultural and associational significance of the site and considered how those values may be recognised, interpreted and integrated with the proposed development.
- 23.9. Importantly, the HIA recognises that living heritage cannot always be represented by identifiable physical features. The statutory enquiry is, therefore, whether those values have been identified, investigated and evaluated in the heritage investigation, and whether the impacts of the proposed development upon those values have been assessed in the HIA.
- 23.10. The HIA does precisely that. It investigates the site’s historical narratives, cultural associations and living heritage. The HIA also evaluates their significance and translates those findings into heritage indicators, spatial planning principles, design responses and management measures. The conclusion by the Appeals Committee that the HIA is deficient merely because these investigations appear within an integrated heritage assessment, rather than in a separately prepared or titled “*Living Heritage Study*”, elevates form above the substantive requirements of section 38.

*Assessment of development impacts*⁷

- 23.11. The HIA expressly assesses the impacts of the proposed development on the identified heritage resources on the site and the cultural landscape, including impacts arising from building massing, visual relationships, riverine interfaces, spatial permeability, heritage precincts and the relationship with surrounding communities, particularly Maitland Garden Village.
- 23.12. The heritage investigation and assessment identifies potential impacts, evaluates their significance and concludes that they are capable of mitigation through a basket of heritage-related controls and management measures including:
 - 23.12.1. Targeted design interventions;
 - 23.12.2. Landscape treatment;

⁶ Socio-historical Impact Assessment dated February 2025 prepared by Ron Martin (“**Socio-historical Impact Assessment**”).

⁷ 2025 HIA (pp 126-153); revised HIA (pp 150-175).



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- 23.12.3. Setbacks;
- 23.12.4. Heritage precinct planning; and
- 23.12.5. Visual management measures.

Evaluation relative to social and economic benefits⁸

- 23.13. Section 38(3)(d) requires heritage impacts to be considered in relation to the sustainable social and economic benefits of the proposed development. The HIA undertakes that evaluation and balancing exercise by considering the project's contribution to urban integration, spatial transformation, affordable housing and the remediation of apartheid spatial planning while recognising the importance of preserving the site's heritage significance. Crucially, the HIA considers the development's potential to contribute to restitution, restorative memory and the breaking down of spatial barriers that have historically marginalised communities.
- 23.14. The development's strategic potential in contributing to social housing falls squarely in line with the constitutional duties and statutory responsibilities imposed on the Western Cape Provincial Government as emphasised by the Constitutional Court in the *Tafelberg case*⁹ which held that the location of social housing is an integral consideration in the context of the right to adequate housing envisaged by section 26 of the Constitution. The location of social housing, according to the Constitutional Court, must be informed by whether or not the location perpetuates the spatial injustice inherent in apartheid-style spatial planning, and the judgement states that:
 - 23.14.1. *"the location of housing must be treated as a relevant factor in determining what constitutes adequate housing and equitable access to land, having regard to the constitutional imperative to redress the spatial injustice inherited from apartheid"*¹⁰; and
 - 23.14.2. *"reasonable measures to fulfil these obligations must include the provision of affordable housing falling within the area of the formerly defined restructuring zone"*¹¹.
- 23.15. The *Tafelberg case* is directly applicable in respect of the proposed development of the Oude Molen Precinct for the following reasons:

⁸ 2025 HIA (pp 150-153); revised HIA (pp 175-176).

⁹ *Adonisi and Others v Minister for Transport and Public Works, Western Cape and Others; Minister of Human Settlements and Another v Minister for Transport and Public Works, Western Cape and Others* 2026 ZACC 29 (2 July 2026) ("**Tafelberg case**").

¹⁰ Paragraph 3 of the Order in the *Tafelberg Case*.

¹¹ Paragraph 3 of the Order in the *Tafelberg Case*.



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- 23.15.1. At least 34% of the proposed development is aimed at providing social housing and First Home Finance and Subsidy Assistance on the site, located as it is in a strategic location within the broader metropolitan area.
- 23.15.2. The proposed development is therefore in furtherance of the Western Cape Provincial Government's imperative to optimally utilise the site to achieve broader spatial justice objectives and provide housing opportunities closer to areas of employment in the CBD.
- 23.15.3. The locational imperatives inherent in the right to adequate housing envisaged in section 26 of the Constitution and amplified by the Constitutional Court in the *Tafelberg case* are achieved as the Oude Molen Precinct forms part of the Consolidated List of Restructuring Zones¹² for the City of Cape Town published by the Department of Human Settlements in GN 3902 in *Government Gazette* 49325 dated 22 September 2023.
- 23.16. The appellant is a government institution and custodian of the Oude Molen Precinct and which holds this land on behalf of the broader public, not solely on behalf of the tenants or users of the site. As stated in the *Tafelberg case* "*there are a few settings in which South Africa's endeavour for constitutional transformation is more vital than spatial inequality and its relationship to the right to adequate housing*".¹³ The Oude Molen precinct is one of these settings.
- 23.17. This role as custodian requires the appellant to uphold its legislative and constitutional obligations to promote equitable access to the CBD for all its residents and which constitutionally necessitates the appellant to pursue a land use which is not only sensitive to the heritage significance of the site but is which also actively works towards dismantling, rather than preserving, spatial inequality.
- 23.18. Moreover, the written submission by Stephen Townsend supports this conclusion, on the basis that the Appeals Committee failed to "*assess the impacts of the development proposal on the significances of putative living heritage*", especially in light of the history of spatial inequality and the need to enable social housing and transform "*the apartheid structure of the city*".¹⁴ The Appeals Committee has not balanced the competing rights as required by section 36(1) and 39(2) of the Constitution, in terms of which the right of equitable access to housing and "*the Provincial Government's responsibility in affording such access*" carries more weight than the "*rights of a small unnamed loosely-formed 'community' to an as yet*

¹² Section 1 of the Social Housing Act 16 of 2008 defines a restructuring zone as "*a geographic area which has been (a) identified by the municipality, with the concurrence of the provincial government, for the purposes of social housing and (b) designated by the Minister in the Gazette for approved projects*".

¹³ Paragraph 98 of the Order in the *Tafelberg Case*.

¹⁴ Page 28-29 of Annexure A.



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undefined living heritage".¹⁵

- 23.19. Not only is the proposed development in line with the *Tafelberg case* and the doctrine of non-retrogression, it is similarly in line with the overarching precedent in respect of access to housing as evident in the Constitutional Court case of *Government of the Republic of South Africa and Others v Grootboom and Others*.¹⁶
- 23.20. As such, the present appeal is not limited to an assessment of heritage significance in isolation from broader constitutional imperatives and socio-economic benefits. Rather, it requires the decision-maker to undertake the statutory balancing exercise contemplated in section 38(4) of the NHRA, informed by the considerations identified in section 38(3)(d). This necessarily entails weighing the significance of the affected heritage resources against the broader constitutional imperatives, public interest considerations, and the socio-economic benefits of the proposed development, all of which constitute relevant considerations in determining the Application.

*Consultation with affected communities and interested parties*¹⁷

- 23.21. The HIA records extensive consultation with I&APs, including First Nations groupings in connection with the HIA from 2021 to date. The report records that the stakeholder identification and consultation process drew upon the extensive Two Rivers LSDF public participation process, the Tussen die Riviere Western Cape Department of Cultural Affairs and Sport process and the River Club section 38 heritage impact assessment process. Public participation was undertaken through notices, direct communication, site notices, public venues, consultation with the tenants committee, a visit by the National Heritage Council and an Open House process.¹⁸
- 23.22. By February 2025, the registered I&AP database comprised 313 participants, including at least 31 identified First Nation stakeholders. The HIA records the issues raised during consultation and demonstrates how those issues informed the assessment.¹⁹
- 23.23. Although differing views were expressed during the HIA regarding the meaning and significance of living heritage, section 38 requires consultation and consideration of those views, not consensus. The existence of differing opinions does not establish any failure to comply with the statutory consultation requirements.

¹⁵ Page 28 of Annexure A.

¹⁶ 2001 1 SA 46 (CC).

¹⁷ 2025 HIA (pp 127); revised HIA (pp 182-206).

¹⁸ Annexure J to the 2025 HIA; Annexure J to the revised HIA.

¹⁹ Annexure J to the 2025 HIA; Annexure J to the revised HIA.



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Consideration of alternatives²⁰

- 23.24. The HIA considers alternatives relevant to the identified heritage impacts, including alternative interface treatment, design responses, relationships with the Two Rivers Area and Maitland Garden Village and the integration of old and new fabric. It also responds to IACom's Further Requirements by refining the design analysis and explaining the heritage rationale for the preferred approach.
- 23.25. The HIA therefore addresses the alternatives requirement under section 38 in the context of the identified heritage impacts. It is important that the alternatives enquiry is understood in relation to the development proposal and the heritage impacts identified. The NHRA does not require the assessment of abstract or unlimited alternatives disconnected from the actual heritage impacts under consideration.

Mitigation and management of adverse effects²¹

- 23.26. The HIA proposes and identifies enforceable mitigation measures, including:
- 23.26.1. The establishment of heritage precincts;
 - 23.26.2. Conservation management planning;
 - 23.26.3. Site development plan approvals;
 - 23.26.4. Archaeological monitoring;
 - 23.26.5. Protection of significant views;
 - 23.26.6. Memorialisation initiatives;
 - 23.26.7. Provision for cultural practices and Indigenous Knowledge Systems;
 - 23.26.8. Ongoing reporting to HWC; and
 - 23.26.9. Future approvals under sections 34 and 35 of the NHRA.
- 23.27. The measures identified in the HIA provide a comprehensive management framework capable of being incorporated into conditions of approval, thereby fulfilling the purpose of

²⁰ Annexure H to the 2025 HIA; Annexure H to the revised HIA.

²¹ 2025 HIA (pp 153-156); revised HIA (pp 181-197).



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section 38(4), namely to ensure that heritage impacts are appropriately managed throughout the implementation of the development.

24. In summary:

24.1. The heritage investigation and assessment reported in the HIA is comprehensive and complies with the substantive requirements of sections 38(3) and 38(4) of the NHRA, as follows:

24.1.1. It identifies and maps heritage resources;

24.1.2. Evaluates their significance against the statutory criteria;

24.1.3. Assesses both tangible and living heritage;

24.1.4. Evaluates the impacts of the proposed development;

24.1.5. Considers alternatives;

24.1.6. Records extensive consultation; and

24.1.7. Provides detailed mitigation and management measures capable of implementation through conditions of approval.

24.2. The Socio-historical Impact Assessment forms an integral component of the HIA and provides the evidential foundation for the assessment of living heritage. It is not a separate exercise but an integral part of the heritage investigation and assessment required by section 38.

24.3. The NHRA does not require a separate study bearing the title "*Living Heritage Study*"; it requires that living heritage be properly identified, investigated, evaluated and assessed as part of the heritage impact assessment. That is precisely what the HIA does.

25. The HIA accordingly provided HWC with all of the information necessary to make the determination contemplated by section 38(4) of the NHRA, and HWC's finding of non-compliance based solely upon the absence of a separately titled "*Living Heritage Study*" constitutes a material error of law. Based on the analysis above, the HIA satisfies the substantive requirements of section 38(3) of the NHRA. In these circumstances, there is no rational or evidentiary basis upon which either IACoM or the Appeals Committee could have concluded that the requirements of section 38(3) were not satisfied.



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Ground of Appeal 2: The HIA complies with the relevant policy requirements governing the assessment of living heritage

26. The HIA's compliance with the policy framework governing the identification and assessment of living heritage is demonstrated by reference to two policy documents published on the South African Heritage Resources Information System ("**SAHRIS**"). These policy documents provide the applicable guidance for the assessment of living heritage and confirm that the HIA adopts an approach that is consistent with the relevant policy requirements.

Requirements for a Cultural Assessment in terms of the SAHRIS

27. The relevant SAHRIS guidance requires that a heritage impact assessment in terms of section 38 of the NHRA include an investigation into the cultural significance of heritage resources that may be affected by the proposed development. A cultural assessment, as per SAHRIS, includes an investigation that extends to both tangible and living heritage and requires an assessment of the meaning and value attributed to heritage resources by communities and stakeholders over time. It also requires an evaluation of the potential impacts of the proposed development and, where necessary, the identification of measures to avoid, minimise or mitigate adverse heritage impacts. A robust cultural assessment of this nature is therefore not ancillary to the evaluation of living heritage. It is a substantive methodology through which the historical, social, cultural and living dimensions of heritage significance can be identified, evaluated and addressed within the broader statutory heritage impact assessment process.
28. The SAHRIS policy guidance does not prescribe that a separate "*Living Heritage Study*" must be undertaken in a section 38 assessment. Rather, it describes the substantive enquiries that must be undertaken to identify, understand and evaluate living heritage within the broader heritage assessment process. Those enquiries substantially mirror the requirements of section 38 of the NHRA and are directed at ensuring that historical, social, cultural and living heritage values are properly investigated and evaluated during the heritage assessment.

The Requirements for a Socio-Historical and Cultural Study in terms of the SAHRIS

29. Similarly, SAHRIS recognises the value of a socio-historical and cultural study as an appropriate methodology for investigating the historical development of communities, social relationships, cultural practices, collective memory, identity, continuity and change. Indeed, those are the very dimensions through which living heritage is constituted and understood.
30. Properly understood, the relevant policy framework on SAHRIS is therefore concerned with the substance of the investigation rather than the title given to any particular report. Following on the SAHRIS policy requirements, a cultural assessment and socio-historical and cultural study are both recognised methodologies through which living heritage may be identified,



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investigated and evaluated. The relevant enquiry is whether the assessment undertaken in terms of the HIA in this case addresses the historical, social, cultural and living dimensions of heritage significance, not whether those investigations appear in a separately titled document.

31. It is our submission that the information tabled before HWC in the HIA satisfies each of the above policy requirements as described below.

Compliance by the HIA

32. The HIA fully complies with the above identified policy requirements.
33. The HIA includes a socio-historical and cultural study which examines the interplay between social, historical, and cultural factors within the community to understand how society evolved and how historical events, social structures, and cultural practices shape the present. It investigates historical contexts, social hierarchies and cultural practices, exploring their interrelationships and impact on identity and belonging. It also considers patterns of change and continuity, the influence of external factors and employs various research methods, such as archival research and ethnography, to gather and interpret data.
34. The HIA incorporates a comprehensive Socio-historical Impact Assessment as part of the overall heritage assessment. It investigates the historical development of the site, its cultural associations, oral histories, collective memory, identity, patterns of continuity and change, and the relationship between communities and place. It further examines the historical processes that have shaped those relationships and evaluates their contemporary significance.
35. The investigation undertaken with regard to living heritage was not undertaken as a discrete exercise divorced from the HIA. Rather, the findings of the Socio-historical Impact Assessment were incorporated throughout the HIA, informing the assessment of heritage significance, the cultural landscape analysis, the identification of heritage indicators, the assessment of impacts, the development of design responses and the proposed mitigation and management measures.
36. This integrated methodology employed during the HIA is entirely consistent with both the NHRA and the SAHRIS policy guidance. Indeed, living heritage is inherently interdisciplinary. It cannot sensibly be isolated from the broader assessment of heritage significance because its value lies precisely in the interaction between historical context, cultural practices, collective memory, identity, social relationships and place.
37. Accordingly, the HIA tabled before HWC does not merely acknowledge the existence of living heritage. It investigates, evaluates and assesses living heritage and integrates those findings into the statutory heritage assessment. The fact that this investigation is undertaken through a consolidated cultural and socio-historical methodology, rather than within a separate study



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bearing the title "*Living Heritage Study*", does not detract from the HIA's substantive compliance with the relevant policy requirements.

Failure by the Appeals Committee

38. Notwithstanding the comprehensive nature of the HIA, the Appeals Committee failed to engage meaningfully with the Socio-historical Impact Assessment. The Appeal Decision contains no substantive consideration of the report's methodology, findings or conclusions. Nor does it explain why the Socio-historical Impact Assessment was considered inadequate or why it failed to satisfy the policy requirements relating to the investigation into and assessment of living heritage. Instead, the Appeals Committee proceeded on the premise that the HIA was deficient because it did not contain a separate document entitled "*Living Heritage Study*". That reasoning conflates nomenclature with substance. Had the Appeals Committee properly considered the Socio-historical Impact Assessment Report, it would necessarily have engaged with its detailed investigation of the site's historical development, cultural associations, oral history, collective memory, identity, living heritage and the continuing relationship between people and place. Those are precisely the matters of substance that the Committee concluded (irrationally) had not been investigated.
39. The omission gives rise to the reasonable inference that the Appeals Committee either overlooked the report or failed to accord it proper consideration. In either event, the Appeals Committee failed to engage with material evidence directly relevant to the question whether the HIA adequately assessed living heritage.
40. The Socio-historical Impact Assessment was not an ancillary document but formed an integral component of the HIA and the evidential basis upon which the proposed development was evaluated or assessed. Administrative justice required the Appeals Committee either to engage with its conclusions (for why the HIA was supposedly deficient) or to explain why it considered the report insufficient. It did neither.
41. In summary:
 - 41.1. The HIA, read with the Socio-historical Impact Assessment, satisfies the relevant policy requirements governing the assessment of living heritage. It undertakes the historical, social, cultural and living investigations contemplated by SAHRIS, incorporates a comprehensive socio-historical and cultural study and integrates those findings throughout the HIA.
 - 41.2. The Appeals Committee erred in treating the absence of a separately titled "*Living Heritage Study*" as evidence of non-compliance with section 38. Neither the NHRA nor the relevant policy framework requires a document of that title. What is required is a substantive



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investigation into living heritage and an assessment of its significance and the impacts of the proposed development. The HIA performed precisely that function.

- 41.3. The Appeals Committee's conclusion accordingly elevates form over substance and is inconsistent with both the NHRA and the applicable SAHRIS policy framework.

Ground of Appeal 3: The Appeals Committee erred in finding that the revised HIA failed to comply with IACom's further requirements

42. The Appeals Committee's finding that the revised HIA failed to comply with IACom's further requirements is founded upon an error of law and fact. It proceeds on the premise that compliance required the preparation of a separate document entitled "*Living Heritage Study*", rather than determining whether the revised HIA substantively investigated and evaluated living heritage as required by section 38(3) of the NHRA and IACom's further requirements.
43. Properly interpreted, IACom's further requirements did not prescribe a particular format or nomenclature. They required that the heritage specialist undertake a more comprehensive investigation of living heritage and demonstrate how the significance of that heritage had been assessed, together with the implications of the proposed development. Those requirements are entirely consistent with the statutory enquiry contemplated by section 38(3) of the NHRA.
44. The revised HIA fully complied with each section 38(3) requirement. It incorporated a comprehensive cultural assessment together with a Socio-historical Impact Assessment, which investigated the historical, social, cultural and living dimensions of the site's heritage significance. Those investigations extended to the historical development of the site, collective memory, oral history, cultural associations, identity, the relationship between communities and place, and the interaction between tangible and living heritage.
45. Importantly, those investigations were not prepared as standalone reports detached from the HIA. Rather, their findings were integrated into the revised HIA and informed the following:
- 45.1. The assessment of heritage significance;
- 45.2. The cultural landscape analysis;
- 45.3. The identification of heritage indicators;
- 45.4. The assessment of impacts;
- 45.5. The design response;



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- 45.6. The proposed mitigation measures; and
- 45.7. The ongoing management framework.
46. This integrated methodology reflects the nature of living heritage itself. Living heritage cannot sensibly be divorced from the broader assessment of heritage significance because it derives meaning from the interaction between historical context, cultural practices, collective memory, identity, social relationships and place. The revised HIA therefore assessed living heritage holistically rather than artificially isolating it within a separately titled report.
47. The revised HIA further assessed the effects of the proposed development on identified heritage values. It evaluated the extent to which the proposed redevelopment could affect historical associations, cultural identity, collective memory, community relationships and the contextual significance of the site. Based on that, the HIA proposed detailed design responses, conservation measures, interpretation initiatives, memorialisation opportunities and ongoing management mechanisms to avoid, minimise or mitigate adverse heritage impacts.
48. The Appeals Committee therefore erred by conflating wording with compliance. The relevant enquiry was whether the revised HIA investigated and evaluated living heritage. On any objective reading, it plainly did so. The finding of non-compliance with section 38(3) by the Appeals Committee is accordingly unsupported by the contents of the revised HIA and is both factually incorrect and legally indefensible.
49. Properly considered, the revised HIA fully satisfied IACom's further requirements and, in doing so, also complied with the substantive requirements of section 38(3) of the NHRA. The Appeals Committee's contrary conclusion is based not upon any identifiable deficiency in the investigations undertaken, but upon the absence of a separately titled "*Living Heritage Study*". That conclusion is inconsistent with the NHRA, inconsistent with the relevant policy framework and inconsistent with the evidence contained in the revised HIA.

Ground of Appeal 4: The HIA expressly considered and assessed the cultural landscape and the broader affected area

50. The Appeals Committee's finding that the revised HIA failed adequately to assess the cultural landscape and the relationships between its constituent elements is unsupported by the contents of the HIA. Properly considered, the revised HIA contains a comprehensive cultural landscape assessment that evaluates both the site itself and its broader heritage context.
51. The revised HIA recognises that the site forms part of an evolving cultural landscape rather than an isolated parcel of land. It expressly acknowledges that cultural landscapes are dynamic and that change is an inherent characteristic of such landscapes. The assessment, therefore,



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considers how the proposed future development of the site may occur in a manner that protects, enhances and interprets significant heritage values while accommodating appropriate contemporary development.

52. Consistent with that approach, the revised HIA assesses the relationship between the site and the broader affected area, including:
 - 52.1. the evolving urban cultural landscape;
 - 52.2. surrounding heritage resources and Heritage Protection Overlay Zones;
 - 52.3. important visual resources and significant view corridors;
 - 52.4. the Black River, Liesbeek River and associated riverine and wetland landscape;
 - 52.5. the Peninsula Mountain backdrop and broader landscape setting; and
 - 52.6. the landmark landscape features and spatial relationships that contribute to the interpretation and significance of place.
53. The assessment further evaluates the existing landscape character of the site, including the transformed nature of the landscape, the historic landscape structure, vegetation patterns, mature tree planting, the relationship between built form and open space, and opportunities for landscape rehabilitation to reinforce heritage character, spatial legibility, and interpretation.
54. Importantly, the revised HIA does not confine its assessment to physical landscape characteristics. It also evaluates the historical, cultural and associational dimensions of the cultural landscape. The assessment considers competing historical narratives associated with the site and, applying professional heritage expertise, concludes that the dominant themes of heritage significance relate to First Nations dispossession, the incarceration of Zulu King Cetshwayo, and the history of segregated psychiatric care at the Valkenberg facility on the site. That conclusion represents an evaluative professional judgment regarding relative heritage significance; it cannot properly be characterised as a failure to assess the cultural landscape.
55. The NHRA requires that heritage resources be identified, investigated and evaluated. It does not require every identified heritage theme to be afforded equal weight, nor does it prescribe the conclusions that heritage specialists must reach. The Appeals Committee was entitled to disagree with the specialist conclusions in the revised HIA, but it was not entitled to characterise a considered professional evaluation as an omission from the assessment requirements under section 38.



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56. The revised HIA assesses the broader affected area rather than limiting its enquiry to the development footprint. It considers the relationship between the site and the broader TRUP, the river corridors, surrounding heritage resources and neighbouring communities, including Maitland Garden Village. The assessment recognises that the significance of the site is partly derived from those wider spatial, historical and cultural relationships.
57. Maitland Garden Village provides a clear example of this integrated approach. The revised HIA evaluates not only the physical characteristics of the Garden City layout and historic townscape, but also its social history, community continuity and broader cultural significance. In doing so, it considers both the tangible and living heritage values that contribute to the significance of the neighbouring heritage resource.
58. More broadly, the revised HIA consistently integrates tangible and living heritage throughout its assessment. It identifies buildings, structures, landscape elements, character areas and significant spatial relationships while also investigating the historical, social, cultural and living heritage associated with those places. Where appropriate, those historical and cultural associations are related to identifiable places within the site and the surrounding cultural landscape. This integrated methodology employed in the HIA reflects the nature of heritage significance recognised by the NHRA, as it recognises that heritage significance is derived not merely from physical fabric, but from the interaction between places, landscapes, historical events, collective memory, cultural practices and the continuing relationship between communities and place. The fact that certain living associations cannot be mapped with the same precision as physical structures does not demonstrate any deficiency in the assessment under section 38. Rather, it reflects the inherent character of living heritage.
59. Properly understood, the revised HIA does precisely what a comprehensive heritage assessment is required to do in terms of section 38 of the NHRA. It identifies the heritage resources within the affected area, evaluates both tangible and living heritage values, assesses the broader cultural landscape and analyses the relationships through which those heritage values derive their significance.
60. Accordingly, the Appeals Committee's criticism is legally indefensible. The revised HIA contains a comprehensive assessment of the cultural landscape and the broader affected area, identifies and evaluates both tangible and living heritage resources, and considers the relationships between them in an integrated manner. At best, the Appeals Committee's finding therefore reflects a disagreement with the professional conclusions reached by the heritage specialists rather than any omission in the scope or methodology of the revised HIA.

Ground of Appeal 5: The revised HIA comprehensively Investigated the historical development and



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associations of the heritage resources

61. The Appeals Committee's finding that the revised HIA failed to adequately investigate the historical development and associations of the heritage resource is not supported by the contents of the HIA. Properly considered, the revised HIA undertakes a comprehensive historical investigation that examines the successive historical processes through which the site and its broader cultural landscape developed, changed in use and acquired heritage significance.
62. The historical investigation is not limited to describing existing buildings or recording historical events. Rather, it places the site within its broader historical and spatial context and explains how successive patterns of occupation, land use, development and social change have contributed to its present heritage significance. This layered methodology reflects the reality that heritage significance is often the product of accumulated historical associations rather than a single event or period.

Historical development of the broader cultural landscape

- 62.1. The revised HIA investigates the historical evolution of the site within the broader Two Rivers cultural landscape. It examines the role of the Black and Liesbeek River corridors in shaping patterns of settlement, movement, agriculture, institutional development and land use, and explains how these landscape features influenced the spatial structure and historical development of the area.
- 62.2. The assessment therefore considers not only the Oude Molen Precinct itself but also its relationship with the surrounding riverine landscape, ridgelines, crossings, settlements and institutions. In doing so, it demonstrates how the site acquired its significance within a broader interconnected cultural landscape.

Historical layering of the site

- 62.3. The revised HIA identifies and evaluates the successive historical layers associated with the site, including its relationship with the First Frontier between Dutch colonists and the Peninsula Khoikhoi, the early colonial landscape, the establishment of the Oude Molen mill, subsequent institutional development and the history of confinement, exclusion and marginalisation associated with the area.
- 62.4. Rather than treating these as isolated historical episodes, the HIA explains how each period of occupation and use contributed to the site's evolving character and heritage significance. The assessment therefore establishes the historical development of the site in the sense contemplated by section 38(3) of the NHRA.



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Historical associations and heritage significance

- 62.5. The revised HIA identifies the principal historical associations from which the site derives cultural significance, including:
- 62.5.1. First Nations occupation and dispossession;
 - 62.5.2. the First Frontier and its historical significance;
 - 62.5.3. the incarceration of King Cetshwayo and the continuing significance of that history to the Zulu Nation;
 - 62.5.4. the history of segregated psychiatric care and institutional confinement; and
 - 62.5.5. broader themes of exclusion, marginalisation and social injustice.
- 62.6. Importantly, the assessment does not merely record these historical themes. It evaluates their contribution to the cultural significance of the site and, where appropriate, relates those associations to identifiable places within the site and the surrounding cultural landscape. In this way, the HIA connects historical evidence directly to the assessment of heritage significance.

Relationship between history and place

- 62.7. A significant strength of the revised HIA is that it examines the relationship between historical events and the physical landscape. It interprets the site's location within the riverine corridor, its relationship with the Valkenberg / Observatory ridgeline and its position within the broader cultural landscape as part of the historical processes that shaped the area.
- 62.8. The assessment therefore recognises that heritage significance is derived not only from surviving buildings or structures but also from the interaction between landscape, historical events, collective memory and place. It analyses how those relationships continue to inform the present significance of the site.

Continuity and change

- 62.9. The revised HIA further investigates the transformation of the site over time. It recognises that the present landscape reflects successive layers of indigenous, agricultural and institutional use, and explains how earlier historical associations remain legible



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notwithstanding subsequent development and change. This analysis is particularly relevant to living heritage.

- 62.10. The revised HIA also recognises that historical significance may survive through collective memory, cultural association and continuing relationships with place, even where the physical environment has evolved.

Relationships with neighbouring heritage resources

- 62.11. The historical investigation is not confined to the Oude Molen Precinct. The revised HIA clearly also considers the historical development and associations of the surrounding heritage landscape, including the relationship between the site, the TRUP and neighbouring heritage resources such as Maitland Garden Village.
- 62.12. In relation to Maitland Garden Village, the assessment considers both its physical heritage attributes and its social history as a historic coloured community established within the context of apartheid spatial planning. The HIA accordingly evaluates the affected area as a connected network of places whose significance is derived from shared historical, spatial and cultural relationships.

Historical investigation informs the statutory assessment

- 62.13. The historical investigation is not undertaken as a standalone academic exercise in the HIA. Rather, it provides the evidential foundation for the statutory assessment of heritage significance undertaken in terms of section 38(3) of the NHRA. The historical analysis explains why particular heritage resources are significant, how those values developed over time and how they contribute to the cultural significance of the broader affected area.
- 62.14. The revised HIA therefore uses the historical investigation to inform the identification of heritage resources, the assessment of cultural significance, the evaluation of impacts and the development of appropriate mitigation and management measures. History is not merely described; it is integrated throughout the heritage assessment and forms the basis upon which the significance of both tangible and living heritage is evaluated.
63. Accordingly, the revised HIA fully satisfies the requirement to investigate the historical development and associations of the heritage resources. It adopts a layered and contextual historical methodology, examines the successive historical processes through which the site and the broader cultural landscape evolved, identifies the historical associations that give rise to heritage significance, and demonstrates how those associations continue to inform the present cultural significance of the site and surrounding heritage landscape.



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Ground of Appeal 6: The revised HIA investigates the social and cultural relationships through which heritage significance is created, maintained and transmitted

64. The Appeals Committee's finding that the HIA failed to investigate the social and cultural relationships associated with the affected area is unsupported by the contents of the HIA. Properly considered, the revised HIA adopts a relational understanding of heritage that is entirely consistent with section 38(3) of the NHRA and the concept of living heritage.
65. The revised HIA recognises that heritage significance is not confined to the physical fabric of buildings or structures. Rather, significance frequently arises from the relationship between places, communities, historical experiences, cultural identities, collective memory, social practices and the continuing use and interpretation of the landscape. The assessment therefore investigates heritage as a dynamic relationship between people, history and place rather than as an attribute inherent only in physical objects.
66. Consistent with that approach, the revised HIA examines the social and cultural relationships through which heritage significance is created, maintained and transmitted.

Heritage significance is created through relationship between communities, history and place

- 66.1. The revised HIA investigates the relationship between particular communities and the places with which they are historically and culturally associated. It considers, among other matters, the relationship between the site and First Nations history, the significance of the site to the Zulu Nation, the history of institutional segregation and exclusion, and the social history and continuing community identity of Maitland Garden Village.
- 66.2. The assessment does not treat these matters as isolated historical facts. Rather, it evaluates how those historical experiences have created enduring and cultural meaning and contributed to the heritage significance of the site and the broader Two Rivers cultural landscape.
- 66.3. The revised HIA likewise examines the relationship between living cultural meaning and tangible places. It identifies how particular buildings, landscapes, river corridors and spatial relationships operate as reference points through which historical narratives, collective memory and cultural identity continue to be understood and experienced.

Heritage significance is maintained through continuing community relationships

- 66.4. The revised HIA further investigates how heritage significance is maintained through continuing social relationships, community identity and cultural association. This is particularly evident in its assessment of Maitland Garden Village, where the HIA recognises



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that the significance of the area derives not only from its physical townscape but also from its social history, community continuity and enduring cultural identity. Similarly, the HIA considers the continuing cultural significance of the site's historical associations with First Nations communities, the Zulu Nation and other communities connected to the broader cultural landscape.

- 66.5. The assessment also considers differing understandings of contemporary heritage significance, including the views of current tenants, users and I&APs. While the HIA ultimately reaches professional conclusions regarding the statutory significance of those contemporary practices, it nevertheless evaluates those views and demonstrates that they formed part of the heritage assessment. The existence of differing opinions regarding the significance of particular cultural associations does not demonstrate that they were ignored. Rather, it demonstrates that the HIA engaged with competing understandings of heritage significance and evaluated them in the exercise of professional judgment.

Heritage significance is transmitted through interpretation, commemoration and cultural practice

- 66.6. The revised HIA also considers how the identified heritage significance may be maintained and transmitted to present and future generations. In this regard, the HIA recommends a range of heritage responses, including memorialisation, interpretation, heritage routes, cultural activities, provision for rituals and Indigenous Knowledge Systems, a Centre for Memory and opportunities for continued public engagement with the site's layered history.
- 66.7. These measures recognise that heritage is not preserved solely through the retention of physical fabric, but also through the continued expression, interpretation and communication of historical and cultural meaning.
- 66.8. The HIA therefore treats living heritage as something capable of being actively experienced and transmitted through cultural practice, education, interpretation and community engagement rather than merely recorded as historical information.

The integrated assessment of social and cultural relationships

- 66.9. The revised HIA does not consider social and cultural relationships in isolation. The findings of the Socio-historical Impact Assessment are integrated throughout the HIA and inform the assessment of heritage significance, the cultural landscape analysis, the identification of heritage indicators, the assessment of impacts and the proposed mitigation and management framework.
- 66.10. The HIA therefore translates identified social and cultural relationships into practical heritage management responses, including landscape interventions, improved spatial



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connectivity, memorialisation initiatives, cultural spaces, interpretation strategies and design principles intended to maintain the relationships through which the heritage significance of the affected area is understood and experienced. This integrated methodology reflects the nature of living heritage itself. Heritage significance is not created, maintained or transmitted through buildings alone, but through the continuing interaction between places, communities, historical experience, cultural identity, collective memory and social practice. The revised HIA assesses those relationships holistically rather than artificially separating tangible and living heritage into discrete assessments.

- 66.11. Accordingly, the revised HIA provides a comprehensive investigation of the social and cultural relationships through which the heritage significance of the affected area is created, maintained and transmitted. It investigates the relationship between communities and place, evaluates the continuing significance of historical experiences, considers collective memory, cultural identity and community continuity, assesses competing cultural associations and translates those findings into appropriate heritage management, interpretation and design responses.
- 66.12. The Appeals Committee's criticism therefore cannot be sustained. The issue is not whether every social or cultural relationship identified by stakeholders was ultimately accepted as having equal statutory significance. The relevant enquiry is whether those relationships were identified, investigated and evaluated as part of the HIA. On any objective reading of the revised HIA, they plainly were, and the requirements of section 38(3) were satisfied by the HIA.

Ground of Appeal 7: Meaning and value attributed to heritage resources by relevant communities and stakeholders

67. The Appeals Committee erred in concluding that the HIA failed adequately to consider the meaning and value attributed to the heritage resources by relevant communities and stakeholders.
68. Properly construed, the revised HIA undertakes precisely that enquiry through an integrated process of historical research, specialist assessment, extensive public participation and evaluation against the statutory heritage significance criteria contained in the NHRA. It does not assume that heritage significance is determined solely by the physical characteristics of a place or by the opinion of the heritage practitioner. Rather, it identifies the meanings and values attributed to the site by affected communities and stakeholders and evaluates those claims within the broader statutory and evidential framework.
69. The revised HIA demonstrates that this enquiry was undertaken, comprehensively so.



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Identification of relevant communities and stakeholders

- 69.1. The HIA identifies and consults a broad range of communities and stakeholders with historical, cultural and contemporary associations with the site, including:
- 69.1.1. First Nation communities and representatives;
 - 69.1.2. representatives of the Zulu Monarch and Zulu Nation;
 - 69.1.3. the Maitland Garden Village Residents Association;
 - 69.1.4. current tenants and users of the Oude Molen site;
 - 69.1.5. other I&APs;
 - 69.1.6. relevant government departments and heritage authorities; and
 - 69.1.7. stakeholders associated with the broader Two Rivers cultural landscape.
- 69.2. The consultation process was extensive, involving more than 300 registered I&APs, including at least 31 identified First Nation organisations and representatives, and generated substantial written submissions from a wide range of stakeholders. The HWC Appeals Committee therefore had before it a substantial body of evidence regarding the different meanings and values attributed to the site by those most closely associated with it.

Investigation and evaluation of stakeholder values

- 69.3. The HIA does not treat public participation as a procedural 'tick box' exercise. Rather, it analyses the historical, cultural, social, spiritual and associational values attributed to the site by different stakeholder groups and evaluates those values against the statutory heritage significance criteria contained in section 3(3) of the NHRA.
- 69.4. In doing so, the HIA recognises that different communities attribute different forms of significance to the site. These include:
- 69.4.1. the cultural and historical significance attached by First Nation communities to the First Frontier and the history of dispossession;
 - 69.4.2. the national and cultural significance attributed by the Zulu Nation arising from the incarceration of King Cetshwayo;



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- 69.4.3. the social history, community continuity and identity associated with Maitland Garden Village;
 - 69.4.4. the social, cultural and community value attributed by current tenants and users to their continuing activities on the site; and
 - 69.4.5. the broader historical and cultural significance of the Two Rivers landscape.
- 69.5. Importantly, the HIA does not merely record these views. It investigates their historical and cultural basis, evaluates the strength and nature of the asserted associations, and considers whether they satisfy the statutory criteria for heritage significance. In this respect, the HIA performs the evaluative function required by section 38 of the NHRA rather than simply compiling stakeholder opinions.

Recognition of competing and overlapping values

- 69.6. The HIA further recognises that the site is characterised by multiple and sometimes competing historical narratives and cultural associations. It does not assume that there is a single authoritative interpretation of the site's heritage significance. Rather, it evaluates overlapping claims advanced by First Nation communities, the Zulu Nation, Maitland Garden Village residents, current tenants and other stakeholders within the broader historical and statutory context.
- 69.7. The HIA also distinguishes between the existence of community value and statutory heritage significance. It acknowledges, for example, that current tenants and users attribute considerable social and cultural value to their activities, while evaluating whether those activities constitute living heritage or heritage significance for purposes of the NHRA. That evaluative exercise is precisely what section 38 requires.
- 69.8. The fact that the HIA does not accept every asserted claim of heritage significance does not demonstrate a failure to consider those claims; rather, it demonstrates that they were investigated and evaluated.

Integration into heritage management

- 69.9. The HIA further demonstrates that the values identified through consultation were not simply recorded and disregarded. They informed the proposed heritage management framework, including recommendations relating to:
- 69.9.1. memorialisation and interpretation;



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- 69.9.2. a Centre for Memory;
 - 69.9.3. engagement with the Tussen Die Riviere Resistance and Liberation Heritage Route;
 - 69.9.4. spaces for cultural activities, rituals and Indigenous Knowledge Systems;
 - 69.9.5. place and precinct naming;
 - 69.9.6. conservation management planning;
 - 69.9.7. protection of important spatial and visual relationships; and
 - 69.9.8. continued stakeholder engagement during subsequent phases of implementation of the proposed development of the site.
- 69.10. These recommendations demonstrate that the HIA translated the meanings and values attributed by relevant communities into practical heritage management, interpretation and conservation measures. This confirms that stakeholder values were not merely acknowledged but informed the assessment and proposed management of the heritage resource.
70. The HIA therefore satisfies the substantive requirement to evaluate the meaning and value attributed to the heritage resources by relevant communities and stakeholders. It identifies the relevant communities; investigates the historical, cultural and social basis of the values they attribute to the site; evaluates those values against the statutory heritage significance criteria; recognises competing and overlapping understandings of the site; and incorporates those findings into an integrated heritage management framework.
71. The Appeals Committee's conclusion that the HIA failed to undertake this enquiry accordingly cannot be sustained. The HIA demonstrates that the required investigation was undertaken comprehensively and integrated into the section 38 assessment. The Committee's criticism therefore elevates form above substance and overlooks the extensive historical research, consultation and evaluative analysis contained in the HIA.
72. Properly construed, the revised HIA fully complies with the requirements of section 38(3) of the NHRA. It evaluates the meaning and value attributed to the heritage resources by relevant communities and stakeholders through a holistic and integrated methodology, and provides a reasoned assessment of those values within the statutory heritage framework.
73. The fact that the HIA ultimately accepts, qualifies or rejects particular claims of heritage significance does not demonstrate a failure to undertake the enquiry; it demonstrates that the



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enquiry was properly undertaken and evaluated.

Ground of Appeal 8: The HIA assesses the potential positive and adverse effects of the proposed development on heritage values, associations and relationships

74. The Appeals Committee erred in concluding that the HIA failed adequately to assess the effects of the proposed development on identified heritage resources. Properly construed, the revised HIA undertakes a comprehensive impact assessment that examines the interaction between the proposed development and the tangible, living, historical, social and cultural dimensions of the affected heritage resources.
75. The HIA assesses not only impacts on physical fabric, but also the effect of the development on the historical associations, cultural meanings, spatial relationships and community values through which heritage significance is created, experienced and transmitted.
76. Consistent with section 38(3) of the NHRA, the assessment recognises that heritage impacts are not confined to demolition or physical alteration. It therefore evaluates the potential effects of changes in scale, height, density, land use, spatial relationships, visual connections, access, permeability, public space and the treatment of significant heritage precincts because those changes may affect not only the physical character of heritage resources, but also the historical and cultural relationships that gives those resources their significance.

Assessment of impacts on tangible and living heritage

- 76.1. The HIA evaluates the effect of the proposed redevelopment on both tangible and living heritage resources. It considers the potential consequences for historic buildings, precincts, landscape character, visual setting and the broader cultural landscape, while simultaneously assessing the potential effects on historical associations, cultural meaning, collective memory, community identity and the relationship between people and place.
- 76.2. In relation to living heritage, the assessment specifically considers whether the proposed development may affect the legibility and continued expression of important historical associations, including First Nations dispossession, the incarceration of King Cetshwayo, institutional segregation and other themes that contribute to the heritage significance of the site. It evaluates whether the development would diminish, reinforce or create opportunities to better interpret and communicate those associations.
- 76.3. The HIA therefore assesses impact in a manner appropriate to the nature of the heritage resource. Where significance resides in physical fabric, it evaluates impacts on buildings, structures and setting. Where significance resides in historical, cultural or social associations, it evaluates impacts on contextual relationships, cultural meaning,



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interpretation, community identity and the continued transmission of heritage significance.

Assessment of impacts on community and cultural relationships

- 76.4. The HIA also considers the potential effects of the redevelopment on communities associated with the site. It evaluates concerns raised by current tenants, users and neighbouring communities regarding displacement, loss of livelihoods, community cohesion and continuity, while distinguishing between broader socio-economic consequences and impacts falling within the statutory ambit of heritage management.
- 76.5. The HIA does not ignore those concerns. Rather, it considers them and evaluates whether they affect the heritage significance of the identified resources. This distinction reflects the statutory enquiry required by the NHRA and demonstrates that the assessment evaluates, rather than merely records, competing claims regarding heritage impacts.

Assessment of Maitland Garden Village and the broader cultural landscape

- 76.6. The HIA provides a detailed assessment of the relationship between the proposed redevelopment and Maitland Garden Village. It recognises that the Village derives significance not only from its physical form but also from its social history, community continuity and cultural identity.
- 76.7. The assessment evaluates the potential effects of increased height and density on that relationship, including the implications for visual character, spatial integration and community experience. It also considers the spatial factors mitigating those impacts, including building setbacks, existing landscape buffers, road reserves, articulation, visual permeability, pedestrian-scaled design and landscape treatment.
- 76.8. The assessment concludes that the visual impact is moderate and largely capable of mitigation through detailed design, landscape structuring, visual permeability and sensitive treatment of the interface.
- 76.9. The assessment therefore evaluates the effect on the relationship between the proposed development and the social and spatial characteristics of Maitland Garden Village, rather than treating the issue as a purely architectural or visual comparison.

Assessment of positive impacts

- 76.10. The HIA does not assume that redevelopment necessarily results in adverse heritage impacts. It also evaluates the potential positive effects of the proposal, including:



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- 76.10.1. restoration and adaptive reuse of significant heritage buildings;
 - 76.10.2. the creation of more coherent heritage precincts;
 - 76.10.3. enhanced public access and connectivity;
 - 76.10.4. opportunities for cultural interpretation and memorialisation;
 - 76.10.5. provision for cultural activities, rituals, and Indigenous Knowledge Systems;
 - 76.10.6. establishment of a Centre for Memory and related interpretive facilities;
 - 76.10.7. the integration of the site into broader heritage routes; and
 - 76.10.8. improved connections between historically separated communities.
- 76.11. The HIA therefore evaluates whether redevelopment may not only affect existing heritage significance, but also provide opportunities to enhance, restore, interpret and transmit heritage values that are presently under-recognised.

Assessment of historical and cultural associations through spatial relationships

- 76.12. The HIA evaluates the effect of the development on the site's broader historical associations by analysing its spatial relationships within the Two Rivers cultural landscape.
- 76.13. The site is assessed as a nodal point on the eastern bank of the Black River, with visual and spatial relationships extending towards the riverine and wetland landscape, Maitland Garden Village and the Valkenberg / Observatory ridge. These relationships are important because they help make the historical and cultural significance of the site legible.
- 76.14. The HIA therefore considers whether the proposed redevelopment would sever, obscure or reinforce these relationships. The development's design and heritage indicators are consequently directed at maintaining visual permeability, preserving significant relationships and creating connections between heritage precincts and the broader cultural landscape.
- 76.15. This reflects and demonstrates that the HIA comprised a comprehensive assessment of impacts on living and associational heritage in a substantive sense. The impacts evaluated are not necessarily limited to the destruction of a physical object; but may include the weakening of the relationship through which the historical significance of that object or place is understood.



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Assessment of transmission and continuing expression of heritage

- 76.16. The HIA also considers whether the development can provide opportunities for heritage significance to continue to be expressed and transmitted. As indicated above, the HIA demonstrates the proposed development framework provides for interpretation, memorialisation, cultural activities, rituals and the practice and application of Indigenous Knowledge Systems. The HIA further considers the potential for a cultural village, a Centre for Memory and participation in broader heritage routes and commemorative activities.
- 76.17. The HIA therefore assesses not only whether the development may affect existing heritage associations, but also whether the development may create opportunities for those associations to be made more visible, accessible and meaningful to present and future generations.
- 76.18. This is particularly significant in the context of living heritage. The relevant question is not simply whether an existing practice or association remains physically unchanged. It is whether the development permits the cultural meaning, association or practice to continue, adapt, be expressed and be transmitted.

Assessment of alternatives and mitigation

- 76.19. The HIA further considers alternative development scenarios and evaluates whether adverse heritage impacts can be avoided or reduced. It assesses lower-density and higher-density development alternatives before concluding that the preferred option appropriately balances heritage conservation, feasibility and broader public objectives.
- 76.20. The impact assessment reported in the HIA is translated into detailed mitigation and management measures directed at avoiding, minimising and managing potential adverse effects. These include:
- 76.20.1. reducing or controlling height and massing at sensitive interfaces;
 - 76.20.2. maintaining visual and physical permeability;
 - 76.20.3. retaining and framing significant views;
 - 76.20.4. using setbacks, articulation and landscape buffers;
 - 76.20.5. protecting significant heritage precincts;



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- 76.20.6. retaining significant buildings and spatial relationships;
- 76.20.7. creating interpretive and memorialisation opportunities;
- 76.20.8. providing spaces for cultural practices and rituals;
- 76.20.9. supporting Indigenous Knowledge Systems;
- 76.20.10. establishing further conservation management processes; and
- 76.20.11. requiring further design development and heritage review at subsequent stages.
- 76.21. The HIA therefore demonstrates that impacts were assessed holistically rather than solely by reference to physical alteration. It evaluates the effects of the proposed redevelopment on:
 - 76.22. tangible heritage resources and their setting;
 - 76.23. historical and cultural associations;
 - 76.24. community identity and continuity;
 - 76.25. living heritage values;
 - 76.26. relationships between places, landscapes and heritage precincts;
 - 76.27. the broader Two Rivers cultural landscape; and
 - 76.28. opportunities for future interpretation, cultural practice and transmission of heritage significance.
- 77. Properly construed, the revised HIA satisfies the statutory requirement in section 38 to assess both the positive and adverse effects of the proposed development on identified heritage resources. It evaluates the significance of those effects, considers alternative development approaches, identifies appropriate mitigation and enhancement measures, and integrates those findings into the overall heritage assessment.
- 78. The Appeals Committee's conclusion that the HIA failed to assess these impacts is irrational and unreasonable. The revised HIA clearly demonstrates that the required enquiry was undertaken comprehensively and in accordance with section 38(3) of the NHRA. The fact that the HIA concludes that certain impacts are acceptable, moderate, capable of mitigation or fall outside



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the statutory scope of heritage management does not demonstrate a failure to assess them. On the contrary, those conclusions reflect the evaluative exercise that the NHRA requires.

Ground of Appeal 9: Measures to avoid, minimise or mitigate adverse impacts

79. The HIA identifies appropriate measures to avoid, minimise and mitigate adverse impacts by translating the identified heritage significance and impact assessment into a structured heritage management framework. The proposed measures are not generic or divorced from the assessment. Rather, they respond directly to the tangible, living, historical, cultural, social and spatial values identified in the HIA and are directed at protecting the relationships through which those heritage values are expressed.
80. The HIA follows an accepted heritage impact assessment methodology by:
- 80.1. identifying the heritage resources and their significance;
 - 80.2. identifying the values, associations and relationships that may be affected;
 - 80.3. assessing the likely impact of the proposed development; and
 - 80.4. prescribing measures to avoid, minimise or mitigate those impacts while providing for the ongoing protection, management and interpretation of the identified heritage significance.

Avoidance through protection of significant heritage resources

81. The HIA gives priority to avoiding impacts where possible by requiring the retention and protection of significant heritage resources, precincts and spatial relationships. It provides for the conservation of significant buildings and heritage elements and requires new development to respond appropriately to those resources.
82. The HIA also seeks to avoid impacts through the protection of important cultural landscape relationships, including those between the Oude Molen Precinct, the Black River corridor and the Valkenberg / Observatory ridgeline. Rather than relying solely on compensatory mitigation after harm has occurred, the assessment identifies measures aimed at preventing or reducing impacts at source.

Minimisation through design and spatial responses

83. Where impacts cannot reasonably be avoided, the HIA identifies design measures to reduce their extent. In relation to the proposed development's height, density and scale, particularly



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at the Maitland Garden Village interface, the assessment identifies measures including:

- 83.1. building setbacks;
 - 83.2. appropriate height transitions;
 - 83.3. articulation of building massing;
 - 83.4. landscape structuring;
 - 83.5. visual permeability;
 - 83.6. maintaining appropriate spatial separation;
 - 83.7. pedestrian-scale treatment; and
 - 83.8. careful treatment of the interface between new development and heritage areas.
84. The HIA concludes that potential visual and contextual impacts can be substantially reduced through these measures, demonstrating that the proposed mitigation is proportionate to the impacts identified and the significance of the resource.

Mitigation of impacts on living and associational heritage

85. Recognising that heritage significance extends beyond the physical fabric of the site, the HIA proposes a comprehensive suite of mitigation measures directed at protecting and promoting living, historical and associational heritage. These include memorialisation and interpretation initiatives, the establishment of a Centre for Memory, integration with the Tussen Die Riviere Resistance and Liberation Heritage Route, heritage-sensitive place, street and precinct naming, the facilitation of commemorative events and cultural activities, the provision of spaces for rituals and other forms of cultural expression and the recognition and application of Indigenous Knowledge Systems.
86. These measures respond directly to the identified heritage significance by providing mechanisms through which historical memory, cultural identity and community associations may remain visible, accessible and capable of continued expression and transmission.

Mitigation through continued cultural practice and expression

87. The HIA identifies measures intended to ensure that relevant cultural practices and forms of living heritage are not simply recorded but can continue to be expressed. The provision for



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spaces in which rituals and other cultural activities may take place, together with the practice and application of Indigenous Knowledge Systems, is particularly important. It recognises that living heritage may be maintained through continued practice and transmission.

88. The HIA also provides for cultural activities and a cultural village, including the potential accommodation of cultural practices associated with relevant cultural groups and the Zulu Royal Family. These measures therefore address potential adverse impacts on living heritage by preserving the possibility of continued cultural practice and expression.

Maintaining relationships within the cultural landscape

89. The HIA also identifies measures aimed at maintaining the spatial and visual relationships that contribute to the significance of the affected area. It provides for the preservation of important views, visual permeability, spatial connections and sensitive treatment of interfaces between the Oude Molen Precinct, the Black River corridor, Maitland Garden Village, the Valkenberg / Observatory ridgeline and the wider Two Rivers cultural landscape.
90. These measures recognise that adverse heritage impacts may arise not only through the loss of physical fabric but also through the disruption of the historical, cultural and spatial relationships that give heritage resources their meaning.

Ongoing heritage management

91. The HIA further provides for continued heritage management through conservation management planning, detailed heritage indicators, design review, specialist oversight and ongoing consultation. These mechanisms ensure that the identified heritage objectives continue to inform the detailed design and implementation of the development.
92. This is an appropriate approach because the precise form of future development cannot be fully resolved at the heritage assessment stage. The assessment therefore establishes the heritage principles and management controls necessary to ensure that identified heritage values remain protected throughout subsequent planning and implementation.
93. In summary:
- 93.1. The HIA adopts a clear hierarchy of impact management. It seeks first to avoid impacts through the protection of significant heritage resources and relationships; where avoidance is not possible.
- 93.2. The HIA minimises impacts through appropriate design and spatial controls; and where residual impacts remain, it provides targeted mitigation through interpretation,



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memorialisation, cultural activities, Indigenous Knowledge Systems, heritage routes, a Centre for Memory and ongoing heritage management.

- 93.3. The measures identified in the HIA are directly linked to the heritage significance identified in the assessment and are proportionate to the nature of the impacts. They address physical fabric where physical resources are affected, protect important spatial and visual relationships where contextual significance is at risk, and provide mechanisms for the continued expression and transmission of living, historical and tangible heritage.
- 93.4. The HIA therefore satisfies the statutory requirement to identify appropriate measures to avoid, minimise and mitigate adverse impacts. The measures are evidence-based, integrated with the heritage significance assessment, and form part of a coherent heritage management framework rather than a generic catalogue of mitigation proposals.

Ground of Appeal 10: The results of consultation with I&APs and communities affected by the proposed development

94. The HIA investigates and assesses the history, beliefs, cultural associations and values of tenants, stakeholders and communities through an integrated process of historical research, specialist assessment, consultation and stakeholder engagement.
95. It recognises that the significance of a heritage resource cannot be determined solely from its physical characteristics or from an expert's interpretation of the historical record. The views, experiences, histories and cultural associations of the people and communities connected to the site constitute relevant evidence in assessing heritage significance and were expressly investigated and evaluated.
96. The HIA accordingly investigates both the historical development of the site and the histories, beliefs and cultural associations of the communities connected to it.

Identification and consultation of affected communities

- 96.1. The HIA identified and engages with of the principal communities and stakeholders associated with the site including First Nation groupings and representatives, representatives of the Zulu Monarch and the Zulu Nation, the Maitland Garden Village community, current tenants and users of the site, residents and community organisations, other I&APs and relevant public and heritage authorities.
- 96.2. The consultation process was extensive and included submissions and engagements with representatives of the Zulu Monarch, First Nation groupings, the Maitland Garden Village Residents Association, current tenants and users, and other I&APs. The HIA therefore had



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before it a broad range of perspectives concerning the history, significance and future of the site.

Investigation of community histories and cultural associations

- 96.3. The HIA investigates the historical associations between these communities and the site. It considers, amongst others, the First Nation groupings' occupation, colonial expansion, dispossession and the First Frontier, the association of the site with the incarceration of King Cetshwayo and its significance to the Zulu Nation, the social history and community continuity of Maitland Garden Village and the contemporary history and use of the site by existing tenants and users.
- 96.4. The HIA therefore examines not only the history of the place itself but also the historical relationships between the site and the communities that attribute meaning to it.

Evaluation against the NHRA

- 96.5. The HIA evaluates the histories, beliefs and cultural associations identified through consultation against the statutory criteria for heritage significance, including whether a place:
- 96.5.1. is important in the community or pattern of South African history;
 - 96.5.2. has a strong or special association with a particular community or cultural group;
 - 96.5.3. possesses social, cultural or spiritual significance; or
 - 96.5.4. has historical or other associational significance recognised under the NHRA.
- 96.6. In doing so, the HIA treats stakeholder submissions as relevant evidence rather than conclusive proof of historical significance. It evaluates the nature and strength of the asserted associations, their historical basis, the identity of the community concerned and their relationship to the statutory heritage criteria.

Translation into heritage management response

97. The HIA does not merely record the histories and cultural values identified during consultation. Where those values contribute to heritage significance, they are incorporated into the proposed heritage management framework through the measures identified above including: memorialisation, interpretation, a Centre for Memory, engagement with heritage routes, Provision for cultural activities and ritual places, Indigenous Knowledge Systems, place and



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precinct naming, and ongoing consultation during future heritage management processes.

98. In summary:

- 98.1. The HIA investigates and assesses the history, beliefs, cultural associations and values of tenants, stakeholders and communities through historical research, extensive consultation and a structured evaluation against the NHRA.
- 98.2. It identifies the communities associated with the site, records and investigates their histories and cultural associations, evaluates those associations against the statutory heritage criteria, and incorporates those found to contribute to heritage significance into the proposed heritage management framework.
- 99. The HIA recognises that heritage significance cannot be determined solely from the physical characteristics of a place or an expert interpretation of historical sources. It also depends on the meanings, experiences and cultural associations attributed to the site by the communities connected with it. The HIA investigates those perspectives, evaluates them within the statutory framework and reaches reasoned professional conclusions as to their heritage significance.
- 100. The fact that the HIA does not accept every asserted claim of cultural significance or living heritage does not demonstrate a failure to investigate those claims. Investigation necessarily entails evaluation.
- 101. It is indisputable that the HIA identifies the relevant histories, beliefs and cultural associations, considers the evidence advanced by affected communities, evaluates that evidence against the NHRA and explains the conclusions reached. It accordingly satisfies the statutory requirement to investigate and assess the history, beliefs, cultural associations and values of tenants, stakeholders and communities.

Ground of Appeal 11: The HIA acknowledges the right of affected communities to be consulted and to participate in the management of heritage resources

- 102. The HIA acknowledges the right of affected communities and stakeholders to be consulted and to participate in the management of heritage resources by adopting an iterative and participatory approach to heritage assessment and management. It recognises that the identification, evaluation and future management of heritage significance cannot be undertaken solely as an expert or administrative exercise divorced from the communities and cultural groups associated with the heritage resource.
- 103. Consistent with the NHRA, the HIA treats consultation as serving both an evidential and a management function. Communities and stakeholders are consulted to understand the



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meanings, histories, values and associations attributed to the site and are recognised as having an ongoing role in determining how identified heritage values should be interpreted, commemorated, practised, managed and transmitted. Consultation is therefore integrated into both the assessment of heritage significance and the proposed heritage management framework in the HIA.

Extensive consultation with affected communities

104. The HIA demonstrates that affected communities and stakeholders were afforded various opportunities to participate meaningfully in the assessment process. The public participation process was progressively expanded in response to the requirements of the heritage authority.
105. The HIA was circulated for comment, public notices were published and 88 individuals and organisations submitted 112 written responses, including representatives of the Zulu Monarch, First Nation groupings, the Maitland Garden Village Residents Association, current tenants and users, community organisations and relevant heritage authorities. The process therefore extended beyond procedural notification. It provided a substantive opportunity for affected communities to contribute evidence regarding the site's history, cultural significance, social value and living heritage.

Communities were able to express their own understanding of heritage significance

106. The HIA records and considers the different meanings and values attributed to the site by affected communities. Current tenants and users describe the site as living heritage connected to their activities, livelihoods and community relationships. The First Nation representatives emphasised indigenous history, dispossession, cultural identity and custodianship. Representatives of the Zulu Nation highlighted the site's association with King Cetshwayo and its broader national significance. Maitland Garden Village representatives emphasised community continuity, social history and the relationship between heritage and the future of the community.
107. The HIA records these different perspectives, including areas of disagreement, and evaluates them within the statutory heritage framework.
108. Meaningful participation requires that communities have an opportunity to articulate their relationship with the site and that those views are considered. It does not require that every submission be accepted without professional evaluation by the heritage assessment practitioner.



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Participation informs the management of living heritage

- 109. The HIA expressly recognises that the management of living heritage requires continued participation by the communities associated with that heritage.
- 110. It records that proposals relating to memorialisation, interpretation and the site's living heritage should be developed through continued engagement with the relevant stakeholders, including First Nation representatives and representatives of the Zulu Nation.
- 111. The HIA accordingly recognises that communities participate not only in identifying heritage significance but also in determining how their histories and cultural associations should be represented, interpreted and managed.

Ongoing participation heritage management

- 112. The HIA provides for continued stakeholder participation beyond completion of the assessment. It proposes representative management structures, including a project team involving the site custodian, relevant government departments, heritage stakeholders, potential funders and directly affected I&APs to guide the implementation of the heritage components of the redevelopment.
- 113. The HIA further provides for continued consultation during conservation management planning, detailed design, memorialisation initiatives, the development of the Tussen Die Riviere Resistance and Liberation Heritage Route, cultural facilities and other heritage programmes.
- 114. The HIA therefore recognises that heritage management is an ongoing collaborative process rather than one concluded upon approval of the HIA.

Participation does not replace statutory decision-making

- 115. The HIA appropriately distinguishes between meaningful participation and decision-making authority. It recognises the right of affected communities to participate in identifying, interpreting and managing heritage resources, while acknowledging that statutory decisions remain the responsibility of HWC as the competent heritage resource authority.
- 116. The fact that the HIA does not accept every submission, or confer a veto on any stakeholder, does not detract from the meaningful nature of the consultation process. Consultation requires genuine consideration of stakeholder views, not automatic acceptance of every position advanced.
- 117. In summary, the HIA acknowledges the right of affected communities and stakeholders to be



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consulted and to participate in the management of heritage resources by:

- 117.1. Undertaking extensive and iterative consultation;
 - 117.2. engaging directly with First Nation representatives, the Zulu Nation, Maitland Gerden Village, current tenants and other I&APs;
 - 117.3. considering the histories, beliefs, meanings and values attributed to the site by those communities;
 - 117.4. recognising that living heritage should continue to be interpreted and managed with the participation of the communities to whom it relates;
 - 117.5. establishing mechanisms for continued stakeholder participation in conservation management, memorialisation, and future heritage initiatives; and
 - 117.6. integrating consultation into both the assessment of heritage significance and the ongoing management of the site's heritage resources.
118. The HIA therefore recognises that affected communities are not merely sources of information but active participants in the continuing identification, interpretation and management of heritage significance.
119. It adopts an iterative model in which consultation informs both the assessment of heritage significance and the implementation of future heritage management measures.
120. Accordingly, the HIA satisfies the substantive requirement to acknowledge and facilitate the right of affected communities and stakeholders to be consulted and to participate in the management of heritage resources. The evidence demonstrates extensive consultation, genuine consideration of stakeholder views and the establishment of mechanisms for continued community participation throughout subsequent heritage planning and implementation stages of the proposed development.

Ground of Appeal 12: The Appeal Decision ignores the manner in which the proposed development promotes spatial justice and integration

121. The Oude Molen Precinct occupies a well-located site between the Cape Town CBD and the northern and southern suburbs. It is close to major transport routes and employment centres. The site is particularly well-located and valuable public land in this regard because it avoids further urban sprawl; it reduces infrastructure costs compared with developing greenfield sites on the urban edge; and it allows government to address housing need without reinforcing



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historical patterns of exclusion.

122. South Africa's urban form is a product of apartheid spatial planning, the history of which forms part of the country's heritage. It is for this reason that the Constitution and planning and housing legislation seek to create integrated, sustainable human settlements rather than continuing segregated residential patterns.
123. The proposed redevelopment of the Oude Molen Precinct into a mixed-use development that includes a significant social and affordable housing component will enable the government to achieve the following strategic spatial justice objectives:
 - 123.1. The use of a scarce public asset to ensure the efficient use of publicly owned land and simultaneously achieve constitutional housing objectives.
 - 123.2. The progressive realisation of several constitutional rights, including access to adequate housing (section 26); equality (section 9); human dignity (section 10); and the state's obligation to transform society by addressing the legacy of past discrimination.
 - 123.3. Enhancing access to a broad range of socio-economic opportunities, by providing residents with relatively good access to employment in the CBD, Observatory, Salt River and surrounding industrial areas; educational institutions, including nearby universities and colleges; health services, including major hospitals; public transport corridors; and recreational and public amenities.
 - 123.4. Providing affordable rental housing in a high-opportunity area. This will reduce commuting costs for working households; enable key workers—such as teachers, nurses, police officers and municipal employees—to live closer to work; and create a socially mixed community.
 - 123.5. Positively contributing to reversing apartheid spatial planning (which deliberately located certain communities on the urban periphery, far from employment, education and services, while reserving centrally located land for white residents) by integrating lower-income households into areas with greater economic opportunity.
 - 123.6. Achieving the objectives of the Social Housing Act, which promotes restructuring South African cities through well-located affordable rental housing. The proposed development would accommodate households from different income groups; reduce racial and economic segregation; integrate affordable rental housing with market housing, commercial activity and community facilities; and create a more diverse neighbourhood.
 - 123.7. Serving the heritage objectives of transformation, reconciliation and social justice objective by contributing to urban densification; transit-oriented development; more sustainable



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infrastructure investment; and greater economic inclusion.

124. In essence:

124.1. The inclusion of a significant social and affordable housing component means the project would convert strategically located public land into inclusive housing, enabling lower-income households to live closer to opportunities and helping to dismantle the spatial patterns of exclusion created by apartheid.

124.2. The proposed development aligns with the constitutional objective of creating integrated, sustainable human settlements and with the restructuring goals of South Africa's social housing framework.

125. The significance of the Oude Molen site should therefore be understood not only in relation to its colonial and institutional history but also in relation to its capacity to contribute to a more integrated urban future in an urban context. Consequently, an evaluation of the proposed development in terms of section 38 of the NHRA should not treat the surrounding spatial inequalities as irrelevant.

126. The essence of this appeal ground is not that the NHRA imposes a housing obligation on HWC, but that HWC failed to consider the broader public interest at hand and the social significance of the place when assessing the application.

127. The spatial justice implications and inclusion of social and affordable housing at the Oude Molen Precinct is a relevant consideration in a heritage impact assessment conducted under section 38 of the NHRA. The following submissions are relied upon in this regard:

127.1. Section 3 recognises that the national estate includes places with historical, social, cultural, scientific, aesthetic and spiritual significance. Heritage significance is therefore not confined to structures with architectural merit or archaeological remains. A place such as Oude Molen derives significance not only from its built fabric and landscape but also from its role in Cape Town's evolving urban history and its potential contribution to addressing the enduring legacy of apartheid spatial planning.

127.2. Section 38 of the NHRA requires consideration of heritage resources within their wider context. This assessment necessarily involves balancing competing public interests. Heritage authorities are not simply required to preserve places unchanged; they must determine whether redevelopment can conserve heritage significance while enabling broader public benefits.

127.3. Accordingly, where redevelopment on public land can simultaneously conserve significant



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heritage resources; adaptively reuse historic buildings; improve public access; and deliver social and affordable housing, those public benefits are relevant to the assessment of the proposal.

- 127.4. Heritage conservation must be interpreted consistently with section 39(2) of the Constitution which requires legislation to be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights. When exercising powers under section 38 of the NHRA, decision-makers should therefore have regard to constitutional values, including: equality (section 9); human dignity (section 10); access to adequate housing (section 26); and the state's commitment to remedy the effects of past discrimination.
128. This does not mean that housing automatically overrides heritage resource management. As the Oude Molen Precinct is publicly owned, any decisions about its future must therefore engage multiple public interests. The HIA demonstrates that heritage objectives can be achieved while also providing well-located affordable housing; promoting social inclusion; reducing spatial inequality; and improving public access to the site. Those outcomes strengthen, rather than weaken, the public-interest justification for redevelopment.
129. The HIA recognises that heritage significance includes community value; social value; intangible associations; evolving uses; and the contribution of places to contemporary society. It directly considers how can the heritage significance of the place can be conserved while enabling it to serve present and future generations. For the Oude Molen site, one answer may be that carefully designed social and affordable housing enables the site to acquire new social significance while respecting its historic character.
130. In summary:
- 130.1. The redevelopment of the Oude Molen Precinct for a mixed-use development incorporating social and affordable housing is relevant to the assessment required under section 38 as the NHRA protects heritage resources in their full historical, social and cultural context and must be interpreted consistently with constitutional values.
- 130.2. Because the Precinct occupies strategically located public land within a city profoundly shaped by apartheid spatial planning, its capacity to contribute to spatial integration and improved access to well-located housing constitutes a material public-interest consideration.
- 130.3. The NHRA requires heritage values to be identified and assessed; the Constitution and the NHRA's broad conception of heritage support the view that social justice, adaptive reuse, and the transformation of historically exclusionary urban spaces are legitimate considerations in evaluating redevelopment proposals under section 38.



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- 130.4. The HIA evaluates not only the effects of redevelopment on the site's physical heritage resources but also the extent to which an adaptive and inclusive redevelopment can conserve heritage significance while advancing the constitutional objectives of equality, dignity and transformation. These considerations are relevant to determining whether the proposed development represents an appropriate balance between conservation and the broader public interest.
- 130.5. The HIA represents an integrated heritage management rather than suggesting that housing policy displaces heritage protection.

CONCLUSION

- 131. The revised HIA complies with the requirements of sections 3 and 38 of the NHRA and the applicable policy framework. It adopts a holistic and integrated approach to the assessment of heritage resources by evaluating tangible heritage, cultural landscape values and living heritage within a coherent heritage management framework, thereby providing an adequate evidentiary basis for informed decision-making.
- 132. In particular, the HIA:
 - 132.1. identifies, maps and evaluates the affected heritage resources, including tangible and living heritage, against the statutory significance criteria contained in the NHRA;
 - 132.2. integrates historical, socio-cultural and specialist research with extensive public participation to investigate and evaluate the historical development, cultural associations and heritage significance of the site and the broader cultural landscape;
 - 132.3. demonstrates that the NHRA does not require a separate "Living Heritage Study", but rather requires living heritage to be properly identified, investigated, evaluated and assessed as part of the HIA, which the revised HIA demonstrably does;
 - 132.4. provides the heritage resource authority with all information required to make the determination contemplated by section 38(4) of the NHRA, with the result that any finding of non-compliance based solely on the absence of a separate "Living Heritage Study" constitutes a material error of law by elevating form above substance;
 - 132.5. identifies and evaluates the historical development, cultural associations, community relationships and living heritage values that contribute to the significance of the site, and translates those findings into appropriate heritage management, interpretation and design responses;



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- 132.6. identifies and evaluates the potential impacts of the proposed development on the affected heritage resources and their associated values, relationships and cultural significance, including appropriate alternatives and measures to avoid, minimise or mitigate adverse impacts; and
- 132.7. demonstrates that affected communities and stakeholders were afforded repeated and meaningful opportunities to participate in the assessment process, and establishes appropriate mechanisms for their continued participation in the interpretation, management and transmission of the heritage values identified.
- 133. Properly considered, the appeal is not concerned with an absence of information, but with whether the HIA satisfies the substantive requirements of section 38 of the NHRA. The evidence demonstrates that it does. The HIA comprehensively identifies, investigates, evaluates and assesses living heritage within the broader heritage assessment and provides an appropriate framework for the ongoing management of the site's heritage significance.
- 134. It is accordingly respectfully submitted that the appeal authority should:
 - 134.1. Uphold the appeal;
 - 134.2. find that the revised HIA satisfies the requirements of section 38(3) of the NHRA;
 - 134.3. endorse the Development Framework, Draft Precinct Plan, Urban Design Guidelines and preferred development alternative 4c, subject to the continued application of the heritage indicators contained in section 12 of the revised HIA, the mitigation measures contained in section 17 thereof, and the refinement of identified heritage matters through the subsequent design and approval processes (to ensure that all mitigation measures should be incorporated into future planning and design documentation and submitted to HWC for confirmation that they accord with the approved heritage indicators and mitigation measures);
 - 134.4. approve the demolition of the buildings older than 60 years identified in Figure 183 of the revised HIA; and
 - 134.5. direct that the archaeological indicators identified in the HIA be implemented during the next phase of design development, including:
 - 134.5.1. The protection of the area of very high archaeological sensitivity associated with the probable location of the historic mill ruin as a no-go area for development; and



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134.5.2. The undertaking of archaeological test trenching in the above area, in accordance with a work plan approved by HWC, before the next phase of design development so that the results may appropriately inform the final design.

Yours faithfully,

RICHARD SUMMERS INC.

A handwritten signature in black ink, appearing to read 'R Summers', written in a fluid, cursive style.

RICHARD SUMMERS